



California First-Year Law Students' Examination

**Essay Questions
and
Selected Answers**

June 2019



The State Bar of California
Committee of Bar Examiners / Office of Admissions

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ESSAY QUESTIONS AND SELECTED ANSWERS

JUNE 2019

CALIFORNIA FIRST-YEAR LAW STUDENTS' EXAMINATION

This publication contains the four essay questions from the June 2019 California First-Year Law Students' Examination and two selected answers for each question.

The answers were assigned high grades and were written by applicants who passed the examination. The answers were produced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. They are reproduced here with the consent of the authors.

<u>Question Number</u>	<u>Subject</u>
1.	Torts
2.	Contracts
3.	Criminal Law
4.	Contracts

June 2019

ESSAY QUESTIONS



California First-Year Law Students' Examination

Answer all 4 questions.

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 or no 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 that are not pertinent to the solution of the problem.

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

QUESTION 1

Ann owns a chain of day care centers in City and needed to hire a new director of operations. John Smith, who had recently moved from a small town ("Town") to City, applied for the position. He appeared to be well qualified for the job. Ann sent an email to her friend Bob, who lived in Town, to see if Bob knew John Smith and whether he had any information about him.

Bob emailed back stating that he did not know John Smith, but that he believed that John Smith was a convicted drug dealer who had sold drugs to minors. Although he did not explain the source of his belief to Ann, it was based on an article in Town's newspaper that he had read about the conviction of a major drug dealer named John Smith who had been selling drugs to students at the local high school. Ann decided not to offer the job to John Smith. When Smith inquired as to why he had not received the job, Ann truthfully told him that Bob had informed her that he was a convicted drug dealer who had sold drugs to minors.

In fact, the John Smith that Bob had read about in the article was a different John Smith, and the newspaper article had included the actual drug dealer John Smith's address and photograph. They were in no way similar to job-applicant John Smith, who was the fine, upstanding citizen that he appeared to be.

Upset and distracted after talking with Ann, applicant John Smith got into his car and carelessly merged into traffic, cutting off Deb, who barely avoided running into him. Deb became enraged and, after he pulled into a driveway to turn around, managed to use her car to block him in his car in the driveway for 10 minutes. John Smith screamed at her and called her insulting names. Deb took her foot off the brake and drove her car into John Smith's car, significantly damaging the bumper. It took the mechanic two weeks to repair John Smith's car and he charged \$2,000 for the repair.

Applicant John Smith sued Bob in tort for harm to his reputation. He sued Deb in a separate case in tort.

1. Is applicant John Smith likely to prevail in his lawsuit against Bob? Discuss.
2. What intentional torts, if any, can applicant John Smith likely prove in his lawsuit against Deb? Discuss.

QUESTION 1: SELECTED ANSWER A

JOHN SMITH ("P") V. BOB

DEFAMATION

Defamation is a false statement of material fact of or about the plaintiff published to another causing damage to reputation.

False and Defamatory Statement

Statement must be false and defamatory, holding plaintiff up to disgrace and ridicule.

Here, Bob emails back Ann and states that he did not know P, but that he believed that P was a convicted drug dealer who had sold drugs to minors. P will assert that such statement is libel per se, since it accuses him of criminal conduct, and that it holds up him (P) up in disgrace and ridicule. Bob will assert that he obtained that information from an article he read in Town's newspaper. The facts support that P was a different "John Smith," that P was a fine, upstanding citizen, and therefore the statement was false and defamatory.

Therefore, the statement was false and defamatory.

Of or About the Plaintiff

Statement must refer to plaintiff.

Here, the statement was about John Smith (the plaintiff), and since Ann reasonably believed that the "John Smith" referred to the P, then the statement referred to the plaintiff.

Publication

Publication occurs when the statement is heard or seen by other than plaintiff.

Here, Bob emailed the statement to Ann, and therefore the statement was published.

Damages

Damages include damage to reputation, and are presumed if libel or slander per se.

Slander per se includes statement accusing P of criminal conduct.

Here, P will assert that the statement was defamatory and libel per se, since it accused him of criminal conduct, and therefore damage to reputation is presumed. P will further assert that because of the statement, Ann did not hire him, and therefore he is entitled compensation for the lost income. Bob will assert that he was telling the truth, since there was in fact another John Smith, and that he was referring to the John Smith from the article, and not the John Smith ("P") that was interviewing with Ann.

Therefore, the statement constitutes libel per se.

Constitutional Issues

A private person in a private matter needs to show only negligence on part of the defendant. Under Gertz, a private person must show only negligence, but must show actual malice if seeking punitive damages. Under New York Times v. Sullivan, a public person in a public matter must show actual malice and falsity. Actual malice is knowledge or reckless disregard of the falsity of the statement.

Private Person in a Private Matter

Here, P will assert that he was applying for a job as a director of operations, and that Ann owned a chain of day care centers in City, and therefore he is a private person in a private matter. Bob will assert that a "drug dealer" working in a chain of day care centers, in a

high position, is a matter of public concern. Even if that were the case, P will respond that he still needs to show only negligence from Bob to prove his case (if he does not pursue punitive damages - Gertz).

Therefore, P is a private person in a private matter. Therefore, he only needs to show that Bob acted negligently.

Bob Acted Negligently

Bob has a duty to act as the reasonably prudent person under the circumstances. When Bob informed Ann about P being a drug dealer, he did not explain the source of his belief, which came from the article from Town's newspaper. P will therefore assert that Bob could have informed Ann about the article, and raise doubts as to whether P was the same person from the article. P will further assert that had Ann known, she could have detailed the source of the information, and therefore P could have dispelled Ann's doubts about him (P).

Therefore, Bob acted negligently.

DEFENSES

TRUTH

Truth is an absolute defense.

Here, Bob will assert that he spoke the truth, and therefore he is not liable. P will assert that Bob defamed P before Ann, and since Bob was mistaken about the John Smith he was referring to, Bob did not speak the truth.

Therefore, Bob may not prevail on this defense.

QUALIFIED PRIVILEGE

One is privileged to make statements without malice in the interest of the public, or recipient.

Here, Bob will assert that he made the statement without malice, and since the statement was in the interest of the recipient (Ann), he had a qualified privilege to make the statement (so that she could have hired the right individual).

Therefore, Bob may prevail using this defense.

THEREFORE, if the court does not find that Bob had a qualified privilege, P is likely to prevail in his lawsuit against Bob.

JOHN SMITH ("P") V. DEB

FALSE IMPRISONMENT

False imprisonment is an intentional confining or restraining of another to a bounded area, without consent, by use of threat, assertion of legal authority, or actual force. P must suffer harm or be aware of the confinement.

Here, P cut off Deb while driving. Deb became enraged and, after he pulled into the driveway to turn around, managed to use her car to block him in his car in the driveway for 10 minutes. P will thus assert that Deb intentionally confined him to a bounded area, where there was no reasonable means of escape, and therefore Deb is liable for false imprisonment. Deb will assert that 10 minutes is not sufficient for this tort, and that P could have left his car, in which case he had a reasonable means of escape. P will assert that the car is an extension of him, and since the car was blocked, false imprisonment applies, even if Deb blocked him for only 10 minutes (and since P screamed at her and called her insulting names, it shows that Deb did not have consent to imprison him).

Therefore, Deb is liable for false imprisonment.

ASSAULT

Assault is an intentional act causing apprehension of a harmful or offensive contact.

Here, P will assert that Deb is liable for assault, since Deb took her foot off the brake and drove her car into P's car, significantly damaging his car. Since Deb likely created a reasonable apprehension of harmful contact, Deb is likely liable for assault.

Therefore, Deb may be liable for assault.

BATTERY

Battery is an intentional infliction of harmful or offensive contact.

Here, P will assert that the car is an extension of him, and therefore Deb is also liable for battery, since she rammed her car onto his.

Therefore, Deb is liable for battery.

TRESPASS TO CHATTEL

Trespass to chattel is an intentional interference with the personal property of another, causing damage.

Here, Deb significantly damaged P's car, when she rammed her car onto his. Therefore, P will assert that Deb is liable for trespass to chattel, in which case she will need to compensate him for the actual damage, or \$2,000. P will also claim that he should be compensated for the time he did not have his car, since the mechanic took 2 weeks to repair the damage, which Deb had caused.

Therefore, Deb may be liable for trespass to chattel, and may need to compensate P with \$2,000, and rental time of another vehicle for 2 weeks.

CONVERSION

Conversion is an unreasonable interference with the personal property of another, causing deprivation of possession. Proper remedy is a forced sale.

Here, P may assert that Deb converted his car, and therefore he should be compensated for a forced sale of the car. Deb will assert that actual damage is the proper remedy, or \$2,000.

Therefore, Deb is not liable for conversion.

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS (IIED)

IIED is an intentional or reckless infliction of severe and emotional distress by extreme and outrageous conduct.

Here, P will assert that when Deb imprisoned him, he screamed at her and called her insulting names, which shows that Deb inflicted on him severe and emotional distress, by use of extreme and outrageous conduct (false imprisonment, assault, battery, and trespass to chattel). Deb will assert that IIED needs actual damages, and that P did not suffer severe and emotional distress.

Therefore, Deb is not likely liable for IIED.

DEFENSE

DURESS

Duress is a defense if there was reasonable belief of improper threat or use of force against D.

Here, Deb may assert that she acted under duress, since P had cut her off, and therefore she is not liable for the torts she committed. P will assert that a "cut off" does not amount to a reasonable belief of improper threat of use of force, for purpose of duress.

Therefore, Deb will not prevail using this defense.

QUESTION 1: SELECTED ANSWER B

1. Is applicant John Smith likely to prevail in his lawsuit against Bob?

John Smith vs. Bob

DEFAMATION

A defamatory statement of and concerning the plaintiff, published to a third party, which causes harm to his reputation.

Here, the facts indicate that John Smith (JS) moved from a small town to City and applied for a job at a day care center in the City. Ann sent an email to her friend Bob who lived in the town and inquired whether Bob knew JS. Bob stated in an email that he did not know JS but he believed that JS was a convicted drug dealer who had sold drugs to minors. Although he did not explain the source of his belief to Ann, he gathered these facts from an article he read in the newspaper.

Bob made a defamatory statement (JS was a convicted drug dealer) of and concerning JS to Ann (a third party), which caused JS to not get the job he applied for. Therefore, JS may have a successful case against Bob for defamation.

Libel

Libel is written defamation and no special damages must be proven. Here, the facts indicate that Bob emailed, which will be a form of writing, to Ann and told her that JS was a convicted drug dealer based on the article in the newspaper. Therefore, this email by Bob will constitute a libel against JS.

Slander

Slander is oral/verbal defamation and special damages must be proven by the plaintiff. Here, since an email may constitute a writing, then Bob's defamatory statement against JS will not be slander. However, if for any reason, the court does not find that an email is a writing, then slander per se will apply.

Slander Per Se

Slander per se is defamation on its face and no special damages must be proven by the plaintiff. However, the statements made by the defendant must fall within one of the following categories:

- 1) statement made accused the plaintiff of a crime of moral turpitude
- 2) unchastity of a woman
- 3) statement made was disparaging the business or trade of the plaintiff
- 4) and accusing the plaintiff of having a loathsome disease.

Here, if for any reason, the court does not find the email to constitute a writing, then the court may deem Bob's statement as slander per se because the statement made accused JS of being a convicted drug dealer, which to a reasonable person would be highly offensive and extreme. Being convicted for dealing with drugs would constitute a crime of moral turpitude. Thus, the court may reach a finding of slander per se if libel does not apply and plaintiff does not have to prove he suffered any damages.

Private Figure vs. Private Figure

Here, the facts do not indicate that JS was a public figure, so he does not have to show that Bob acted with actual malice when he made the defamatory statement against his person. Since he will be considered a private individual, negligence by Bob will suffice. JS will show that Bob failed to check who JS, the person applying for the job with Ann really was. He should have checked the source and asked Ann to verify that it was not the same John Smith in the newspaper he read about.

Republication

Bob will state that he did not make up any of the facts but that he was simply restating what the article in the newspaper published. However, Bob will be liable the same the newspaper would be if the newspaper negligently published defamatory statements about

the JS who actually applied for the job with Ann. Bob will be liable and should have made sure that the JS applying for the job was not the same JS in the newspaper. Alternatively, Bob should have told Ann that he did not know JS and could not state anything about him and his character.

Conclusion:

Bob will be held liable for defamation of JS due to the libel statement he made to Ann about him.

Defenses of Bob:

Truth

Here, Bob may state that he based his belief because of what he read in the newspaper. He was not sure it was the same John Smith, but Ann should have checked if it was the same person. Bob will argue that he thought the newspaper's article was true about the only John Smith he knew. However, this defense will not work.

Qualified Privilege

Here, Bob will state that when Ann emailed him about JS, he truthfully believed that the JS in the newspaper could probably be the JS Ann was considering hiring. However, since Bob did not know JS, he did not have a qualified privilege to make any statements about him; so, this defense will fail.

Consent

Again, Bob will state that when Ann asked him about JS, he had the right to state his opinion about JS. He told Ann about what he saw in the newspaper but that was it. However, again, he did not know JS and he did not consent to Bob making any reference statement about him. This defense will fail too.

Absolute Privilege

Since JS is a private individual and there is no judicial or legislative proceedings involved, then Bob will not have the defense of absolute privilege. This defense will fail and will not apply in this case.

Comparative Negligence

A percentage that the court may apportion to the blameworthiness of each party involved. Here, Bob will argue that Ann will be deemed at fault for not checking her sources too. He cannot take the fault for JS not having gotten the job. Ann will be liable as well because she could have seen the newspaper article and verified JS's picture with the one in the newspaper article.

The court may impose fault against Bob and Ann for the damages of JS.

2. What intentional torts, if any, can applicant John Smith likely prove in his lawsuit against Deb?

False Imprisonment

A volitional act with the intent to cause an act of restraint and which causes physical or psychological confinement to the plaintiff in a bounded area, and the plaintiff has no means of escape

Here, JS will argue that when Deb used her car to block him in the driveway, she used her car (intentionally because she was upset she had been cut-off by JS) to restrain him in a bounded area. Because of her act, he could not move or get out (causing him not to escape), so he was physically confined to the driveway due to Deb's actions for a period of ten minutes. With Deb actions he did not suffer any type of harm but, for false imprisonment, no damages must be shown, only the mere fact that the plaintiff could not get out from the bounded area. JS will be successful in filing a cause of action against Deb for false imprisonment.

Assault

A volitional act with the intent to cause a reasonable apprehension of imminent harmful or offensive touching.

Here, JS will argue that Deb intentionally caused him a fear of being hurt when she blocked him in his own car and could not escape. Deb will argue that she was simply teaching him a lesson and did not mean to harm him in any way. However, a reasonable person might find apprehension when being faced with a car in front of them. Therefore, there is a possibility that JS will find a cause of action for assault against Deb if the court deems it was a reasonable apprehension to use her car against JS.

Battery

A volitional act with the intent to cause a harmful or offensive touching against the person or extension of the person.

Here, JS may argue that Deb caused him a battery because she intentionally took the foot off her brakes and drove her car into JS's car. Although the car did not physically touch him, the car was an extension of JS at that movement and so he could have been greatly injured as a result of the accident Deb intentionally caused. Therefore, Deb will be liable for battery against JS.

Trespass to Chattels

An intentional interference with the possession of another's chattel without consent or privilege. Here, JS will argue that when Deb intentionally ran her car into JS's car, she caused property damage to his car. In fact, he took the car to a mechanic and had it in the repair shop for two weeks and was charged \$2,000. He could not use the car for that amount of time and so, Deb committed a trespass to his chattel (JS's car).

Conversion

An intentional exercise and dominion over the title of the chattel of another. If the car was considered to be a total loss, then JS will be able to file a conversion suit against Deb

because she caused him to lose the use of his property permanently. Deb would be liable for the full value of what JS's car was worth prior to the accident.

IIED

Intentional infliction of emotional distress is conduct that is extreme and outrageous and causes severe emotional distress against the plaintiff. If the court finds that Deb's action of running her car into JS's car and going on a road rage blocking him access from the driveway is extreme and outrageous, then JS will have a successful cause of action against Deb for IIED. However, the facts do not indicate that JS suffered any emotional distress, so it is difficult to have a claim for IIED against Deb.

Defenses of Deb:

Consent

Deb will try to argue that when JS cut her off in the driveway, he consented to the type of behavior she showed against him. However, the facts do indicate that JS was distraught and he did not intentionally drive negligently. It was an accident and Deb simply got angry and showed road rage not knowing the actual circumstances of why JS acted the way he did. Therefore, JS did not consent to this behavior.

Bob's Damages:

General Damages

JS will be able to claim past, present, and future damages against Deb for pain and suffering he sustained due to Deb's actions against him.

Special Damages

JS will be able to claim past, present, and future damages for loss of wages and any medical bills he might have incurred due to the car accident caused by Deb.

QUESTION 2

Ed is elderly and is often forgetful. He owns a home on a large lot in a subdivision governed by extensive homeowners' association ("HOA") regulations. Nate lives next door and has a lawn care business. Nate drafted a contract stating that Nate will provide lawn care services to Ed for five years, with the full amount to be paid in advance, at the time the contract is signed. Nate intended the amount to be for \$100 per month, for a total of \$6,000 due in advance. Unbeknownst to Nate, he had made a mistake when typing the contract and it stated that the amount Ed was to pay was \$1,000 per month, with \$60,000 due in advance. The contract contained a merger clause stating that the written contract was intended as a complete and final expression of the parties.

Nate knew that Ed drinks alcohol heavily every evening and waited until 10:00 p.m. to bring the contract over to Ed. Ed was on the porch drinking a cocktail. When Ed asked for time to review the contract, Nate said that Ed had already orally agreed to hire Nate for lawn care services at \$100 per month and that the written contract simply memorialized their deal. In fact, that conversation never occurred. Ed was afraid that he may have entered into the oral contract with Nate, but had forgotten about it due to a "blackout," which he occasionally experienced. Nate also told Ed that if someone reported the poor condition of Ed's lawn to the homeowners' association, Ed could be liable for a large fine for violation of association regulations. Frightened, Ed quickly signed the contract without reading it, but subsequently refused to pay Nate.

Nate sued Ed for breach of contract, seeking \$60,000. What arguments would Nate make, what defenses could Ed reasonably raise, and what would be the likely outcome? Discuss.

QUESTION 2: SELECTED ANSWER A

Nate v Ed

Applicable Law

The common law governs contracts for services.

Here, the contract was to provide lawn care services, thus the contract was for services.

Therefore, the common law applies.

Valid Contract

A valid contract consists of an offer, acceptance and consideration.

Offer

An offer is the manifestation of contractual intent, with certain and definite terms made to an offeree.

Here, Nate drafted a contract stating that Nate will provide lawn care services to Ed for five years, with the full amount to be paid in advance in the contract. Thus, by drafting a contract Nate had contractual intent to enter into a contract with Bob, the offeree. The certain and definite terms are as follows:

Quantity-Ends Lawn

Time- For five years

Identity of parties-Ed and Nate

Price- \$1,000 per month with \$60,000 due in advance.

Subject matter- Lawn care services

Acceptance

An unequivocal assent to the terms of the contract.

Here, Ed signed the contract without reading it. Usually, one shows their assent and is bound by the contract even if they did not read it. Thus, by signing it he showed his assent.

Therefore, there would be an acceptance absent a valid defense (infra).

Consideration

Consideration is a bargained made in exchange requiring a legal detriment.

Here, Ed bargained to receive Nate's lawn services and his detriment was to pay Ed for the services. Nate bargained for Ed's compensation and his detriment was doing the lawn services.

Thus, there was consideration.

Statute of Frauds

Contracts that cannot be performed in one year must be in a signed writing by the parties to be charged to be enforceable.

Here, the contract is for lawn services for five years, thus the contract cannot be performed in one year. However, Nate placed the contract and its terms in writing. Ed later signed the contract. Since Ed signed the contract and he was being sued for breach, the contract is signed by the party to be charged.

Thus, the statute of frauds is satisfied.

Parol Evidence

No prior written or oral statements or oral statements made with the formation of the contracts, can be used to vary, alter, or contradict the original writing.

Here, the contract contained a merger clause stating that the written contract was intended as a complete and final expression of the parties. The merger clause would void any attempts to add evidence of anything outside of the contract. However, there are exceptions to a merger clause, including a mistake.

Mistake

A contract may be reformed if there was a mutual mistake, or a unilateral mistake and the party knew or should have known of the mistake.

Here, Nate intended the amount to be for \$100 per month, for a total of \$6,000 due in advance. Further, the contract was supposed to be for \$100 per month, for a total of \$6,000 due in advance.

Nate is going to fight to keep the terms as is and will assert that there was a merger clause, and thus the other terms should not be allowed into the contract. Further, this was not a mutual mistake because Ed did not know of it, thus Ed can't assert that there was no meeting of the minds. Additionally, this was only a unilateral mistake and Ed did not know of the mistake. With that he agreed to the terms as is and will be held subject to the terms.

Ed will argue that Nate had orally stated that the contract was for \$100 per month and that he relied on that statement before signing the contract. Further, when he did sign the contract Nate did not know of the mistake, therefore, both parties would be mistaken. Since, both parties were mistaken there would be no meeting of the minds. Further, this will be allowed as evidence even under a merger clause.

Therefore, the evidence of the mistake will be allowed in the contract. In addition, if there is a mutual mistake, then the contract can be reformed to the parties' true intentions.

Misrepresentation

A misrepresentation is a false statement of a material fact, with intent to induce reliance, the plaintiff justifiably relied, which caused the plaintiff damages.

Here, Nate said that Ed had already orally agreed to hire Nate for lawn care services at \$100 per month and that the written contract simply memorialized the deal. This was a false statement. Further, entering into a five year contract would be a matter of great importance, thus a material fact. Additionally, Nate wanted Ed to sign the contract, therefore, he intended to induce reliance. Ed was known to black out when drinking, thus

he thought this was possible, thus he justifiably relied on the statement. Further, he is being sued for \$60,000, thus sustaining damages.

Incapacity

A party who is too intoxicated to understand that he formed an agreement will not be bound by the agreement. Further, an elderly person who has the inability to understand the terms of an agreement or lacks the capacity to understand its implications will not be bound to the agreement.

Here, Ed was on his porch drinking a cocktail. Further, the facts say that he is known to drink heavily. However, it does not say whether or not Ed was intoxicated enough to understand the contract that he entered. However, it may be used as evidence for the totality of the evidence.

Elderly

Here, Ed was elderly and often forgetful. This in of itself is not enough to not have the capacity to enter a contract. Ed would have to have some other disability or impairment to meet that threshold.

However, between the fact that he was old and forgetful and that he had been drinking a cocktail, it would be reasonable for a jury to determine that Ed did not have the capacity to enter a contract. Further, this was the reason why Nate entered at 10:00 PM, in hopes that Ed would be able to make a good decision

Duress

A defense if Ed can show he was coerced into entering the contract.

Here, Nate told Ed that if someone reported the poor condition of his lawn then Ed could be liable for a large fine. Ed will assert that he was frightened and quickly signed the contract. One should not be frightened into entering a contract. They should be able to make the decision of their own free will. Further, this can be seen as a threat, as it was unknown if Nate would report him.

Thus, Ed will prevail here.

Anticipatory Repudiation

An unequivocal expression that one will not perform under the contract.

Here, Ed refused to pay Nate. Since the contract was ongoing, this would be a repudiation by words, before performance is due. Thus, Ed could sue now or wait until performance is due.

Thus, there was a repudiation, but Ed will have a defensive as discussed supra.

Damages / Conclusion

Ed will not be liable for the contract per supra defenses. He can, however, request a **reformation of the contract**, and for the contract's original terms.

QUESTION 2: SELECTED ANSWER B

Governing Law

Contracts for the sale of goods are governed by Article 2 of the Uniform Commercial Code. All other contracts are governed by common law. Here, the agreement between Ed and Nate was for the provision of lawn care business, and therefore, common law will govern.

Elements of an Enforceable Contract

An enforceable contract consists of offer, acceptance, consideration, and a lack of formation defenses. Here, Nate made a written offer which Ed accepted by signing the contract. There appears to be valid bargained-for consideration. Therefore, the case will primarily turn on formation defenses.

Formation Defenses - Voluntary Intoxication; Misrepresentation; Duress; Mistake; Unconscionability

Voluntary Intoxication is a valid defense when one party is so intoxicated at the formation stage that he was not able to form the requisite intent to contract, provided that the other party was not reasonably aware of the intoxication.

Here, Ed will not likely to prevail under this defense because although he had been drinking alcohol prior and during the contracting process, his mental capacity was not so impaired that he was not aware of the quality and nature of his conduct. The facts indicate that Ed was conscious enough to understand Nate's subsequent representation regarding the HOA's enforcement and appreciate the consequence of the large fine for violation.

Therefore, Ed will not likely raise a voluntary intoxication defense successfully.

Duress is a valid defense where a party uses threat of imminent physical or economic harm to influence the other party in forming the contract.

Here, Ed would argue that he entered into the contract because Nate threatened him with the "large fine for violation of association regulations." However, because the danger

of fine was neither created by Nate nor exacerbated by Nate, Ed would have no valid ground to invoke this defense

Therefore, Ed is not likely to raise the duress defense successfully.

Misrepresentation is a valid defense where (1) a party makes a statement of fact regarding an essential aspect of the deal; (2) the statement is reasonably foreseeable that the other party will be induced based on the representation; (3) the other party indeed justifiably relied on the misrepresentation; and (4) the other party suffers damages as a result.

Here, Ed would assert that his acceptance was reasonably induced by Nate's misrepresentation that they had previously orally agreed on the lawn care contract. In response, Nate would argue that a reasonable person would not be induced by Nate's statement regarding the previous oral contract because the reasonable person would have realized that the conversation never occurred. However, the court will likely not accept this argument because Nate consciously took advantage of Ed's mental impairment due to his alcohol intake. Because he was aware of the possible mental impairment, the inducement as a result of the impairment would be foreseeable. Finally, Ed entered into the contract as a result of the misrepresentation ("Ed was afraid that he may have entered into the oral contract with Nate, but had forgotten about it").

Therefore, Ed is likely to prevail on the misrepresentation defense, and if so, the contract would be voidable at his option. Price term subject to discussion below regarding the PER.

Mistake is a valid defense where (1) the two parties mutually were mistaken as to an essential aspect of the bargain; or (2) only one party was mistaken as to an essential aspect of the bargain but the other party would not reasonably discover the mistake.

Here, Ed would assert that the change in price term goes to the essence of the bargain as it severely prejudices his commercially reasonable expectation to only pay \$100 per month. Ned would argue that a reasonable person would have discovered the mistake as it is obvious. A court, similar to the misrepresentation situation, would consider the

circumstance that Nate consciously took advantage of Ed's drunkenness and the mistake in the price term would not be reasonably foreseeable under the specific circumstances.

Therefore, Ed is likely to prevail on the mistake defense, and if so, the contract would be voidable at his option. Price term subject to discussion below regarding the PER.

Unconscionability is a valid defense where during the bargaining process, a party was in such an advantaged position or had so much bargaining power so as to make the other party have no choice but to accept the offer.

Here, Ed would assert that Nate took serious advantage of him by coming to him at the time he's like to be too impaired to contract. If he succeeds in this defense, the court may (1) choose not to enforce the contract; (2) blue pencil the terms by striking out the unconscionable term and supplementing with a reasonable term; or (3) enforce the contract in a way that would avoid the unconscionable result. Here, as discussed below, Ed is likely able to show that the real price term is \$100 per month. In the spirit of the positive bias favoring a finding of contract formation, the court may choose to find the contract enforceable, with the price term being \$100 per month.

Price Term - Parol Evidence Rule (PER) and Its Exceptions

The parol evidence rule states that where an agreement is intended as the final expression of the terms of the contract, parol evidence (prior written and oral evidence and contemporaneous oral evidence) cannot be admitted to contradict the terms in the final written expression. When the final written expression is completely integrated, no parol evidence can be admitted to contradict or supplement the final written expression.

Here, Nate would assert the PER to prevent Ed from introducing the conversation they had around 10pm before the signing of the contract as evidence of the true price term (\$100 per month for 60 months). First, the court will determine whether there was an integration. Because the written agreement has a merger clause, the court will likely determine as a matter of law that the written contract was a complete integration of the terms between the parties, therefore barring parol evidence to contradict or supplement the written terms. Second, the court will determine whether the conversation on that night between the two

parties is indeed parol evidence. Because, the conversation occurred prior to Ed's signing of the contract, it would be deemed as parol evidence. Third, the court will evaluate the impact of the parol evidence on the written contract and determine whether to admit the evidence. Because the conversation would indicate that the parties actually intended to agree on \$100 per month, and not \$1000 per month, as the price term, the conversation directly contradicts the purportedly integrated writing, and would therefore be barred from the proceeding.

Therefore, under the PER, Ed would not be able to introduce his conversation with Nate at 10pm as evidence to clarify the terms of the contract, if Ed cannot invoke exceptions to the PER.

Exceptions to the PER

Exceptions to the PER exist where the party intends to introduce evidence to (1) show a mistake in the integration; (2) show a condition to the effectiveness of the contract; or (3) show a collateral contract. Under these exceptions, the party's evidence may be introduced.

Here, Ed may properly invoke the first PER exception to show that the price term in the written contract was a mistake and the parties intended the price term to be \$100 per month.

QUESTION 3

Ava used to work as a daytime housecleaner for Claire, who had terminated Ava's employment. Ava decided to go to Claire's house the following Saturday when she thought Claire would be at her weekly book club meeting, and to take two large paintings worth several thousand dollars and to sell them. Ava told Ben of her plan and offered to pay him one-third of the proceeds from the sale of the paintings if Ben gave her a ride and helped her load the paintings into his van. Ben said he needed to think it over.

Shortly after sunset on Saturday night, Ben picked Ava up and they drove in his van to Claire's house. Ava used a copy she had made of a key that Claire had given her to open the locked front door. Claire was sick with the flu and had decided not to go to her book club meeting. Claire walked into her living room just as Ava and Ben were taking down the first painting. Claire suffered from a serious heart condition. Claire screamed when she saw Ava and Ben, had a heart attack, collapsed, and died.

Ben, not realizing that Claire had died, told Ava that he was through doing jobs with her and used his cell phone to call an ambulance. After Ben hung up the phone, Ava ran out without the paintings, but saw Claire's diamond watch on a table, grabbed it, and took it with her as she fled.

Ben was arrested.

With what crime or crimes can Ben reasonably be charged, what defenses, if any, may he reasonably raise, and what is the likely result? Discuss.

QUESTION 3: SELECTED ANSWER A

With what crime or crimes can Ben reasonably be charged, what defenses, if any may he reasonably raise, and what is the likely outcome?

STATE V. BEN

CONSPIRACY

Under common law, conspiracy is when two or people agree to work together to commit a crime. Modernly, an overt act in furtherance of the crime is needed.

Here, Ben agreed to break into Claire's house to commit larceny of 2 paintings. When Ben picked up Ava to drive her to Claire's house, is when Ben committed an overt act in furtherance of the conspiracy goal.

Therefore, Ben can be charged with Conspiracy.

PINKERTON RULE

Under Pinkerton all co-conspirators are vicariously liable for foreseeable crimes that are committed in furtherance of the conspiracy goal.

Because of Pinkerton, Ben will be guilty of burglary, attempted larceny, second degree murder or involuntary manslaughter but not for larceny of the diamond watch analysis infra.

ACCOMPLICE

An accomplice is one who aides, abets, assists or encourages another to commit a crime. He is vicariously liable for all crimes that are foreseeable and are in furtherance of the conspiracy goal that are committed by the principal.

Here, Ben assisted Ava by picking her up in his van to drive her to Claire's house to commit the conspiracy goal.

Therefore, Ben will be charged as an accomplice.

ASSAULT

Under criminal law, assault is the infliction of an apprehension of a battery.

Here, Claire screamed when she saw Ben and Ava removing the painting from the wall. A reasonably prudent person typically screams when they are in fear of being hurt especially when someone unexpectedly is in your home.

Therefore, Ben will be charged with Assault.

COMMON LAW BURGLARY

Under common law, burglary is the breaking and entering of the dwelling of another at night with the intent to commit a felony.

Here, Ava had a spare key to the door since she used to be Claire's housekeeper. Ben and Ava entered through the front door with a key; therefore, no breaking occurred. They did enter into the dwelling of another, Claire's house, at night, on Saturday night with the intent to commit larceny of the paintings.

Therefore, since the element of breaking is not met, under common law, Ben cannot be charged with burglary.

MODERN BURGLARY

Modernly, burglary is seen as the entering of any structure with the intent to commit a crime during any time of the day.

Here, Ben entered into the structure of Claire's home, with the intent to steal the paintings, during Saturday night.

Therefore, Ben will be charged with modern burglary.

ATTEMPTED LARCENY

Attempted larceny is the attempt of taking and carrying away the personal property of another with the intent to permanently deprive.

ATTEMPT

Jurisdictions look at the Probable Desistance Test to determine what substantial steps has the perpetrator already committed toward the commission of the crime versus what is left to determine attempt.

Here, Ben entered into Claire's house, helped Ava take the first picture off the wall, when Claire walked in and had a heart attack and collapsed.

Therefore, using the probable desistance test, Ben took enough substantial steps towards the commission of the crime versus what was left. It is safe to say that Ben would have successfully taken the paintings out of the house if Claire had not collapsed in front of him.

Therefore, Ben can be charged with Attempted Larceny.

LARCENY

Under criminal law, larceny is the taking and carrying away of another's personal property with the intent to permanently deprive.

Here, Ava decided to flee the scene but not without taking the diamond watch on the table before she fled. Although Pinkerton Rule holds all co-conspirators liable for crimes committed during the commission of the conspiracy goal that are foreseeable, Ben did withdraw, analysis supra., before Ava took the diamond watch and Ben will argue that it was not foreseeable nor in furtherance of stealing the paintings when Ava took the diamond watch. It was never a party of the plan to take anything out than the two paintings.

Therefore, Ben will more than likely not be charged with diamond watch if the court finds he withdrew from the conspiracy and it was not foreseeable that Ava would take the watch.

HOMICIDE

Homicide is the unlawful killing of a human being.

Here, Claire died after seeing Ben in her home taking her painting off the wall.

Therefore, there is a homicide.

CAUSATION

ACTUAL CAUSE

Actual Cause is the But For defendant's conduct, the P would not have died.

But For Ben being in Claire's home, she would not have screamed and had a heart attack and died.

PROXIMATE CAUSE

Proximate cause is the foreseeable injury with no intervening events breaking the chain of causation.

Here, Claire screamed when she saw Ben and Ava in her home taking her painting off the wall. This is what caused her to collapse and have a heart attack and die. Ben will argue it was unforeseeable because Claire had a heart condition and was already sick with the flu which is what caused her heart to be weak and caused her to collapse and suffer a heart attack and die. However, the Egg Shell rule holds that Defendants take the victim as they find them and as a result whatever injury is caused during the D's infliction of injury, D is liable for any injuries to the plaintiff.

Therefore, there is actual and proximate cause.

MURDER

Murder is the unlawful killing caused by malice aforethought.

MALICE

Malice aforethought can be expressed or implied through the intent to kill; intent to cause serious bodily harm; depraved heart killing; felony murder which is a killing that occurs during the commission of an inherently dangerous felony such as burglary, arson, rape or robbery.

INTENT TO KILL

Intent to kill can be shown through the defendant's desire to kill.

Ben did not have any intention to kill Claire, in fact, he thought she was alive and called the ambulance when she collapsed.

Therefore, there is no intent to kill.

INTENT TO CAUSE SERIOUS BODILY HARM

Intent to cause serious bodily harm can be seen when the defendant knows or should know his actions will cause serious bodily harm.

Here, Ben had no intent to cause serious bodily harm on Claire. As stated above he tried to save her by calling the ambulance.

Therefore, there is no intent to cause serious bodily harm.

DEPRAVED HEART KILLING

A depraved heart killing is when the defendant acts with a disregard to human life through reckless and wanton conduct.

Here, Ben did not act with a depraved heart or a disregard to human life.

The State will argue that anyone who burglarizes another, should know that his actions are reckless and show a disregard for human life.

Therefore, if the State is able to prove that Ben acted with a reckless disregard for human life, then there is a depraved heart killing; otherwise, there is no depraved heart killing.

FELONY MURDER

Felony murder is when a killing occurs during an inherently dangerous felony.

Here, if the courts find under common law that Ben did not commit burglary, then there was no inherently dangerous felony resulting in Claire's death.

However, if the courts find that Ben did commit burglary under modern law, then Claire did die during the commission of an inherently dangerous felony committed by Ben and Ben can be charged with Felony Murder.

DEGREE OF MURDER

First Degree Murder/Second Degree

First degree murder results from premeditation, deliberation and a motive for killing the victim. All other murders are second degree.

Here, Ben will assert that he did not have a motive, deliberation or premeditation to kill Claire. The State will assert that he had a motive for entering the house and that it was foreseeable if someone was home, they could be killed. Ben will assert that Ava told him no one was home and there was no way of knowing that Claire was home with the flu.

Therefore, it is more than likely the court will find Ben guilty of second degree murder.

MITIGATION

Defendant can mitigate to voluntary manslaughter for imperfect self-defense or heat of passion killing. Since neither apply to Ben and if Ben is not found to have committed burglary resulting in felony murder, because the courts used the common law statute, he may argue he should be able to mitigate to involuntary manslaughter.

INVOLUNTARY MANSLAUGHTER

Involuntary manslaughter is an unlawful killing as a result of criminal negligence, recklessness and/or commission of a non-inherently dangerous felony.

Ben will assert that he was an accomplice, and Ava was the principal, the mastermind of the crime. He did not intend for anyone to be killed. He did act criminally negligent and should have not gone along with the plan.

Ben will use the defense of **withdrawal from conspiracy**, which is when a co-conspirator communicates they no longer want to be a party to the conspiracy goal and attempt to stop the others from committing the crime. Ben will state that he attempted to withdraw from the conspiracy after Claire collapsed and before he realized she was dead, he told Ava that he was through doing jobs with her and used his cell phone to call an ambulance to save Claire and prevent Ava from committing the crime any further.

The State will argue that it was late in the game and that Ben had taken substantial steps towards commission of the conspiracy goal before he withdrew. He committed a dangerous felony of burglary and acted recklessly when it was foreseeable someone would get hurt.

Depending on how the court views the burglary, under common law or modern law, will determine if Ben is guilty of burglary which is an inherently dangerous felony making him guilty for felony murder. If the court uses the common law, then it is possible the court will find Ben guilty of involuntary manslaughter, if not second degree murder.

DEFENSES

Withdrawal from Conspiracy,

Withdrawal from conspiracy is when a co-conspirator communicates they no longer want to be a party to the conspiracy goal and attempt to stop the others from committing the crime.

Ben will assert that he did withdraw from the conspiracy as soon as it was apparent that Claire was injured. Ben will assert that he did not intend for anyone to be injured let alone killed. Ben will also assert that it was not foreseeable that Ava would steal the diamond watch before she fled and he should not be guilty for that crime.

QUESTION 3: SELECTED ANSWER B

STATE V BEN

Conspiracy

Conspiracy is an agreement between two or more persons to commit a crime with intent to agree and intent for the crime to succeed. A majority of jurisdictions also require an overt act by at least one of the co-conspirators towards the commission of crime.

Here, the facts state that Ava being angry at Claire who fired her from her job, decided to go into her house and steal the paintings. Ava asked Ben to help her out of the plan in return for one-third of proceeds from the sale of the paintings. The facts further state that after thinking over it Ben agreed to do it, when he picked up Ava on Saturday night and drove to Claire's house. This act shows that the agreement to commit a crime is present. Furthermore, because Ben was motivated to get paid for his help, his intent to agree and to get the paintings out of Claire's house, i.e. to commit a crime is also present. And finally, when both of them drove to Claire's house, an overt act was committed, since even a preparation would be enough.

As such, Ben could be reasonably charged at the very least with conspiracy to steal paintings (larceny) and burglary.

Pinkerton Liability

A person will be liable for all acts of his co-conspirators, if foreseeable and in-furtherance of the conspiracy.

Here, Ben would be charged for all other criminal acts of Ava, as long as they are foreseeable and committed in furtherance of the conspiracy. For example, it could be foreseeable that while running out of the house, Ava would grab another valuable belonging of Claire, like the diamond watch, on her way out. Since this act was committed during the course of the conspiracy, it was in furtherance of it and Ben would be charged with larceny of the diamond watch as well, even if they did not initially agree to steal this particular item.

Defense of withdrawal

Defendant can withdraw from a conspiracy by voluntarily renouncing his participation in it. However, it will help him escape liability only for the future crimes and he will still be liable for the initial act of conspiracy.

Here, Ben would say that when he told Ava he was done doing jobs for her and called an ambulance, this act was sufficient enough to qualify as withdrawal from the conspiracy and he should be liable for larceny of the watch, which Ava stole after his withdrawal took place. However, despite the withdrawal, Ben would still be liable for the initial act of conspiracy and all other crimes that happened before the withdrawal, i.e. burglary, death of Claire.

Accomplice Liability (larceny of diamond watch)

One who is aiding, abetting, encouraging, assisting or helping another person commit a crime with the intent for the crime to succeed, will be held liable as an accomplice for the crimes of that person, which are a foreseeable and natural and proximate cause of their criminal acts.

Here, the facts state that Ben agreed to help Ava in breaking into Claire's house and stealing the paintings and he acted according to the plan, when he drove Ava to the house and was taking a painting out of the house. Hence, Ben assisted Ava in commission of the crime. He also had intent for the crime to succeed, since he was promised to be paid from the proceeds of sale.

Therefore, in addition to the crimes committed by him personally, Ben could be reasonably charged as an accomplice in the second degree as to Ava's crimes such as larceny of the diamond watch, which are a foreseeable and natural and proximate cause of their criminal acts.

Burglary

Burglary at common law is breaking and entering the dwelling house of another at night time with the intent to commit a felony therein.

Night time

Here, the facts state that Ben and Ava went to Claire's house after sunset on Saturday night. Hence, the night time requirement is satisfied.

Breaking

Breaking takes place, when Defendant creates even the smallest opening in the dwelling of another without owner's consent.

Here, Ava used a copy she made of a key that Claire had given her to open the locked door. Since neither Ava nor Ben were authorized to do the above and they opened the door without Claire's consent, Ben and Ava broke into Claire's house.

Entering

Even partial entering through a door or window will suffice.

Here, the facts state that Ben and Ava entered into Claire's house. Thus, the entering element is present.

Intent to commit a felony therein

Here, the facts state that Ben and Ava agreed to break into Claire's house with intent to steal paintings well in advance. Hence, their intent to commit larceny was present at the time of breaking. Therefore, if the jurisdiction recognizes larceny as a felony, then, with all elements of burglary being satisfied, Ben could be reasonably charged with burglary.

Larceny of paintings

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

Here, after breaking into Claire's house, Ben was able to take one of the paintings down. Since even the smallest movement of personal property would suffice, this act would qualify as taking and carrying away of Claire's painting without her consent. Furthermore, the intent to permanently deprive is present, since Ava was planning on selling the paintings and Ben would get a percentage. This shows that neither of them were planning on returning the property.

Hence, Ben could be reasonably charged with larceny of paintings.

Assault of Claire

Assault is creation of a reasonable apprehension of imminent harmful or offensive contact with another.

Here, the prosecution could argue that when facing two burglars in the middle of the night in her own house, a reasonable person would most certainly be put in imminent apprehension of harmful contact. In fact, this is what happened with Claire - she got so scared that she had a heart attack and died.

Hence, Ben could be reasonably charged with assault.

HOMICIDE of Claire

Homicide is an unlawful killing of one person by another. Homicide consists of murder and manslaughter. Murder is an unlawful killing of one person by another with malice aforethought. Malice aforethought consists of one of the following states of mind: intent to kill, intent to cause great bodily injury, reckless indifference to highly unjustifiable risk to human life or intent to commit a felony. Because Defendant committed an act which resulted in another person's death, he committed a homicide.

Felony murder

Felony murder is a death that occurs in the course of commission or attempted commission of a felony, subject to the following limitations: felony must be inherently dangerous, death occurred in furtherance of the felony, and there was an independent felonious purpose (purpose other than killing).

Here, the facts state that as soon as Claire saw Ava and Ben taking down the painting, she suffered a heart attack and died. This shows that her death occurred during commission of a burglary, i.e. in furtherance of the felony. Furthermore, since burglary is considered an inherently dangerous felony, the inherently dangerous limitation is satisfied as well. And finally, since the purpose of the felony was stealing the paintings, not killing, the independent felonious purpose is satisfied as well. Therefore, Ben could be reasonably charged with felony murder of Claire.

Second degree murder

Second-degree murder is killing of another human being with malice aforethought, which consists of intent to kill, intent to cause great bodily injury, or reckless indifference to a highly unjustifiable risk to human life.

Here, the prosecution could reasonably argue that, that when faced with burglars in their own house at night, even a healthy person could suffer a heart attack and die. And since this risk is obvious, by breaking into Claire's house, Ben acted with depraved heart, i.e. reckless indifference to a highly unjustifiable risk to Claire's life and he could reasonably be charged with second-degree murder.

Involuntary manslaughter

Killing of another human being with gross criminal negligence.

Here, even if Ben was not aware of Claire's heart condition, the prosecution could still argue that he acted with great deviation from a standard of care a reasonable person would have exercised under the circumstances, since even if not obvious, it is reasonably foreseeable that even a person without a heart condition could have become shocked by presence of burglars in her house, get a heart attack and die.

Hence, Ben could be reasonably charged with involuntary manslaughter.

Lack of Causation Defense

Actual cause

Here, but for Ben and Ava breaking into Claire's house, she would not have suffered a shock, which led to her heart attack and she died. Hence, Ben's criminal act was an actual cause of Claire's death and he would have more success arguing lack of proximate causation.

Proximate cause/lack of proximate cause defense

Criminal result must be a foreseeable consequence of D's act.

Here, Ben would argue that Claire's heart condition was an independent supervening factor, which caused her death and broke the chain of causation necessary for him to be liable for her death. However, the court will likely apply the rule that Defendant takes the victim as he finds her, and Claire's heart condition would not be considered an unforeseeable act to break the chain of causation. Therefore, this is not a valid defense and Ben's criminal act would be considered a proximate cause of Claire's death.

QUESTION 4

Pete, a retired professional football player, signed a one-year contract effective January 1 with Grills to promote its cooking grills. Grills also signed and promised to pay Pete \$50,000 per month. Pete promised to act in six commercials for Grills, filming at times mutually agreed upon by the parties. Pete also promised to make two promotional appearances (“appearances”) every month. The contract contained the following provision:

PARAGRAPH (6): If Pete engages in disreputable conduct that reflects adversely on Grills or its association with Pete, Grills at its option may terminate this agreement.

Pete acted in two commercials from January to May and attended all appearances. In June, Pete did not show up for the filming for the third commercial because he had overslept. Pete offered to pay the cost of the film crew and said he’d be available any time Grills wished to reschedule. Pete was on time for the next two appearances and received his June check.

In July, Pete was the subject of stories in magazines and sports programs, which included photos of him at the roulette table at Casino with a drink in his hand, looking quite intoxicated, and hanging onto people to keep from falling down. The news stories were more humorous than critical. Two days later, Grills emailed Pete, stating that his contract had been terminated “due to the breach of your obligations with respect to television commercials and because Grills is invoking Paragraph 6 based on your conduct at Casino, documented in news stories in July.” Pete believes the real reason Grills terminated his deal was because grill sales were down. Pete’s advertising expert was surprised by the termination because news stories like the one Grills complained of are common and have little negative effect on companies that hire athletes to promote their products.

From August through December, Pete promoted products for other companies, earning \$100,000. He turned down a similar offer of \$250,000 from Casino because of his concerns it would reinforce a negative public image. Pete’s agent told him that being dropped by Grills will reduce Pete’s future promotional opportunities.

Pete sued Grills for breach of contract.

What arguments will Pete make in support of his claim, what defenses will Grills assert, and what is the likely outcome of the case, including the amount of damages, if any, Pete can expect if his claim succeeds? Discuss.

QUESTION 4: SELECTED ANSWER A

GOVERNING LAW

Common law governs contracts for services. UCC governs contracts for the sale of goods.

Here, the contract is to promote Grills' cooking grills by way of Pete acting in commercials, etc.

Common Law applies here.

OFFER

Offer is an outward manifestation of an intent to be contractually bound, communicated to the offeree, with certain and definite terms.

Here, the outward manifestation element is satisfied because a writing existed that stated Pete would promote Grills' grills for pay. The intent to be contractually bound is satisfied either by the writing itself, or by Pete signing the contract and then Grills also signing. The communicated to the offeree element is satisfied because Pete had the writing available to him to sign. The certain and definite terms element is satisfied because the contract stated that Pete was to promote Grills' cooking grills and Grills was to pay Pete \$50,000 per month.

There was an offer.

ACCEPTANCE

Acceptance is the unequivocal assent to the terms of the offer and is effective upon dispatch.

The facts show that both parties signed the agreement, indicating assent to the terms of the offer.

There was Acceptance.

CONSIDERATION

Consideration is a bargained for exchange for a legal detriment.

Here, Pete's benefit was \$50,000 per month for one year, and his detriment was providing acting services and promoting Grills' grills. Grills' benefit was receiving Pete's services, and Grills' detriment was paying Pete \$50,000 per month for one year.

There was consideration.

There is a valid contract.

ENFORCEABILITY

STATUTE OF FRAUDS

Statute of Frauds says that contracts for marriage, contracts that cannot be completed in a year, contracts for land, contracts for executorships, contracts for goods valued at \$500 or more, and contracts for suretyship must be in writing.

Here, Pete and Grills both signed a writing. The statute of frauds is satisfied and cannot be used as a defense to enforceability. The contract is enforceable.

BREACH

Did Pete breach when Pete did not show up for the filming of the third commercial because he had overslept?

Breach occurs when any party fails to perform its duties under the contract.

Under the contract, filming would be at times "mutually agreed upon by the parties." Here, the facts imply that there was an agreed upon time for the third commercial, and that Pete breached by not showing up for the filming. Pete may argue that the time for the third commercial was not mutually agreed upon by him because he slept at the time the filming was scheduled. Grills will argue that two prior commercial shoots, if agreed upon in similar manner to the third, showed that the third commercial shoot time was also agreed upon by both parties, as the contract states.

It is likely that Pete breached.

MINOR BREACH?

A minor breach may not excuse performance if it did not materially affect the agreement.

Here, Pete may argue that Pete performed two of the commercials already, and all appearances. After not showing up for the third commercial because Pete overslept, Pete offered to pay the cost of the film crew and said he'd be available any time Grills wished to reschedule. Pete was on time for the next two appearances and received his June check. Grills may argue that the third commercial shoot's timing was material, however no facts state the significance of timing.

Pete is likely in minor breach.

WAIVER OF CONDITION

A party can waive an express condition by express waiver or implied by conduct.

Here, Grills alleged a "breach of your obligations with respect to television commercials..." as one reason for cancelling the Pete Grills contract. Pete may argue that Grills waived the condition of "filming at times mutually agreed upon by the parties" when Grills shot two additional commercials with Pete even after Pete didn't show up to the third shoot. Pete may argue that Grills' conduct in continuing on with the contract waived the condition and no facts show that Pete violated that condition other than not showing up to the third commercial shoot.

This could go either way, but Pete will probably succeed in establishing the waiver of condition by Grills.

MAJOR BREACH

Did Pete breach when Pete was the subject of stories ... which (among other things) included photos of him ... quite intoxicated, and hanging onto people to keep from falling down?

Major breach excuses performance by materially affecting the agreement.

Here, the contract stated that Grills may terminate the agreement at its option if Pete engages in disreputable conduct that reflects adversely on Grills or its association with Pete. Grills will argue that Pete's conduct at the casino qualifies as disreputable because publicly looking quite intoxicated and hanging onto people to keep from falling down may not be behavior that Grills wants associated with its brand. Pete will argue that none of the activities reported in the stories were illegal and were in a business catering to adult customers. Pete may also argue that the news stories were more humorous than critical, and therefore his behavior should not be treated as a major breach.

This could go either way. Pete will likely not be liable for major breach.

FRUSTRATION OF PURPOSE

Frustration of purpose is when the subject matter, and reason for the contract is destroyed.

Here, Grills may argue that the ability to associate Grills' brand with Pete's upstanding reputation, the reason for the contract to promote its grills, was destroyed when Pete destroyed that upstanding reputation by Pete's conduct at Casino, as reported in magazines and programs. If Grills is successful in arguing this defense to performance, Pete will not recover from Grills.

Grills is unlikely to prove frustration of purpose.

ANTICIPATORY REPUDIATION

Anticipatory repudiation is the clear communication that one party cannot or will not perform under the contract before performance is due, and the non-breaching party can sue immediately.

Here, Grills wrote to Pete that the contract had been terminated "due to breach of your obligations with respect to television commercials and because Grills is invoking Paragraph 6 based on your conduct at Casino..." Grills clearly communicated to Pete that Grills would not perform further duty to pay Pete.

Pete's minor vs major breach will be argued, and if Pete is not found to be in major breach, Pete can sue immediately.

MITIGATION

The non-breaching party is obligated to mitigate damages or may be barred from recovering fully from the breaching party.

Here, Pete promoted products for other companies' products, earning \$100,000 in the 5 months following Grills' cancellation of the Pete Grills contract. No facts show that Grills paid Pete beyond Pete's June Check. Under the Pete Grills contract, Pete would have earned \$300,000 for July through December.

Pete mitigated his damages and can recover fully from Grills if Grills breached.

DAMAGES

EXPECTATION DAMAGES

Pete can recover \$300,000 from Grills in damages minus Pete's mitigation of \$100,000. Grills may argue that Pete turned down an opportunity to earn \$250,000 from a casino and

therefore Pete's expectation damages should be \$0. Pete will argue that he only turned down the Casino opportunity because of the breach, and that Pete did not want to reinforce the negative public image that Grills claimed as a cause for cancelling the contract.

Pete is likely to recover \$200,000 from Grills.

CONSEQUENTIAL DAMAGES

Pete may seek consequential damages that flowed from the breach because Pete's agent told Pete that being dropped by Grills will reduce Pete's future promotional opportunities. These damages are too speculative and Pete will likely not recover.

LIQUIDATED DAMAGES

Liquidated damages are damages outlined in the contract itself for when legal damages would not be reasonably calculable or sufficient.

Here there is no mention of liquidated damages in the facts. Pete cannot recover liquidated damages.

RELIANCE DAMAGES

If the contract never existed, and Pete relied on Grills' promise to Pete's own detriment, then Pete could recover reliance damages. However here, Pete cannot, because there was a contract.

NOMINAL DAMAGES

Pete will not likely recover nominal damages.

INCIDENTAL DAMAGES

Incidental damages are expenses incurred by Pete as a result of the breach. No facts show Pete had expenses. Pete will not likely recover incidental damages.

OUTCOME

If Pete is not found to be in major breach, then Pete will likely recover from Grills for breach of contract.

QUESTION 4: SELECTED ANSWER B

APPLICABLE LAW

The common law governs contracts for services and land.

This is a contract for an employment contract. Pete will act in six commercials and make two promotional appearances every month. Since this is a contract for employment, which is a service, this is a contract which is governed by common law.

CONTRACT FORMATION

For a contract to be formed, there must be mutual assent, i.e. there must be an offer and acceptance. There must be valid consideration, and no defenses to the formation of the contract.

MUTUAL ASSENT

Mutual assent is an offer, with corresponding acceptance, which together show a mutual manifestation of present intent to be bound by the terms of the agreement.

OFFER

A valid offer can be shown by a manifestation of present intent by the offeror to invoke a power of acceptance in the offeree. There must be certain and definite terms. The offer must be communicated to the offeree.

Here, it is unclear who was the offeree and who was the offeror, but that is essentially irrelevant since there was clearly mutual assent in that they both signed the contract and agreed to terms.

price: \$50,000 per month

subject matter: Pete to make two promotional appearances every month and to act in six commercials for Grills

timing: for the next year, effective January 1st

Parties: Grills and Pete

Thus, there was a valid offer.

ACCEPTANCE

A valid acceptance can be shown by a manifestation of intent to agree to the terms offered.

Again, it is unclear but also irrelevant who was the offeree and who was the offeror in this contract. All that is relevant is that there was mutual assent to be bound by the terms of the ultimate contract.

Thus, even though it is unclear which of the parties is the offeror and which the offeree, there is a mutual manifestation of present intent to be bound by the terms of the agreement, and thus there is mutual assent.

CONSIDERATION

For consideration to be present, there must be legal detriment to both sides as a result of entering into the contract.

Grills suffers legal detriment as a result of the contract because they must pay \$50,000 per month which they did not previously have to pay.

Pete suffers legal detriment as a result of the contract, because he must make two promotional appearances every month and act in six commercials for Grills.

Therefore, there was consideration in support of contract formation.

DEFENSES TO CONTRACT FORMATION

STATUTE OF FRAUDS

The statute of frauds applies to specific kinds of contracts that must be in writing in order to be valid. The contracts that would be covered under the statute of frauds include contracts for i) marriage, ii) contracts that cannot be completed in less than a year, iii) contracts for land, iv) an executor's promise to pay the debt of the estate personally, v) goods worth over \$500, and vi) surety. The statute of frauds is satisfied by a writing that contains the required terms and is signed by both parties.

Here, the contract does not fall within the statute of frauds, because the contract can be completed within 1 year. Regardless, since there is a signed writing between Nate and Ed, the contract would satisfy the statute of frauds.

OTHER DEFENSES

It does not appear that either party disputes the existence of the contract. Pete is suing for contract damages, thereby showing that he believes there is a valid and enforceable contract. Grills stated that "due to breach of your obligations.... Grills is invoking paragraph 6", also showing that they believe that there is a valid and enforceable contract. Thus, there are no further defenses to contract formation.

TERMS OF CONTRACT

Therefore there is a valid contract. The contract is for the following terms:

price: \$50,000 per month

subject matter: Pete to make two promotional appearances every month and to act in six commercials for Grills

timing: for the next year, effective January 1st

Parties: Grills and Pete

Thus, there was a valid offer.

DIVISIBLE CONTRACT

A contract is divisible, if it can be divided into parts, and each party could perform equally portions of the contract.

Here, we have a divisible contract. Pete is due to make six commercials and two appearances per month, in return for a monthly fee. He could similarly make 3 commercials and two appearances for six months, and it would be clear that Grills would have to pay him the monthly fee for those six months.

BREACH OF DUTY

Assuming there is a contract, was there a breach? A breach can be shown when a party has a duty and that party does not discharge that duty.

BREACH OF DUTY I: PETE NOT SHOWING FOR THE COMMERCIAL RECORDING

Here, Pete had a duty to act in a commercial in May, at the time mutually agreed upon by the parties. However, Pete overslept and did not show up for the commercial filming. This is a breach of duty as they had agreed on a mutual time, and he was bound by the contract to film the commercial.

MINOR BREACH

A breach of duty is minor if the party substantially performs, and the non-breaching party gets substantially the performance that they bargained for. If it goes to the essence of what the party bargained for, then it is a major breach.

Here, Pete has performed in the previous 2 commercials, the previous appearances, and the subsequent two appearances. This is the only time that he breached the contract. Since Grills has substantially received the benefit of the bargain, the breach is minor. Further, since this is a divisible contract, Grills could segment off payment for the breach and not pay him for that portion of the contract, rather than declaring breach on the entire contract, which is excessive given the minor breach. Further, Pete offered to cure the breach, by paying for Grills' film crew cost so that they can reschedule the filming of the commercial on a different day. Thus, the breach is minor, and Grills could not declare a breach of the entire contract, although it could demand damages for the specific breach that occurred.

WAIVER

A party can waive a duty if a duty becomes due and is not discharged, but they do not enforce it.

Pete did not show up for his May commercial because he overslept. Under the contract, he had a duty to show up, but did not. Grills, however, paid him for June, and did not take him up on his offer to reschedule the commercial. Therefore, they have waived their right to have him film that specific commercial. They could later force him to film that commercial so long as he does not detrimentally rely on their waiving that duty.

BREACH OF DUTY II: PETE ENGAGING IN DISREPUTABLE CONDUCT

A breach of duty is as stated above.

Under the contract, Pete has a duty to "not engage in disreputable conduct that reflects adversely on Grills or its association with Pete". Here, Grills is claiming that his "conduct at Casino, documented in news stories in July" allowed them to invoke the paragraph that allowed them to terminate if he breached that duty. However, custom and usage in the industry would suggest that "news stories like the one Grills complained of are common and have little negative effect on companies that hire athletes to promote their products." This would suggest, that Grills would NOT be adversely affected by the news story. Custom and usage is not as persuasive as the specific facts at hand here, though, and so

a court would look at the specific situation to determine whether there was a breach. In this specific scenario, "the news stories were more humorous than critical." Once again, Pete is able to establish that the news stories are not an adverse reflection on Grills and its association with Pete, since they are not even an adverse reflection on Pete. Thus, the court would likely rule in favor of Pete and agree that there is no breach of duty.

BREACH III: GRILLS' ANTICIPATORY REPUDIATION OF A VALID AND ENFORCEABLE CONTRACT

An anticipatory repudiation is a clear and unambiguous statement by one party that they will not perform their obligations under the contract. The non-repudiating party can then 1) suspend their duties until the other party revokes their repudiation or 2) declare breach and sue immediately for damages

Grills did not have sufficient grounds to terminate the contract with Pete. Its early termination of the contract was therefore an anticipatory repudiation of its remaining duties under the contract. It clearly and unambiguously stated that it was terminating the contract, and that it would not be performing the remainder of its contract. Pete can declare breach and sue immediately for damages.

DAMAGES

Damages must be foreseeable, unavoidable, causal, and concrete. The damages must have been foreseeable at the time of the contract formation, must be unavoidable (i.e., there is a duty to mitigate damages wherever possible), they must be causally related to the breach of the contract, and it must be possible to identify what the damages are.

EXPECTATION DAMAGES

Expectation damages seek to put a party in the place that they would be had there been no breach. In an employment contract where the party claiming damages is the employee, the expectation damages would be the salary that they are entitled to but did not receive.

There is a valid and enforceable employment contract for \$50,000 per month. There were 6 months remaining on the contract that Grills had not yet paid for. Thus, there is \$300,000 in expectation damages that are owed to Pete.

CONSEQUENTIAL DAMAGES

Consequential damages are damages that are foreseeable as a result of the breach, but are not contract damages such as lost profits.

Pete would be entitled to consequential damages that were foreseeable when they entered into the agreement, and that occurred as a result of Grill's breach. Consequential damages must be concrete. While the prompt states that "being dropped by Grills would reduce Pete's future promotional opportunities," this isn't sufficiently concrete that there are damages that could be attributed to Grills. Thus there would be no consequential damages.

SPECIFIC PERFORMANCE

Specific performance is inapplicable here, because this is a service contract, and courts generally do not provide for specific performance where the contract involves a service.

INCIDENTAL DAMAGES

Incidental damages are damages incurred after the breach in trying to resolve the issue. For example, expenses incurred in finding an alternative buyer.

Here, we are not told that there are any incidental damages.

MITIGATION OF DAMAGES

A non-breaching party has a duty to mitigate his damages once a breach has occurred. The damages mitigated will reduce the damages awarded for such a breach.

Here, Pete reduced his damages by \$100,000 by promoting products for other companies.

The question is whether he should not have turned down \$250,000 in promotions for a casino as this would further mitigate his damages. It would be inconsistent for him to argue that playing roulette at a casino would not negatively impact his public image, while signing onto a deal to advertise a casino would. Therefore, he should not have turned down the \$250,000 and this will be deducted from his overall damages.

Therefore, his overall damages would be \$300,000 in expectation damages, minus \$350,000 in damages that he should have mitigated, for a resulting \$0 in damages that he could collect on.