

**Model Answer**  
**Essay Review Question 1**

**In an action brought by Ned against Roofer for Negligence, what defenses might Roofer reasonably assert, and what is the likely outcome on each? Explain fully.**

**Ned v Roofer**

**Negligence**

Negligence requires a showing that a duty was owed, that the duty was breached, and that the breach was the actual and proximate cause of damages.

**Duty**

Defendant has a duty to act as a reasonable prudent person under the same or similar circumstances.

Roofer owes Hal a duty to clean up all the nails and other materials that were scraped off during the removal of Hal's old roof. A reasonable prudent person would take those steps reasonably necessary to assure that roofing materials scraped off during removal of an old roof would be confined and collected during the removal process.

Roofer will counter that his duty is owed to Hal only. The fact that Hal hired Roofer to fix his roof establishes a relationship creating a duty owed to Hal

Therefore, Roofer has a duty of care to Hal.

**Duty – Cardozo – Andrew View**

Ned will argue that under the Cardozo view Roofer owes a duty of care to foreseeable plaintiffs in the zone of danger.

Since Ned is a neighbor of Hal, Ned will argue that he is within the foreseeable zone of danger of Roofer's conduct.

Roofer will counter that although he did not have enough tarpaulins and failed to place one on the ground at the rear end of Hal's house, he did his best in cleaning up the debris. Further, the incident involving Ned occurred on Ned's property about six months later after one of the discarded nails was propelled into Ned's yard by Hal's mower. As such, Ned is not within the foreseeable zone of danger.

On the other hand, Ned will argue that Andrews' view of duty applies. Under the Andrew's view, Roofer's conduct would create a foreseeable risk of harm to Ned and he would be injured

upon a nail propelling over the fence into his backyard. Further, Roofer knew that tarpaulins were to be used on the ground to catch the nails and other materials. Thus, Roofer's conduct of not cleaning up all of the nails imbedded in the grass created a reasonably foreseeable risk of harm to others.

However, the only foreseeable harm was to those persons walking in Hal's backyard and not nails being propelled into a neighbor's backyard.

Therefore, the court will find that Roofer did not owe a duty of due care to Ned.

### **Breach**

In the event the court finds' that Roofer owed a duty to Ned, Roofer left some nails imbedded in the grass. Thus, Roofer's conduct fell below the reasonable person standard of care.

Therefore, Roofer breached his duty owed to Ned.

### **Actual Cause**

Ned would not have stepped on a nail and been severely injured "but for" Roofer not using a tarpaulin to catch all the nails from Hal's roof.

Thus, Roofer was the actual cause of Ned's injuries.

### **Proximate Cause**

It is foreseeable that leaving nails imbedded in the grass that someone may be injured by stepping on a nail. However, Roofer will argue that it is not foreseeable that Hal would run over a nail propelling it into his neighbor's yard in which his neighbor, Ned, stepped on the nail causing him injury.

### **Intervening, Superseding Cause**

An intervening cause is one that occurs after the negligent conduct of defendant but before the harm. An independent, intervening act is an abnormal response to stimulus created by defendant's negligence. The fact that the intervening force was not reasonably foreseeable does not excuse D from liability as long as result was foreseeable, such as a third person's negligent conduct.

Roofer will argue that his actions were indirect and independent of Hal's act of mowing the lawn, and running over the nail propelling it into his neighbor's backyard. Thus, Hal's act was an intervening act.

However, the negligence of a third person is always foreseeable and will not cut off Roofer's liability.

Therefore, Roofer was the proximate cause of Ned's injuries.

### **Damages**

Ned sustained injuries as a result of stepping on the nail. Therefore, he would be able to recover for his pain and suffering, as well as his medical bills.

### **Defense - Contributory Negligence**

Conduct of plaintiff, which falls below the reasonable person standard of care, which if proven, is a complete defense to a negligence cause of action.

Roofer will argue if Ned had not been walking barefoot in his backyard he would not have stepped on the nail and been injured. The act of walking barefoot without determining the condition of the pathway is conduct falling below the standard of care to which Ned should have conformed to protect his own safety. Thus, he contributed to his own injuries.

However, the fact that Ned was walking barefoot in his own backyard in which he takes care of and would be aware of any condition is not conduct falling below the standard of care.

Therefore, contributory negligence is not a valid defense.

### **Defense - Comparative Negligence**

Where plaintiff's conduct falls below the standard of reasonable care such that liability, including the amount of plaintiff's negligence, is apportioned according to fault.

Roofer will argue since Ned's conduct fell below the standard of care owed, the court will apportion his own fault against Roofer's liability. However, since Ned did not fall below the standard of care owed, as discussed supra, the court will not apportion according to fault.

### **Last Clear Chance**

It appears from the facts that Roofer could have avoided the accident if he had used a tarpaulin to catch all the nails when removing the old roof.

Thus, Roofer had the last clear chance to prevent the injury.

### **Assumption of Risk**

One who assumes the risk when he has knowledge, comprehension and an appreciation of the danger and voluntarily elects to encounter it, cannot recover for Defendant's negligence.

Roofer will argue since Ned walked barefoot in his backyard he had knowledge that rocks, twigs or other materials could be in the grass and cause him injury. By walking barefoot Ned has comprehension and an appreciation of the danger and voluntarily elects to encounter that danger.

However, Ned will argue that there was no knowledge that nails were in his grass and that he could have stepped on the nail causing injury to his foot. Since Ned did not assume the risk, Roofer will be found liable.

Assumption of the risk is no defense.

## Model Answer Essay Review

### Question 2

1. **Can Cotton Co. prevail in an action for breach of contract against Buyer? Explain fully.**

#### **Cotton Co. v Buyer**

#### **U.C.C.**

A contract involving a transaction in goods is governed by the U.C.C.

Since the transaction involved the sale of cotton batting, the transaction would qualify as a transaction of goods. Therefore, the transaction would be governed by the U.C.C.

#### **Merchants**

A merchant is a person who deals in the kind of goods involved in the transaction or otherwise holds himself out as having knowledge and skill peculiar to the practices or goods involved in the transaction.

Cotton Co. manufactures batting. Thus, they deal in the kind of goods involved in the transaction.

Buyer manufactures mattresses with a feature of outer layer composed of cotton materials called batting. Thus, Buyer holds himself out as having knowledge and skill peculiar to the goods involved.

Thus, both parties are merchants under the U.C.C.

#### **Offer**

An offer is an outward manifestation with present contractual intent, definite and certain terms and is communicated to the offeree.

On May 1, Buyer telephoned Cotton Co. and told Cotton Co. that he urgently needed a large bale of batting and was willing to pay top dollar. Buyer's conduct of telephoning Cotton Co. and the use of his language he would pay top dollar for batting demonstrated an outward manifestation of present contractual intent to be bound by contractual agreement.

The terms were described as: large bale of batting, quantity; delivery by the end of the day, time period; Buyer and Cotton Co. are the parties; top dollar is the price; and cotton batting is the subject matter. Since the terms are stated with sufficient particularity, the terms are definite and certain.

Buyer telephoned Cotton Co. evidencing a communication to the offeree.

Therefore, a valid offer exists.

### **Acceptance**

An acceptance is an unequivocal assent to the terms of the offer.

On May 1, Cotton Co. delivered the bale of batting, showing an unequivocal assent to the terms of the offer.

Thus, an acceptance exists.

### **Consideration**

Consideration is that which is bargained for and given in exchange for a return promise, requiring a benefit and a legal detriment to all parties.

Buyer bargained for cotton batting from Cotton Co. in exchange for Cotton Co.'s return promise to deliver the batting on the same day, May 1. Buyer bargained for delivery of the bale of batting by May 1, by Cotton Co. in exchange for Buyer's return promise to pay Cotton Co.

Cotton Co. obligated themselves to deliver the bale of batting to Buyer in which they were not previously obligated to do. Cotton Co. incurred a legal detriment – delivering the bale of batting – in exchange for a legal benefit – receiving payment from Buyer. Conversely, Buyer incurred a legal detriment of making payment to Cotton Co. in exchange for the delivery of the bale of cotton batting.

Therefore, valid consideration exists.

### **Statute of Frauds – Contract for the Sale of Goods for \$500 or More**

Pursuant to the Statute of Frauds, a contract for the sale of goods for \$500 or more is unenforceable unless in writing.

The contract involved the sale of cotton batting at \$5000. Since the agreement was oral, i.e. made by telephone and deals with the sale of goods for over \$500, the contract is unenforceable under the Statute of Frauds.

### **Exception – Full Performance**

When a buyer receives and accepts all or part of the goods, the contract becomes enforceable as to the goods accepted and received.

Cotton Co. delivered the bale of cotton batting. Buyer opened the bale and began using the batting to make mattresses. Since Buyer accepted the bale, the contract is enforceable as to the bale of batting accepted.

Hence, this exception takes the agreement outside the Statute of Frauds.

### **Implied-In-Law – Constructive Condition Precedent**

A condition is a fact or event in which the happening or non-happening of either creates or extinguishes an absolute duty to perform.

Cotton Co. must deliver the bale of batting, an event which must occur, before Buyer's duty to pay Cotton Co. arises. Cotton Co.'s act of providing the bale of cotton batting to Buyer creates an absolute duty for Buyer to pay Cotton Co.

Therefore, a constructive condition precedent exists.

### **Full Performance**

Cotton Co. delivered the bale of cotton batting on May 1, to Buyer. Cotton Co. has performed their condition precedent and Buyer's duty to pay arises.

### **Defense – Impossibility of Performance**

Impossibility of performance excuses performance under a contract where it becomes objectively impossible for the party to perform a condition.

Buyer will argue that he ordered the batting from Cotton Co. because he had unexpectedly ran out, which brought his entire production line to a halt. Buyer was trying to fill a large order placed by Sleepco. Buyer will argue that since Sleepco called and cancelled their order, his performance became impossible for him to need all the batting, thereby excusing his performance.

However, Cotton Co. will argue that when Buyer made the contract with them, they were not aware of any contract with Sleepco. The fact that Sleepco cancelled their contract with Buyer does not make it "objectively" impossible for Buyer to perform. Buyer's performance will not be excused.

Thus, Buyer will not be excused from his performance to pay.

### **Frustration of Purpose**

Due to an unforeseeable event, value of contract, as contemplated by both parties, is totally destroyed.

Buyer will argue that since he ordered the batting only to fill a large order by Sleepco and Sleepco cancelled the order this was an unforeseeable event frustrating the purpose of the parties' contract. However, the action of canceling the contract by Sleepco does not totally destroy the purpose of the contract between Buyer and Cotton Co. When Buyer placed the order with Cotton Co., Buyer's purpose of the purchase of the batting for the Sleepco contract was never contemplated for between Buyer and Cotton Co. The contract is not totally destroyed and still can be performed.

Thus, frustration of purpose is not a valid excuse.

### **Breach**

A breach is an unjustified failure to perform, which goes to the essence of the bargain.

Cotton Co. delivered the bale of cotton batting. Buyer must pay for the batting. Buyer's failure to pay goes to the essence of the bargain.

Therefore, Buyer is in breach of contract.

### **Remedies**

A seller of goods may bring an action for the contract price, plus incidental damages, for the goods accepted by buyer.

Cotton Co. can sue for the contract price of \$5,000.

### **2. Does Cotton Co. have the right to reclaim the unused batting? Explain fully.**

#### **2-702 – Seller's remedies on discovery of Buyer's insolvency**

Where the seller discovers the buyer to be insolvent after delivery of the goods on credit, seller may reclaim the goods upon demand within 10 days after receipt of the goods.

On May 5, Cotton Co. learned that Buyer had been insolvent for the past 60 days after the goods were already delivered. On May 6, Cotton Co. demanded that Buyer either pay, or return the unused batting. Upon discovery Cotton Co. made a demand within the 10-day limitation. Cotton Co. may reclaim the unused batting from Buyer.



## Essay Review Model Answer

### Question 3

#### 1. What criminal charges, if any, should be brought against Art and Ben? Discuss.

##### State v Art

##### Conspiracy

An agreement between two or more persons to commit an unlawful act.

Art and Ben decided to rob the all night convenience store, thus an agreement. The agreement was between Art and Ben, and thus was between two or more. Since they agreed to rob the store they were to commit an unlawful act. Thus a conspiracy exists.

##### Burglary – Common Law

At common law, a nighttime breaking and entering of a dwelling house of another, with the specific intent to commit a felony therein.

Since it was an all night convenience store, “nighttime” is presumed. Art and Ben entered the store, thus there was an entry. However since the store was open to the public, there was no breaking. Since the building was a store, it is not a dwelling house of another. Art and Ben entered to rob, thus specific intent to commit a felony therein.

Because there was no “breaking” into the “dwelling house of another,” no common law burglary occurred.

##### Modern Law Burglary

Modernly, the trespassory entry into a structure to commit an unlawful act.

While Art will argue that since the store was open to the public, there was no trespassory entry. However, if one enters with the intent to steal, the owner’s consent is vitiated such that Art’s and Ben’s entry was trespassory. They entered into a store, thus a structure, with the intent to rob, thus an unlawful act.

Thus, a modern law burglary.

##### Robbery

Trespassory taking and carrying away of the personal property of another by force, fear or intimidation with the intent to permanently deprive.

Ben took \$250 from the cash register, which belonged to the convenience store, thereby a trespassory taking the personal property of another. Since he left with the money, he carried it

away. The money was taken from the register when Mark and Fran were locked in the refrigerator. Thus, the taking did not occur in the presence of a clerk such that the taking could be through force, fear or intimidation. Thus, no robbery.

### **Attempted robbery**

An attempt is taking a substantial act towards perpetration of an intended crime, here a robbery.

Art and Ben decided and drove the truck to the store. They entered the store brandishing unloaded pistols, thus they took a substantial act towards perpetration of the intended robbery. Except for the fact that they took the money without force, fear or intimidation, they would have committed a robbery.

Thus, attempted robbery.

### **False Imprisonment**

Unlawful detention or confinement of another.

Art locked Mark and Fran in the refrigerator, thus a confinement of another. Since Mark and Fran were put in the refrigerator against their will and during the course of the burglary, their confinement was unlawful.

Therefore, Art committed false imprisonment.

### **Kidnapping**

The intentional, unlawful movement of another.

Although Art drove Mark and Fran just a very short distance down the dirt road in the truck, such movement of Mark and Fran was sufficient. Further, since the intent of Art was to conduct the movement in order to lock Mark and Fran in the refrigerator, the movement was unlawful.

Therefore, a kidnapping occurred.

### **Homicide**

Killing of a human being by another human being.

Mark died when Art locked him in the refrigerator.

Thus, homicide.

### **Actual cause**

“But for” Art locking Mark in the refrigerator, Mark would not have died.

### **Proximate Cause**

It is foreseeable that by locking Mark in the refrigerator, even though Art may not have known he had an extraordinary susceptibility to pneumonia, that he could catch pneumonia and die.

Thus Art proximately caused Mark's death.

### **Murder**

Is the unlawful killing with malice aforethought.

Art became enraged when he saw Fran with Mark in the store, thus he decided to "chill these lovers out." Thus, Art had the intent to cause bodily harm. By placing someone into a refrigerator would equate to wanton and reckless conduct. Further, his actions were done while he was in the perpetration of a felony, i.e. burglary and larceny, thus felony murder rule establishes malice.

### **Voluntary Manslaughter**

Intentional criminal homicide with mitigated malice. Requires a showing of adequate provocation and insufficient time to cool off.

Art was enraged, and regarded Fran as his girlfriend. He became jealous when he saw her in the store with Mark. A reasonable person would not have been so enraged to kill. Thus no voluntary manslaughter.

### **Attempted Murder of Fran**

Defined supra. Here, the intended crime is murder.

Art was enraged when he saw Fran with Mark and announced he would "chill these lovers out" and placed her in a refrigerator. Thus he had the specific intent to harm Fran, although he did not intend to kill her. Art locked Fran in the refrigerator such that he had the apparent ability. When Art left Fran in the locked refrigerator it could equate to a substantial step towards perpetration.

Since Art did not intend to kill Fran, there was no attempted murder.

## **State v. Ben**

### **Conspiracy**

Defined and discussed supra.

### **Pinkerton's Rule**

Each member of a conspiracy is chargeable with all crimes in furtherance of or the natural and probable consequence of the conspiracy.

Ben will argue that he could foresee the robbery and the burglary since he and Art agreed to rob the store. However, he could not foresee the kidnapping, false imprisonment, or the murder, and thus they were not in furtherance of the conspiracy since the agreement was to rob the store. It was only once they entered the store Art saw Fran and became enraged. The prosecution will argue that it is foreseeable that when you burglarize a store the perpetrator might falsely imprison or kidnap, or kill a customer or clerk as part of the burglary. However, since it appears that Art's motivation for placing Mark and Fran in the refrigerator was jealousy over the Mark-Fran relationship, not the crimes, the kidnapping, false imprisonment and murder were not part of the conspiracy.

Thus, under Pinkerton's Rule, Ben will be liable for the burglary and attempted robbery only.

### **Larceny**

Trespassory taking and carrying away of the personal property of another with the intent to permanently deprive.

Ben took the money from the cash register such that a trespassory taking occurred. Further, when he left the store with the money, he carried away the personal property of another with the intent to permanently deprive.

Thus, a larceny occurred.

## **2. What defenses, if any, do Art and Ben have to the criminal charges? Discuss.**

### **Voluntary Intoxication**

Voluntary intoxication is only a defense to specific intent crimes.

Here, Art drove to the convenience store, loaded Mark and Fran into the truck, drove a short distance, locked the victims in the refrigerator, returned to the store for Ben who had taken the money from the cash register, and Art picked up Ben from the store to escape.

In light of the above facts, voluntary intoxication will not be a defense because Art and Ben still had the specific intent to commit the crimes.

### **Diminished Capacity**

Where the perpetrator's capacity is so diminished that he cannot form specific intent to commit the crime.

In light of the facts above, and the absence of evidence that Art's or Ben's capacity was diminished, diminished capacity will not be a defense.

Thus, there are no defenses to the crimes.