



California First-Year Law Students' Examination

**Essay Questions
and
Selected Answers**

October 2017



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

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ESSAY QUESTIONS AND SELECTED ANSWERS

OCTOBER 2017

CALIFORNIA FIRST-YEAR LAW STUDENTS' EXAMINATION

This publication contains the four essay questions from the October 2017 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.	Criminal Law
3.	Contracts
4.	Torts

October 2017

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

Spacetrip is a new venture created to send paying clients on a trip of a lifetime to the moon aboard its spaceship, the Escapade. This spaceship is equipped with a vehicle escape system using parachutes to allow passengers to return safely to the ground should a malfunction occur during the spaceship's ascent. This system is widely used and listed in the Rocket Industry Standards Manual as being "sufficient to provide adequate safeguards."

Recently, a new system has become available that uses rockets to navigate the escape capsule back to the ground much more safely. However, this new system is also much more expensive than the parachute system and has not been tested in real-life situations. Spacetrip decided to stick with its tried-and-true parachute system.

Paula, who wanted an adventure, decided to purchase this trip from Spacetrip. She signed a contract containing this statement: "Although Spacetrip has taken all reasonable measures to provide a safe voyage, I understand that space exploration is dangerous."

On the day of the liftoff, the weather was beautiful and all systems were working as designed. But shortly after takeoff, a totally unpredictable violent storm arose, blowing the Escapade off course. There was no way to correct for the deviation, so Spacetrip activated the escape system, which deployed as designed. Unfortunately, the storm caused the escape capsule to crash to the ground. Paula was critically injured, but survived. Investigations after the accident indicated that the new rocket escape system might have led to a better outcome.

1. What tort cause(s) of action may Paula reasonably bring against Spacetrip? Discuss.
2. What defense(s), if any, does Spacetrip have? Discuss.

QUESTION 1: SELECTED ANSWER A

1) Paula v. Spacetrip:

Negligence:

Negligence is the failure to behave with the level of care that someone of ordinary prudence would have exercised under the same conditions. In order for the plaintiff to prove a prima facie case of negligence, the plaintiff must prove that the defendant owed her a duty, that the defendant breached that duty, that the breach of that duty was both the actual and proximate cause of her injury/damages.

(1) Duty:

Duty is a legal duty requiring the defendant to conform his conduct to a certain standard of care in order to protect the plaintiff from unreasonable risks of harm. A defendant owes a duty to all foreseeable plaintiffs and the extent of that duty is determined by the applicable standard of care. Under the majority Cardozo view, a plaintiff is foreseeable if he/she is in the zone of danger. Under the minority view, Andrews, everyone is a foreseeable plaintiff.

A defendant owes a duty to exercise reasonable care to foreseeable plaintiffs. Here, Paula (P) is a foreseeable plaintiff that is within the zone of danger because she is a customer of Spacetrip (S) who is using the service provided by S, going to the moon. Seeing that P is a customer, P is an invitee of S. P is an invitee because she is on S's premises, the spaceship, for a business purpose, to go to the moon, in which P is paying S for. As an invitee, S owes P a duty to inspect for unknown concealed dangers and to warn of them or to make the dangerous condition safe. Furthermore, S has a duty to exercise reasonable care for activities conducted on the property.

Here, S owes P a duty of reasonable care in order to prevent unreasonable risks of harm because P is an invitee.

(2) Breach of Duty:

A breach of duty occurs where the defendant fails to act or conform his conduct to the applicable standard of care. A breach of duty can be proven under the Learned Hand Formula and by the Res Ipsa Loquitur test.

Learned Hand Formula:

Under the Learned Hand Formula, a breach of a duty owed by the defendant can be established if the burden of taking a precaution is less than the probability of the harm occurring the gravity of the likely harm.

Here, under the Learned Hand Formula, P can establish that S breached its duty because there is an adequate precaution that S could have taken in order to prevent an injury from occurring. There is a new system that has become available that uses rockets to navigate the escape capsules on the spaceship back to the ground in a much more safe way. Here the burden of taking the precaution is that the extra precaution is more expensive than the system that S is already using, the parachute system. However, the burden of taking the extra precaution is less than the probability of the harm occurring. The probability of the harm occurring may not be relatively high, but the probability of the harm occurring is likely high enough because a newer and safer safety system was developed for this exact purpose. The magnitude of the harm occurring is serious because the failure of a product to function properly and the failure to exercise reasonable care in a safety precaution can result in severe damage to the body and even death. Here the resulting harm that could occur from not taking the precaution and using the new system is outweighed by the magnitude of the harm that can occur, especially since investigators stated the use of new rocket escape system might have led to a better outcome.

Conclusion:

P can establish that S breached its duty to exercise reasonable care by failing to use the safer alternative escape capsule.

Res Ipsa Loquitur:

Under the Res Ipsa Loquitur test, a breach of a duty can be established if there is no direct evidence demonstrating what happened, the event causing the plaintiff's injury is one that would normally not occur in the absence of negligence by someone, and the instrument was under the exclusive control of the defendant at the time the accident occurred.

Here, there is direct evidence showing that the capsule malfunctioned due to the storm. The facts state that the capsule deployed and the storm was the cause of P's harm.

Conclusion:

Under the Res Ipsa approach P will likely fail to establish a breach.

(3) Causation:

Causation is the link that links the defendant's conduct to the plaintiff's injury. The plaintiff must prove that the defendant was both the actual cause and the proximate cause.

Actual Cause:

The defendant is the actual cause of plaintiff's injury if, but for the defendant's failure to exercise reasonable care, the plaintiff would not have suffered injury.

Here P will argue that, but for S not using the new rocket escape capsule system, P would not have suffered an injury. This can further be demonstrated by the fact that investigators stated that the use of new rocket escape system might have led to a better outcome.

Conclusion:

S is the actual cause of P's injury.

Proximate Cause:

Is the philosophical connection that limits liability to consequences that bear some reasonable connection with the defendant's conduct.

Here, P can establish that S is the proximate cause of her injuries because the fact that S failed to take the extra precaution and use the new system, it is foreseeable that an accident of this type can occur. The accident that occurred that caused harm to P is clearly foreseeable based on the fact that there was a new escape capsule being developed that would be safer. It is foreseeable that if S failed to take this precaution then an injury of the type might occur.

S will likely argue that the storm was a superseding cause of plaintiff's injury because it was an act of god.

However, S will likely not prevail on this argument because while, yes, a severe storm is an act of god, it is foreseeable that a storm could occur at any moment, and that a storm could affect the way in which a capsule returns to earth and is foreseeable that the failure to take reasonable precautions would result in damage to a foreseeable plaintiff, consequently, that is P.

Conclusion:

P can establish that S's failure to use the new capsule is the proximate cause of her death.

(4) Damages:

Plaintiff must suffer actual injury.

Here the plaintiff suffered severe injury and is critically injured.

Main Conclusion:

P will succeed on a claim of negligence.

Strictly Liability:

Is liability for injuries regardless of culpability or fault.

Abnormally Dangerous Activity:

A defendant is liable for all injuries that result while engaging in an abnormally dangerous activity so long as the harm suffered is a result of the risk that makes activity dangerous in the first place and the injury was suffered in a foreseeable manner.

Here, the activity of taking passengers to space would be abnormally dangerous because it creates a great risk of harm, the likely harm is serious because it could result in death, the activity is not one of common usage, or appropriate to the community and the risk of the activity outweighs the benefit of the activity to the community.

Here, the likely harm that can be suffered from this activity, death, the activity creates a great risk of death because the activity takes people to the moon and back. This is not common to the community because people do not normally go to the moon and back. Therefore, the risk of harm posed by the activity outweighs the benefit of the activity to the community. Here the harm suffered is the type of harm that is likely to occur from engaging in such an activity because S is traveling to the moon and back which is risky and can cause serious injury. Furthermore, the harm was suffered in a foreseeable manner because it is foreseeable that a storm may occur.

Conclusion:

S will be strictly liable because the activity is abnormally dangerous.

Products Liability:

A seller or distributor will be strictly liable for any harms that occur from a defective product. Plaintiff must prove that the defendant is a merchant, that there was a defective product, causation, and intended or foreseeable misuse.

Defendant is a Merchant:

A merchant is one that ordinarily sells or distributes the goods of the kind.

Here, S is a merchant of the Escapade, the escape capsule, because S normally deals with the good, and he sells trips to individuals who desire to go to the moon. This fact makes S a merchant because he normally deals in the goods of the type and S is one that normally uses the product.

Defective Product:

P must prove that the product was defective. A product can be defective because of a manufacture defect, a design defect, or because the defendant failed to give adequate warning of a non obvious risk.

Manufacture Defect:

A manufacture defect occurs where the product deviates from the norm of products produced by the manufacturer in a way that makes the product more dangerous even though all care was exercised in manufacturing and marketing the product.

Here, the Escapade is a single product that was struck by a storm. According to the facts, the product deployed properly. However, the product can have a manufacture defect because the product was not able to withstand the storm and the product failed to return P safely to earth. Therefore, the product failed to function properly.

Design Defect:

Occurs where all products bear the same feature whose design is defective and abnormally dangerous. There are two tests used, the consumer expectation test and the benefit risk test.

Consumer Expectation Test:

Under the consumer expectation test, P can demonstrate that the product failed

to perform as an ordinary consumer would expect it to. Here, the rocket failed to return P back to earth safely. Therefore, the product failed to perform as safely as an ordinary consumer would expect it to because an ordinary consumer would expect to be returned back to earth safely.

Risk Benefit Test:

P must prove that the defendant could have made a safer product without impacting the price and utility of the product.

Here, P can show that S could have used a safer product, i.e. the new escape capsule. This product is safer and would be a safer alternative to the one that S currently uses.

Causation:

Here, S is the actual cause because, but for S not using the alternative, P would not have suffered harm. S is also the proximate cause because it is foreseeable that a product whose design is faulty, would cause injury to another.

Intended Use or Reasonably Foreseeable Misuse:

A defendant is liable if the product was used as intended.

Here the Escapade was used as intended. The Escapade was used to return passengers to earth in the event that an accident occurred. Here, the Escapade was used when a storm struck the spaceship and the Escapade failed to function properly

Main Conclusion:

P will likely succeed on claim against S for strict products liability.

Warranties:

Express Warranty:

An express warranty occurs where the seller of a product, a merchant, states that the product will function in proper way, or function how the model will function.

Here, there is a breach of express warranty because the escape capsule failed to function properly and failed to perform "sufficient to provide adequate safeguards" upon returning the earth from the moon.

2) Defense:

Contributory Negligence:

If P is found at all negligent, then she will be barred from recovery.

Here, P was not negligent, therefore, she will not be barred from recovery under contributory negligence.

Comparative Negligence:

If P is found to be at all negligent, then P's recovery will be reduced by the percentage that the court applied for her negligence.

Here, P was not negligent in causing her injuries. Therefore, she will receive recovery under both the modified and pure negligence theories.

Assumption of the Risk:

Occurs where the plaintiff voluntarily, and unreasonably proceeds in the face of a known risk created by the defendant's negligence.

Here, S would argue that P impliedly assumed the risk because she voluntarily proceeded in the face of a known danger created by the risk of the activity that S offers.

Conclusion:

Here, it is likely that S will succeed on a claim for implied assumption of the risk because P knew of the danger posed by the venture and P voluntarily proceeded in the face of that danger.

QUESTION 1: SELECTED ANSWER B

Paula v Spacetrip

Negligence

Negligence is the failure to exercise the degree of care that a reasonably prudent person would under similar circumstances. To recover, Plaintiff must show duty, breach of duty, causation, damages and that there are no defenses.

Duty

A defendant owes a duty of care to foreseeable plaintiffs to act as a reasonably prudent person would under similar circumstances. Under Cardozo, (majority) the duty is owed to those in the zone of danger. Under Andrews (minority) the duty is owed to foreseeable plaintiffs.

Here, Spacetrip owed Paula the duty to act as a reasonably prudent carrier would under similar circumstances.

Spacetrip as a common carrier would also owe Paula an elevated duty of care as a passenger on their spaceship. They would have a duty to make sure that they were prepared for any emergency and if those emergencies did occur, that they would protect Paula.

They owe her a duty to take all precautions for a safe trip and to bring her home safely.

Breach of Duty

A defendant breaches their duty when they fail to live up to the standard of care. To decide if they have breached their standard of care, we use two tests: the Learned Hand risk utility analysis and the consumer expectation test.

Learned Hand Risk Utility Analysis

Under this test, if $B < PL$ then the defendant has breached their duty to the plaintiff. B is equal to the burden of prevention, P is equal to the Probability of harm and L is equal to the magnitude of harm.

Here, the Burden of Prevention is the cost of the new vehicle escape system that has become widely available to navigate the escape capsule back to the ground more safely. This system is much more expensive than the parachute system and has not been tested. Paula will argue that Spacetrip should have used the new system as it was much safer. Spacetrip will counter argue that the new system was not only not tested, it was very expensive.

The Burden of Prevention here is therefore very high.

The Probability of Harm is unclear; however it would seem reasonable that any trip to outer space would encounter dangers as we have seen in the past. Spacetrip is also a new venture and therefore would not have the experience that a longer term business would have. It would seem that the probability of harm would be high.

The Magnitude of Harm here would be very high. An accident in space would be magnified by the challenges of rescue and the inherent dangers of traveling in space. Even with what they call a tried and true rescue system, the new venture may not know how to react to risky situations. Therefore, any accident would seem highly likely to result in great harm or death.

Spacetrip also had no other back up system in case they had a mistake. All of their eggs were in one basket so to speak. That makes the magnitude of serious harm more likely. Therefore, the magnitude of harm is very high.

Balancing all of these factors it would seem that Spacetrip breached their duty to Paula by not investing in the new system that would have navigated the escape capsule back

to the ground more safely and by not having a back up system.

Consumer Expectation Test

The consumer expectation test tells us if there has been a breach of duty when a reasonable consumer's expectations are not met.

Here, Paula has purchased a trip to the moon aboard the Escapade. She has a reasonable expectation of safe travel even in a new venture to both get there safely and return safely. A reasonable person would have similar expectations.

Spacetrrip fails the consumer expectation test as they did not meet the expectations.

Spacetrrip will argue here that the system they have installed is "tried and true" and that the vehicle escape system they used is widely used and listed in the Rocket Industry Standards Manual as being sufficient to provide adequate safeguards. They will claim that the new system has not been tested in real life situations. They will say because of this they have not breached any duty. However, because of the elevated duty they have to Paula to keep her safe on her travels they should have invested in the safest system available at the time. Going into space is inherently dangerous and carries enormous risks, and they should have been prepared to face those risks with the latest and safest technology.

Due to Learned Hand and the consumer expectation test, Spacetrrip has breached their duty to Paula.

Actual Cause

Actual Cause can be tested by the "but for" test, where but for their action, the harm would not have occurred.

Here, But for Spacetrrip's crash to the ground Paula would not have been harmed.

Spacetrip is the actual cause of Paula's harm.

Proximate Cause

Proximate Cause is the natural and foreseeable result of one's actions with no superseding intervening causes to break the chain of causation.

Here, Spaceship will argue that there were intervening, superseding causes that break the chain of causation. They will argue that the weather was beautiful when the ship took off and there was a totally unpredictable violent storm that blew the Escapade off course. However, it is foreseeable that when one is traveling that weather conditions can be unpredictable so that will not break the chain of causation.

Spacetrip is the proximate cause of Paula's injury.

Damages

General and Special damages for medical expenses and pain and suffering.

Here, if Paula is considered not to have assumed the risks of space travel, she will be able to collect for the expenses she has occurred as a result of the crash.

Defenses

Contributory Negligence

In a contributory negligence jurisdiction, where the plaintiff negligently contributes to his own harm, the plaintiff's recovery is barred.

Here, there is no indication it is a contributory negligence jurisdiction or that Paula has negligently contributed to her own harm.

This will not be a defense.

Comparative Negligence

In a comparative negligence jurisdiction, the plaintiff contributes negligently to his own harm, and his recovery is reduced by the percentage of his negligence. In a modified jurisdiction, if his negligence is over 50%, his recovery is barred.

Here, there is no indication that Paula has contributed to her own harm.

This will not be a defense.

Assumption of the Risk

When the plaintiff assumes the risks, expressly or impliedly, and they do it knowingly and voluntarily, their recovery may be barred.

Here, Paula signed the contract. It expressly said, "Although Spacetrip has taken precautions, I understand that space exploration is dangerous." By signing this, Paula is agreeing that she is undertaking significant risks in the actions she is taking. It is understood here, that Space presents unique challenges and that by going there she is agreeing to assume the risks of those challenges.

Because Paula assumed the risk of space travel, she will not be able to recover.

Strict Product Liability

Where a defective product causes injury, the manufacturer, retailer, and distributor are strictly liable for any injuries that occur. To recover, plaintiff must show that they are a proper plaintiff, suing a proper defendant, that the product is defective, causation and damages.

Proper Plaintiff

A proper plaintiff is any foreseeable plaintiff, including users and bystanders, as privity is not required.

Paula is a user so she is a proper plaintiff.

Proper defendant

A proper defendant is a manufacturer, retailer, distributor or wholesaler.

Spacecraft is the manufacturer of the spaceship.

They are a proper defendant.

Defective Product

A product is defective if it has a design defect, a manufacturing defect, or a warning defect.

Design Defect

A product has a design defect if it could have been designed safer without destroying the products commercial utility.

Here, the Escapade has been designed with the old safety system. The old safety system does not bring the escape pod to the ground as safely.

We use the risk utility analysis to decide if the product can be designed safer.

Risk/Utility analysis - Supra

Here, we can see that the product has been designed safer. The new system navigates rockets back to the earth more safely.

There is a design defect.

Consumer Expectation Test - Rule and analysis - Supra

This product does not meet the expectations of a reasonable consumer.

There is a design defect.

Actual Cause - Rule and Analysis – Supra

Proximate Cause - Rule and Analysis - Supra

Defenses

State of the art

Here, Spacetrip will claim that they have the most recent "safest" product as the new one has not been tested. They will also argue that they use what is listed in the Rocket Industry Standards and this is what is required.

However the new product is known to be safer, so this will not be a defense.

Damages - Rule and Analysis - Supra

QUESTION 2

One night, Andy went to a local bar in town. He had a large number of drinks and became intoxicated. When the bartender refused to serve him any more drinks, Andy flew into a rage and went to his car to get his handgun.

With the gun in his hand, Andy intended to return to the bar. Instead, he got confused and stumbled into the convenience store next door, pointed the gun at Charles, the cashier, and said: "Give me a drink or I'll shoot." When Charles hesitated, Andy pointed the gun at the ceiling and fired.

At the sound of the gunshot, several store customers rushed outside. One of the fleeing customers bumped into Walter, who was standing on the sidewalk outside the store. The impact caused Walter to fall into the street. Before he was able to recover, Walter was struck and killed by an oncoming car.

When Andy fired the gun, the bullet struck a metal pipe, bounced off the pipe, and hit another store customer, Vickie, in the arm. She was rushed to the hospital to receive emergency medical treatment. Unfortunately, Vickie contracted an infection while at the hospital and later died.

Andy claims he was so drunk he did not know what he was doing. He insists he never wanted to hurt anybody.

1. With what crimes, if any, can Andy reasonably be charged? Discuss.
2. What defenses, if any, can Andy reasonably raise? Discuss.

QUESTION 2: SELECTED ANSWER A

A. Crimes of Andy

1. Assault with a Deadly Weapon

- **Assault.** An assault occurs when the defendant attempts to commit a battery or causes the victim to suffer reasonable apprehension of an immediate battery. A battery occurs when the plaintiff unlawfully applies force on the victim's person. Andy clearly caused Charles to suffer reasonable apprehension of an immediate battery because Andy pointed a gun at Charles and told Charles to give him a drink or be shot. It appears that Charles suffered apprehension because he hesitated when the gun was pointed at him, and being shot would have been an immediate, unlawful application of force. Hence, Andy assaulted Charles.

- **Deadly Weapon.** A deadly weapon is a weapon that a reasonable person would consider likely to cause death. A reasonable person would consider a gun as likely to cause death. Hence, Andy committed assault with a deadly weapon.

2. Attempted Robbery

- **Attempt.** Attempt occurs when the defendant enters the zone of perpetration of a crime with the specific intent to commit the crime. Here, Andy entered the convenience store with a gun and threatened to shoot the cashier if the cashier did not give him a drink. It appears that Andy entered the zone of perpetration of a robbery, with the specific intent to commit a robbery.

- **Robbery.** Robbery is a larceny from the person or presence of the victim by force or threat of force. Here, Andy attempted to obtain a drink from the cashier in a convenience store by threatening to shoot him with a gun. Taking the drink would have been a trespassory taking of personal property of the convenience store. As the

cashier was an agent of the convenience store, taking the drink from the cashier at gun point would have been a larceny from the victim's presence by threat of force.

- **Specific Intent.** Attempt is a specific intent crime. The intent element is satisfied when the defendant acts with desire, purpose, or knowledge to a substantial certainty that an act will cause a specific result. It appears that Andy was acting with specific intent because his conduct and words suggest that he desired to take drink from the cashier by threat of force. However, intoxication may defeat specific intent (see below).
- **Completion of the Crime.** Attempt would merge with the completed crime. Here, it appears that Andy did not get the drink he was demanding; hence, the robbery was not completed and the charge of attempt would be proper.

3. Homicide of Walter

- **Murder.** Murder is a homicide committed with malice.
- **Homicide/Causation.** A homicide is an unlawful killing of a human being. The homicide element is satisfied when death is a foreseeable result of the defendant's conduct. Shooting a gun in a convenience store with people in it is likely to result in the death of someone in the store. The question is whether the manner of death is a foreseeable manner of death. Walter was knocked over by another fleeing customer, and then he was run over by a passing motorist. The manner of death may have been an unforeseeable result of Andy's conduct. As reasonable minds may differ, Andy's criminal liability for Walter's homicide would be a question for the jury.
- **Superseding Cause.** A superseding cause that is unforeseeable may break the chain of causation, cutting off the defendant's liability. The question is whether the other customer knocking into Walter was foreseeable, and whether the car striking Walter when he fell was foreseeable. In light of the fact that Andy was firing a gun in the store, a reasonable person could probably foresee that the people in the store would flee, and

that they may knock into each other. Hence, the customer knocking into Walter and the car running him over were probably foreseeable consequences of Andy's conduct.

- **Malice.** Malice for murder may be established when the defendant acts with intent to kill, intent to seriously injure, wanton and willful conduct (depraved heart), or when the homicide occurs during the commission of an inherently dangerous felony. The deadly weapon doctrine permits intent to kill to be inferred when the defendant uses a deadly weapon in a manner likely to cause death. Andy used a gun to stick up a convenience store. Although intent to kill could be inferred in this case by the deadly weapon doctrine, it appears that Andy did not intend to kill or injure someone because he shot the gun at the ceiling and demanded a drink. If malice cannot be established by intent to kill or seriously injure, then it probably can be established under a depraved heart theory. The depraved heart theory provides that malice exists when the defendant's conduct constitutes a wanton and willful disregard of human life. Sticking up a convenience store full of customers and shooting a gun at the ceiling may be sufficient to satisfy the wanton and willful conduct required for depraved heart murder. If it does not, then it would at least constitute criminal negligence, which is discussed below for involuntary manslaughter.

- **Felony Murder.** Under the felony murder, malice may be inferred by circumstances when a homicide occurs during the commission of an inherently dangerous felony. A felony is inherently dangerous when it requires inherently dangerous conduct as an element of the crime. Robbery requires inherently dangerous conduct because force or threat of force is inherently dangerous. **DURING THE COMMISSION** - For a homicide to fall under the felony murder rule, it must occur during the commission of the crime. The commission of the crime begins when the defendant can be charged with attempt, and it ends when the defendant reaches an apparent zone of safety. If Andy is guilty of attempted robbery, then he may be guilty of the murder of Walter under the felony murder rule.

- **Degree.** First degree murder is defined by statute and generally includes murder that

is premeditated and deliberate, and some felony murders. Each jurisdiction defines its own first degree felony murders. All other murders are second degree. It is clear from the facts that Walter's death was not a result of premeditated and deliberate conduct by Andy. If robbery is a first degree felony murder in this jurisdiction, then Andy may be properly charged with first degree murder. If Andy is not guilty of attempted robbery or robbery is not a first degree felony murder, then Andy may be properly charged with second degree murder.

- Involuntary Manslaughter. Involuntary manslaughter is an unlawful unintended homicide committed without malice that results from criminal negligence or the commission of a crime (misdemeanor manslaughter rule). If Andy's conduct does not rise to the level of constituting a wanton and willful disregard of human life (depraved heart), then it would at the very least be considered criminal negligence. A homicide that results from the defendant's criminal negligence may result in charges of involuntary manslaughter. Hence, Andy may properly be charged with involuntary manslaughter.

4. Battery of Vickie

- Battery. Battery is defined above. Andy caused his bullet to strike a pipe, and then bounce off the pipe and hit Vickie in the arm. Reasonable people would agree that being struck with a bullet in the arm constitutes harmful conduct. As Andy's conduct was unlawful and resulted in Vickie suffering harmful contact, Andy may be properly charged with the battery of Vickie.

5. Homicide of Vickie

- Murder. Defined above. The analysis of Vickie and Walter's homicides are similar except for the causation and superseding cause elements.
- Homicide/Causation. Defined above. In the case of Vickie, Andy's conduct was a but

for cause because he fired the bullet that struck her in the arm and led to her ultimate death.

- **Superseding Cause.** Defined above. Vickie was rushed to the hospital where she received emergency medical treatment, and she later contracted an infection and died. It is possible that she contracted the infection from the hospital, in which case the infection from the hospital could be a superseding cause. The question is whether it was foreseeable. As a reasonable person would expect a gunshot victim to seek medical treatment in a hospital, Vickie's treatment in the hospital was foreseeable. When seeking medical treatment, it is foreseeable that the treatment may be negligent. Negligent medical treatment does not break the chain of causation unless it amounts to reckless conduct. Here, the facts do not indicate that the hospital acted recklessly in its treatment of Vickie. Hence, her medical care would probably not be a superseding cause.

- **Malice.** Defined above. The analysis here is similar to that of Walter above. It is likely that Andy's conduct constituted willful and wanton conduct which evidenced a reckless disregard of human life (depraved heart). If Andy's conduct did not rise to the level of depraved heart, then it would at the least be considered criminally negligent (see below).

- **Felony Murder.** Defined above. Vickie's felony murder analysis is the same as Walter's (see above).

- **Degree.** Defined above. Vickie's degree analysis is the same as Walter's (see above).

- **Involuntary Manslaughter.** Defined above. Vickie's involuntary manslaughter analysis is the same as Walter's (see above).

B. Andy's Defenses

1. Intoxication. Intoxication may be a defense when the defendant has decreased mental and physical capabilities as a result of ingesting drugs or alcohol. Andy was intoxicated. An intoxication defense may defeat specific intent crimes, but it is not a defense to general intent crimes. A defendant acts with specific intent when he acts with desire, purpose, or knowledge to a substantial certainty that his act will cause a specific result. Attempted robbery and first degree (premeditated and deliberate) murder are specific intent crimes. If Andy successfully asserts an intoxication defense, then he may be able to avoid conviction on those charges.

2. Heat of Passion. Heat of passion is a defense to murder when four elements are present: (a) adequate provocation; (b) the defendant was actually provoked; (c) a reasonable person would not have cooled off between the time of provocation and the killing; and (d) the defendant did not in fact cool off. Here, Andy flew into a rage because a bartender denied service. A reasonable person would not consider that as adequate provocation to kill anyone. Hence, a heat of passion defense would fail.

QUESTION 2: SELECTED ANSWER B

PEOPLE V. ANDY

Aggravated Assault

Assault results from an attempted battery or an act intended to cause apprehension of imminent harm to the person of another. Aggravated assault is one in which, e.g., a deadly weapon is used.

Here, Andy walked into the convenience store (intending to return to the bar) but pointed the gun at Charles, the cashier, demanding a drink or that he would shoot. He had a gun in his hand. When Charles hesitated, Andy pointed the gun at the ceiling and fired. While Andy may not have intended to cause Charles harm, it is reasonably inferable that by having a gun, stumbling in, shooting the ceiling, he caused a reasonable apprehension of imminent harm to Charles. Therefore, it is clear Andy perpetrated a battery here. Additionally, because he used a gun, which is a deadly weapon, he will likely be charged with aggravated assault.

Attempted Armed Robbery

Attempt is the attempt to commit a crime. This inchoate offense requires, however, that the defendant engage in more than mere preparation. She or he must commence the consummation of the target crime. Attempt is a specific intent crime.

Robbery is a trespassory taking and carrying away of the personal property of another, from that person or in their presence, through force, fear or intimidation, with the intent to deprive that person of such property permanently. Armed robbery is one with a deadly weapon, including a gun.

Here, Andy pointed his gun at Charles and demanded a drink or he would shoot. By so

doing, it is clear he intended to take by force, intimidation and fear, the personal property, the drink, of the convenience store, from its employee Charles, and in his presence, with the intent to deprive the convenience store of that property, the drink permanently. Inferably, his plan was most likely to drink the drink, as he had previously sought to order one at the bar before he left to get his handgun. Andy's acts were more than mere preparation because he not only aimed the gun and made the demand to Charles, but he shot the ceiling. Therefore, it is clear Andy has committed attempted armed robbery.

Homicide

Homicide is the killing of another human being.

Murder

Murder is the unlawful killing of another human being with malice. Malice may be express or implied, and is present in one of four manners: (i) an intent to kill; (ii) an intent to cause serious bodily injury; (iii) extreme indifference to human life, including by grossly reckless conduct (sometimes referred to as malignant or depraved heart), or (iv) the occurrence of the homicide during the commission of an independent inherently dangerous felony (known as the felony murder rule).

Here, it does not appear Andy intended to kill or cause serious bodily injury to anyone. He was enraged and wanted a drink. He took extreme measures, indeed, but his actions do not appear to comprise a conscious object to kill, or inflict serious bodily harm upon, anybody. On the other hand, his barging into the convenience store brandishing a loaded gun, and shooting it (albeit at the ceiling) exhibits grossly reckless conduct and an extreme indifference to human life. While recklessness requires a conscious disregard of a known and unacceptable risk to human life, here such conscious disregard is present because Andy knew enough to go outside, get his gun, point it at Charles, threaten him and, ultimately, to shoot it. It is certainly foreseeable

that a stray bullet could kill or seriously injure another. Therefore, absent a defense, the malice is present as defined *supra* in clause (iii).

Additionally, as explained above, Andy committed an aggravated assault and attempted armed robbery. These are inherently dangerous felonies, are violent and involve a deadly weapon. Thus, there is malice present here as defined *supra* in clause (iv), under the felony murder rule.

Actual Cause

For a charge of murder, the defendant's conduct must be the actual cause of the death. Here, but for the shooting by Andy, the bullet shot from his gun would not have scared the store customers so as to cause them to run outside, in turn causing Walter to fall in the street, be struck and killed by an oncoming car. Additionally, but for his bullet being shot, it would not have ricocheted into Vickie, causing her to be injured, get an infection at the hospital, and die. Thus, there is actual cause here against Andy for two deaths, Walter's and Vickie's.

Proximate Cause

For a charge of murder, the defendant's conduct must also be the proximate cause of the death. Proximate cause exists when the death was reasonably foreseeable from the conduct of the defendant.

Here, Andy pointed and shot his gun which set into motion the fleeing crowd, bumping into Walter, his falling in the street, and his being hit and killed by an oncoming car. Andy will argue that these multiple disjointed events intervened and superseded his mere shot into the ceiling of the convenience store, and thus there is insufficient proximate cause for Walter's death. This argument will fail. It is certainly foreseeable that the shooting of a gun in a convenience store will cause a mass exit of customers and, if near a street, that one or more of them will enter oncoming traffic and be struck

thereby. Thus, there is proximate cause here for the death of Walter.

In Vickie's case, the bullet struck her by a ricochet into her arm, she contracted an infection, and later died. Andy will likely argue that the ricochet into Vickie was unforeseeable because there was no way a reasonable person would expect a bullet off of a metal pipe in the ceiling to kill a store customer. That argument will fail because, here, when one shoots in a retail establishment, a stray bullet can strike and kill someone. Its trajectory is virtually irrelevant. Thus, there is ample proximate cause here for the death of Vickie.

First Degree Murder

Murder in the first degree generally requires premeditation or deliberation, or a predicate felony murder.

Here, Andy engaged in several concerted steps: he left the bar, went to his car, got his handgun, entered the store (albeit mistaken as to which establishment he was entering), pointed the gun, threatened Charles, and shot. Thus, there was planning and time for deliberation. Thus, Andy may be charged with first degree murder,

Here, too, Andy engaged in an inherently dangerous felony: aggravated assault and attempted armed robbery, as explained above. Thus, he may reasonably be charged with first degree felony murder.

Second Degree Murder

Murder in the second degree requires malice, but may be charged in the absence of a predicate felony murder, premeditation or deliberation.

Here, if the court finds that there was insufficient premeditation or deliberation on Andy's part (such as, for example, if his intoxication absolves him of the *mens rea* of

premeditation and deliberation), or if there is a defense to one of the predicate felonies set forth *supra*, the jury may find Andy to have committed murder in the second degree,

Voluntary Manslaughter

Voluntary manslaughter is a murder that is mitigated to the lesser offense by a defendant's conduct having been motivated by the heat of passion, under adequate provocation, which results from circumstances that would arouse a sudden, uncontrollable and intense passion in an ordinary person, without opportunity to cool down, and under circumstances in which the defendant did not actually cool down.

Here, no such adequate provocation exists. A reasonable person would not pull a gun and shoot when merely declined a drink. Therefore, the charge of voluntary manslaughter will not apply.

Involuntary Manslaughter

Involuntary manslaughter is an unintentional killing that results from a defendant's criminally reckless or criminally negligent conduct. Criminal recklessness constitutes a gross deviation from ordinary conduct in consciously disregarding a known unacceptable risk to human life. Criminal negligence constitutes conduct without awareness of an unacceptable risk to human life, when the defendant should have been aware of it under the circumstances, in gross deviation of ordinary conduct.

Here, in the event there is a defense that absolves Andy of the *mens rea* of malice, or which defeats or mitigates the charges of aggravated battery or attempted aggravated robbery explained above, then the prosecution may reasonably charge Andy here with involuntary manslaughter.

Defenses

Intoxication; Diminished Capacity,

Diminished capacity may be a defense to a crime because it prevents the defendant from forming the necessary *mens rea*. However, voluntary intoxication will generally not be a defense, except to specific intent crimes where the intoxication prevents the defendant from forming the requisite specific intent.

Here, Andy became intoxicated by having a large number of drinks. There are no facts to infer that this intoxication occurred involuntarily. Indeed, by seeking out more drinks, it is clear he intended to drink, and thus became intoxicated (and apparently sought to be further intoxicated).

Andy will argue that he was so intoxicated that he could not be charged with any of the predicate felonies to felony murder, and that he could not attempt to commit an armed robbery because he could not form the specific intent required to steal the drink. He will argue this is evidenced by his going into the wrong establishment: the convenience store rather than the bar. This defense will fail because, while he was evidently intoxicated (stumbling and entering the wrong retail venue), he knew enough to grab his gun, point it and shoot. He knew enough to demand the drink or shoot. Thus, the guilty mind was present, despite his drunkenness.

QUESTION 3

Owner entered into a valid written contract with FloorCo to purchase beige colored Acme brand vinyl floor tiles for her new restaurant, for \$10,000, to be delivered in three weeks. The day after the contract was signed, FloorCo called Owner and orally offered to install the tiles during the week following delivery, for \$5,000, which offer was immediately accepted by Owner.

Two weeks later, FloorCo called Owner again and told her that it was buying a new, superior floor cleaning machine and that it would like to use this new machine to clean the vinyl floors once a week for one year, in return for \$5,000. Eager to have a professional company take care of the cleaning, Owner again immediately accepted the cleaning offer. Owner paid \$20,000 for the tiles, the installation, and the year of cleaning.

FloorCo delivered all the tiles on the scheduled delivery date. Although the tiles were visually identical to the Acme brand beige tiles, they were actually Bravo brand, a more expensive and higher quality vinyl tile than Acme's. That evening, FloorCo sent Owner an email that stated: "We assume you are delighted by our substituting the much better Bravo tiles for your order. We have arranged for and paid Irving, who is an independent contractor flooring installer, to install your vinyl tiles this week. The manufacturer of the new Vinyl-Clean machine has just today permanently ceased all production and canceled our machine order due to a design defect, so we will not be cleaning your floors this year and will refund your \$5,000 immediately."

1. What are Owner's rights and remedies, if any, with regard to getting the wrong brand of tiles from FloorCo? Discuss.
2. What are Owner's rights and remedies, if any, with regard to FloorCo's delegation of its duties to a new installer? Discuss.
3. What are Owner's rights and remedies, if any, with regard to FloorCo's cancellation of the floor cleaning contract? Discuss.

QUESTION 3: SELECTED ANSWER A

OWNER v. FLOORCO – TILES

Choice of Law

The Uniform Commercial Code (UCC), governs the sale of goods. Goods are tangible items of property, moveable at the time of identification to the contract.

Here, Owner entered into a contract to purchase beige colored Acme floor tiles. Floor tiles are tangible items of property and are moveable at the time of identification to the contract as they are to be delivered to Owner.

The UCC will govern this contract and be supplemented by common law.

Status of Parties

The UCC defines a merchant as someone who regularly deals in goods of the kind sold, or holds themselves out as having special knowledge about the goods sold.

Here, FloorCo sells floor tiles. It is suggested by their name, as well as the fact that they sold a large quantity of floor tiles to Owner, that they regularly deal in floor tiles and would therefore be considered a merchant.

Owner is a new restaurant owner. There are no facts to suggest that she regularly deals in floor tiles or that she has any particular expertise in that area. Owner would not be considered a merchant.

Contract Formation and Defenses

A contract validly formed requires offer, acceptance, and consideration with no valid defenses.

The facts here tell us that a valid written contract was formed with respect to Owner's purchase of floor tiles from FloorCo. Therefore, no analysis is required as to offer, acceptance, consideration or defenses to formation. It will further be presumed that the Statute of Frauds was satisfied with respect to this contract.

Breach and Damages

Breach of contract is any deviation from promised performance.

Owner contracted with FloorCo to purchase beige colored Acme brand vinyl floor tiles for her new restaurant. FloorCo instead delivered beige colored Bravo brand vinyl floor tiles instead. This is a deviation from the promised performance and would be considered breach.

The court will look to the materiality of the breach. The facts indicate the "tiles were visually identical to the Acme brand beige tiles." Further, the tiles delivered were a higher quality than what Owner ordered. For Owner to get these higher quality tiles, Owner would have had to pay more money as they are more expensive, but Owner is being provided with these tiles at the lower price than the Acme brand tiles. There are no facts to indicate any particular reason that Owner wanted the Acme brand that would suggest this breach could be material in that respect. In considering any damages that could result from this breach, Owner is not suffering anything by FloorCo providing a different brand. FloorCo delivered the tiles and sent an email to Owner later that day mentioning the substituted tiles. Since the tiles were visually identical, it's likely that Owner would never have noticed the difference, further evidencing Owner has not been damaged.

Based on the foregoing, FloorCo has breached its contract with Owner but that breach is not material. Owner has not been damaged.

Rejection

Upon receipt of non-conforming goods, buyer may reject the non-conforming goods. Where buyer rejects non-conforming goods that seller reasonably believed would be acceptable, seller will be allowed reasonable time to cure beyond the contracted date of performance.

Owner has received goods that do not conform to what was purchased. Owner has the right to reject all or part of the non-conforming goods. If Owner chooses to reject the non-conforming goods, she must do so within a reasonable time, and notify FloorCo that she is rejecting the goods. As noted above, if FloorCo is able to establish that they had reason to believe that Owner would accept the non-conforming goods, FloorCo will be allowed to cure the breach within a reasonable time, even though the date of promised delivery has passed, and Owner must accept. The facts show that FloorCo wrote to Owner saying they assumed she was delighted that they had substituted the much better Bravo tiles in her order. This will support FloorCo's argument that they reasonably believed the better tiles would be acceptable, particularly since any difference in the tiles did not affect them visually.

Owner can reject, but likely, FloorCo will be allowed time to cure.

Good Faith and Fair Dealing

Implied into all contracts is the requirement of good faith and fair dealing.

Owner could argue that FloorCo substituting tiles other than what she ordered amounted to acting in bad faith. FloorCo will counter that there was no bad faith because the tiles they provided were better quality and there is no visible difference. FloorCo can further show that the tiles provided were more expensive and that, in providing these higher quality tiles, FloorCo has incurred added expense for Owner's benefit which is hardly an act of bad faith.

Owner cannot successfully raise this argument.

OWNER V FLOORCO - DELEGATION

Assignment occurs when a party to the original contract assigns their rights to a third party but maintains their place as a party to the original contract. Novation takes place when a party to the original contract assigns their rights and obligations to a third party, placing that third party in their original position and relieving themselves entirely of any rights and obligations under the contract. Novation is essentially forming a new contract and requires the agreement of all parties involved. Service contracts may be delegated, except where the service provided is unique or there was reliance on the particular expertise of the party providing the service.

Here, FloorCo and Owner entered into an oral agreement for FloorCo to install the tiles that Owner purchased. The subject matter of this oral agreement does not fall within the statute of frauds and an oral agreement will be enforceable. There is no mention in the facts that their agreement prohibited any assignment and delegation. This service contract is for the installation of floor tiles and there is nothing to suggest that Owner chose FloorCo because their service was unique or because of any reliance on their particular expertise. Owner appears to have selected FloorCo merely because they called her and offered to install them. FloorCo chose to delegate their rights under this contract to Irving, an independent contractor flooring installer. As such, it would seem Irving is just as qualified as FloorCo in providing this service to Owner. FloorCo may assign its rights to Irving, however, for FloorCo to entirely be relieved of their rights and obligations under the contract, FloorCo must have Owner's consent to be replaced by Irving and form a new contract. FloorCo did not obtain Owner's consent and any novation would not be valid.

Owner has no grounds to object to the delegation of FloorCo's installation service contract to Irving as an assignment. Any novation that replaces FloorCo's rights and obligations with Irving would not be valid because Owner has not consented.

Damages and Remedies

Regardless of any breach on FloorCo's part, Owner will still have to prove damages as a result of the breach.

The facts indicate the tiles have been delivered to Owner's restaurant but have not yet been delivered. Irving has not yet installed the floor tiles and FloorCo could potentially choose to install the tiles themselves after all. Further, there are no facts to indicate that Owner would be damaged as a result of Irving completing the installation as opposed to FloorCo.

If there was, in fact, a breach on FloorCo's part, there are no facts to indicate Owner has not yet been damaged by that breach, or will be damaged by that breach. No remedy will be available where there is no damage.

OWNER V FLOORCO – CANCELLATION OF CLEANING CONTRACT

Anticipatory Repudiation

Anticipatory repudiation takes place when, prior to when performance is due, one party to a contract advises the other that they will not perform. This may be treated as breach and sued upon immediately, or the non-breaching party may wait until the time of promised performance to sue for the breach. The breaching party may retract their anticipatory repudiation at any time until the time performance is due, or until the non-breaching party has relied on the anticipatory repudiation.

Here, FloorCo's performance of the floor cleaning contract was not yet due, as the tiles had just been delivered and were not yet installed or ready for cleaning. FloorCo sent a letter to Owner advising that they "will not be cleaning [Owner's] floors this year and will refund [Owner's] \$5,000 immediately." FloorCo is letting Owner know that they will be breaching the contract when time for performance has come due.

At this point, Owner can sue immediately for the breach but must take steps to mitigate her damages (cover). Owner will be required to seek out another floor cleaning company to provide the same services FloorCo was going to provide. Owner would be entitled to seek any incidental damages, as well as expectation damages if the new company is costlier than her contract with FloorCo.

Owner may choose not to sue immediately and decide to wait for the time of FloorCo's promised performance. FloorCo will then be able to retract their repudiation at any time until the time for promised performance, or until Owner relies on FloorCo's repudiation.

Statute of Frauds

The law requires that certain contracts be evidenced by a writing and signed by the person against whom enforcement is sought. Contracts which, by their terms, cannot be completed within one year fall within the Statute of Frauds. The time is calculated by the date the contract is formed.

Here, FloorCo and Owner entered into a contract for FloorCo to clean Owner's tile floors once per week for one year. By its terms, the contract period is exactly one year, however, the contract was formed several weeks before the tile floors were installed and before performance was due to begin. As such, this contract could not be performed within one year from the date it was formed and is subject to the writing requirements of the statute of frauds.

This is a defense that would be raised by Owner if she wanted to get out of the contract. However, FloorCo is already trying to get out of the contract so this defense will not be helpful to Owner, but rather will be helpful to FloorCo.

Expectation Damages

Expectation damages are a monetary remedy intended to place the non-breaching party in the position they would have been in had the contract been fully performed.

Assuming a contract was validly formed (see Statute of Frauds discussed above), Owner can seek expectation damages. Owner is required to mitigate her damages (cover) by a good faith effort to find another company to clean the floors. FloorCo has already informed Owner that they will be returning her \$5,000 payment to them for the floor cleaning. Owner will have to show that contracting with a different company to provide the same services is more costly. Even if Owner is able to find another company to provide the same services at the same price, Owner may still seek damages for any incidental expenses incurred by FloorCo's breach.

Specific Performance

Specific Performance is an equitable remedy which can be sought when the legal remedy is inadequate.

Here, Owner could attempt to have the courts order FloorCo to perform their end of the contract by cleaning her floors weekly for one year as agreed. However, service contracts are not eligible for specific performance as the constitution prohibits involuntary servitude. Further, courts will not take on the burden of monitoring and enforcing such a contract when the legal remedy (money damages) is adequate. An award of monetary damages will make Owner whole and allow her to hire another company to provide the same services FloorCo was going to provide.

Specific Performance is not a remedy available to Owner.

Impossibility

Here, the manufacturer of the new Vinyl-Clean machine advised FloorCo that it had permanently ceased all production of the machine and had cancelled FloorCo's order due to a design defect. FloorCo may argue that they are entitled to avoid performance of the cleaning contract due to impossibility because the new Vinyl-Clean machine they ordered to do the job is not available. This argument is unlikely to prevail because, as Owner will point out, the subject matter of the contract was for service to have the restaurant floors to be cleaned once weekly for a year. The new Vinyl-Clean machine

was not the subject matter of the contract and that particular machine is not required for FloorCo to perform on the contract. FloorCo can purchase a different type of machine to do the job.

Owner will prevail if FloorCo attempts to raise this argument.

Impracticability

Impracticability can be a defense where, through an event that neither party anticipated, performance is made extremely burdensome or significantly more costly.

FloorCo may argue that, although they can purchase a different machine than the one intended and performed on the contract, to do so would be impracticable because a different machine would be more costly. However, a more costly machine will not relieve FloorCo of their contractual obligations because the difference in price on the machine's is unlikely to be such a significant and outrageous difference as to give rise to impracticability.

Owner will prevail if FloorCo attempts to raise this argument.

QUESTION 3: SELECTED ANSWER B

1. What are Owner's rights and remedies, if any, with regard to getting the wrong brand of tiles from FloorCo? Discuss.

Owner v. FloorCo

BREACH OF CONTRACT

The rights and remedies of the parties herein turn on whether or not a valid contract existed and if it was in fact breached. A contract is a promise or set of promises the performance of which the law recognizes a duty and the breach of which the law provides a remedy. It is based on the objective theory of contracts wherein we take the point of view of a reasonable person in determining if a contract was indeed formed.

What law will govern this contract?

APPLICABLE LAW

Under contract law, Article 2 of the Uniform Commercial Code (UCC) governs the sale of goods. Goods are tangible moveable items identified to the contract. Merchants are often involved in the sale of goods. Merchants are those who regularly deal in the product at hand or who hold themselves out as experts. The common law (CL) governs all other contracts.

Here, we have a contract for the sale of tiles (Tile Contract). Tiles can be held and moved and, therefore, we have a good. We have an owner who is a non-merchant and FloorCo who is a merchant. Although installation services are required to have tiles in place, the predominant purpose of the sale of this contract is for the sale of tiles. Thus, the UCC will govern this contract between a merchant and non-merchant. We also

have a service contract for the cleaning of the tiles (Cleaning Contract). In this case, the common law will govern this contract.

Therefore, the UCC will govern the Tile Contract while the CL will govern the Cleaning Contract.

Do we have a valid contract?

CONTRACT FORMATION

Under contract law, a valid contract requires that there be an offer, no termination of the offer, acceptance and consideration (consideration substitute if no clear consideration).

Here, we are told that the both parties entered into a valid written contract.

Thus, we have a valid contract.

Would FloorCo have grounds to make this contract unenforceable?

DEFENSE TO FORMATION

STATUTE OF FRAUDS (SOF)

Under contract law, contracts whose subject matter fall within the statute of frauds are required to be in writing to be enforceable. Under the UCC, contracts for the sale of goods, \$500 or more, are required to be in writing. Under CL, as it applies here, if the performance of the service will take more than 1 year to fulfill, it will need to be in writing.

Here, because we are dealing with a contract for tiles in excess of \$500, it falls within the SOF and will be required to be in writing. We are told that the cleaning service will take one year and not one year and a day. Because it falls on 1 year, it will not be required to be in writing. However, since we are told that there is a valid written contract, this will suffice to fulfill the SOF requirement.

Thus, we have a writing that will satisfy the SOF.

What were the terms of the contract?

TERMS

Under contract law, express terms are to be strictly construed and implied terms are more flexible.

Here, the express terms are beige colored Acme brand vinyl floor tiles at a price of \$10,000 for delivery in 3 weeks with installation of the tiles a week after delivery for \$5,000. Since we are told we have a valid written contract, we have a fully integrated contract and any evidence of prior written or oral contemporaneous oral agreements that contradict these terms will be barred by the Parol Evidence Rule.

Thus, we have express terms to which both parties are expected to strictly comply.

Do we have a breach?

BREACH

Under contract law, any deviation from promised performance, however slight, is a breach. A material breach is one that substantially undermines the benefit of the

bargain and a minor breach is only a slight deviation from the promised exchange.

Here, we are told that the tiles delivered to the owner were not Acme brand, but rather Bravo brand and it was a more expensive and higher quality tile than the Acme brand. Under the perfect tender rule of the UCC, there must be perfect tender of the product indicated in the contract. There could be an exception wherein the product delivered was similar in all aspects as what was ordered. However, we have a completely different tile delivered here. Therefore, we have a breach and a material one at that.

Thus, we have a material breach here.

Do we have an effective modification?

MODIFICATION

Under contract law, a modification is where parties to a contract agree to a change in the terms of the contract. Under the UCC, good faith is all that is required. Under the common law, additional consideration is required. An oral modification can occur if both parties agree.

Here, we can infer from the facts of the case that there was a UCC modification since we are told that FloorCo sent an email to owner informing him of the change in brand of tiles. Since it was a much better brand, the owner would presumably be happy. Most of all, owner was not charged for the difference in price of the higher quality tiles. Further, the facts are silent as to the owner disagreeing with the change. Since the modification was apparently done in good faith, the modification stays.

Thus, there was an effective modification here.

Is FloorCo's breach excused?

EXCUSES

Under contract law, a material breach excuses the aggrieved party from performance where a minor breach does not.

Here, because the breach resulted in a modification, FloorCo will be excused. Unless of course, owner complains, but the facts are silent with regards to that. Normally, owner would be excused from further performance due to FloorCo's material breach. But since it appears that owner accepted the modification, owner will not be excused from performing.

What remedies are available to the Owner?

REMEDIES

EXPECTATION DAMAGES

Under contract law, and as laid out in *Hawkins v. McGee*, expectation damages will put the aggrieved party in the same position he/she would have been had the contract been performed. Damages must be reasonably certain, foreseeable and unavoidable.

Here, the owner would be entitled to the difference in price between the Acme brand tiles and the Bravo brand tiles because Acme brand tiles were what was identified to the contract and it was what the owner agreed to. However, as discussed supra, we have a valid modification.

Thus, although Owner would be entitled to expectation damages, it will not be needed here.

SPECIFIC PERFORMANCE

Under contract law, specific performance is where the courts make the breaching party do what they said they were going to do.

Here, Owner may ask for specific performance as a remedy to the Tile Contract. However, since the tiles were not unique in any way other than being a higher quality tile, Owner could go to other tile companies to acquire such tiles. Owner may also ask for specific performance when it comes to the Cleaning Contract; however, specific performance is never available for service contract since it could violate the 13th amendment prohibition of involuntary servitude.

Thus, Owner may seek specific performance, but the courts will not grant it.

CONCLUSION

FloorCo did not breach his contract with Owner.

2. What are Owner's rights and remedies, if any, with regard to FloorCo's delegation of its duties to a new installer? Discuss.

THIRD PARTY RIGHTS AND OBLIGATIONS

DELEGATION

Under contract law, delegation is a transfer of contract duties. The delegate is the party to whom the duty is transferred. The delegator is the party who transfers the duty and the obligee is the party with the right to receive the transferred duty. The delegator always remains liable unless the delegate has received compensation.

Here, unless the contract prohibits a delegation, the delegation will apply. Certain situations would prohibit a delegation such as if it was expressly stated in the contract, the Owner had a special interest in the FloorCo performing the duty or FloorCo had a special talent or skill. The facts are silent as to these situations. Further, should any problems arise with the installation of the tiles by the independent contractor (the delegate), FloorCo will always remain liable. However, if independent contractor accepted any kind of payment from Owner, then independent contractor would also be liable to Owner.

Thus, these are the rights and remedies of the Owner as it pertains to the delegation of duties by FloorCo to independent contractor.

3. What are Owner's rights and remedies, if any, with regard to FloorCo's cancellation of the floor cleaning contract? Discuss.

DISCHARGE OF DUTY

Under contract law, duties can be discharged through impossibility, commercial impracticability or frustration of purpose.

Here, FloorCo will argue that their duty under the floor cleaning contract was impossible. They will argue that due to the permanent ceasing of the manufacturer in the production of the new Vinyl-Clean machine, all production was cancelled due to a design defect and therefore, it is impossible for FloorCo to continue the service contract. On the other hand, Owner will argue that the new Vinyl-Clean machine is not the only vinyl cleaning machine in the market and that FloorCo could have gone out and gotten another vinyl cleaning machine. It was not impossible to fulfill the service contract. FloorCo could also allege that they intended to use the machine for cleaning services and since the machine will not be available, their purpose in cleaning was frustrated. Nonetheless, however, since FloorCo will refund Owner's \$5,000 immediately,

FloorCo's duty will consequently be discharged.

Therefore, FloorCo's refund due to the cancellation of the cleaning contract will adequately discharge FloorCo's duties.

QUESTION 4

On a sunny winter day, Dan went for a hike in the mountains. While walking on a trail far from civilization, a sudden storm arose. Thick snow accompanied by horrific winds created blizzard conditions. Dan was an experienced outdoorsman and knew that, without shelter, he was likely to succumb to hypothermia and die.

Fortunately, Dan remembered that his friend Jill owned a cabin in the vicinity. Jill had told him that he could use the cabin should the need arise. In the blizzard conditions, Dan struggled to find Jill's cabin, but soon saw a red-roofed log cabin that looked exactly like Jill's. As promised, the key was under the mat, and Dan entered to wait out the storm. In order to stay warm, Dan removed some built-in wooden bookshelves from the wall and used them to build a fire in the fireplace. He also threw in some books that were on the shelves to keep the fire going. He slept in front of the fire, and the storm was over the following morning.

Before leaving the cabin, Dan wrote Jill a note thanking her for the use of the cabin and apologizing for the missing shelves. He forgot to mention the books. He left his phone number and told her to give him a call.

As it turns out, the cabin where Dan stayed was owned by Polly and not Jill. When Polly went to the cabin to open it for the summer, she noticed that her bookshelves and books were missing and found a note on the table from some fellow named Dan.

Polly was outraged that a stranger would use her cabin without her permission, destroy the bookshelves, and take her books. She decided to sue Dan.

1. What tort cause(s) of action can Polly reasonably raise against Dan? Discuss.
2. What defense(s), if any, can Dan reasonably assert? Discuss.
3. What types of damages, if any, might Polly recover from Dan? Discuss.

QUESTION 4: SELECTED ANSWER A

POLLY v. DAN

TRESPASS TO LAND

The intentional and volitional entry onto the real property of another person with possessory rights that causes damages. It interferes with the exclusive possession of the land.

Here, Dan enters onto the land of Polly. The land does not belong to Dan, nor does Dan have any ownership interest in the land.

Polly will argue that Dan was not authorized to enter the land. Polly will also say that just because she was not present and using her land/cabin at the time of Dan's arrival, that Dan had the right to enter the land or the cabin.

Thus, Dan has committed Trespass to Land.

DEFENSES

PRIVATE NECESSITY

When there is an emergency situation, a person may enter the land of another to avoid extreme physical harm or injury, but they are still liable for damages.

Here, Dan is hiking in the wilderness. Dan sees that there is a bad storm coming. There are thick snow and blizzard conditions. Dan realizes that he would likely die if he does not find shelter. Dan will likely be seen as "authorized" to enter the land of Polly because his life was in danger. However, Polly can sue for damages and recover for any harm caused.

This defense will be successful. However, Polly can recover damages discussed infra.

CONSENT

When there is adequate and authorized permission, there is consent.

Here, Dan believes that he is entering his friend's cabin, and not the cabin of Polly. Dan has the express consent to enter the land and cabin of his friend. However, Dan

requires the consent of Polly, and not the consent of his friend.

This defense will likely fail.

MISTAKE

When the actual circumstances of the situation are different than one has surmised, there is a mistake.

Dan has mistakenly entered into the land of Polly with the belief that the property actually belongs to his friend. Dan has mistaken the red-roof of his friend's cabin for Polly's cabin.

Dan will say that there was a key under the mat, just as he expected. This is the exact behavior that his friend Jill does.

This will not serve as a defense to the intentional tort of trespass to land. Mistake is not a defense for this intentional tort.

TRESPASS TO CHATTELS

The intentional and volitional interference with the possession or use of property of another that causes damages.

Dan used Polly's stationery to write a letter. The stationery (paper and pen) did not belong to Dan. Dan interfered with Polly's right to use her belongings for other purposes. However, this worked out well for Polly because Dan identified himself and left his phone number, making him easy to contact and identify if Polly wanted to seek recovery.

Dan has committed trespass to chattels.

DEFENSES

None available for this tort.

CONVERSION OF BOOKS AND WOOD SHELVES

The intentional and substantial interference with the personal property of another that is so great that it is treated as a forced sale. The remedy is typically the fair market value of the goods at the time and the place of the conversion.

Here, Dan "burned" some of the book shelves in the fireplace in order to stay warm. He also burned some of the books. Property that is completely burned cannot be recovered. The interference of Polly's property possession is "substantial" because it is completely destroyed.

This is a conversion.

DEFENSES TO CONVERSION

IMPLIED CONSENT

Dan will argue that his friend would have allowed him to burn whatever was necessary for him to burn in order to stay warm and not die from the cold blizzard.

This argument will likely fail because the consent of Polly was required - not the consent of his friend. Polly did not allow him to destroy her property.

Thus, no implied consent.

NECESSITY

Again, Dan will argue that it was necessary for him to start a fire. He will say that he used the most reasonable materials available - wood and books. He will further state that he would have died from hypothermia without a fire.

This argument will succeed, however damages are recoverable, discussed below.

DAMAGES

NOMINAL DAMAGES FOR TRESPASS TO LAND

The land was not harmed. Nominal damages (perhaps \$1.00) to show that a wrong has occurred will likely be available.

FAIR MARKET VALUE FOR THE BOOKS AND SHELF WOOD

There was a conversion (discussed supra). Polly can recover the fair market value of the wood for the shelves, as well as the books that were destroyed.

GENERAL DAMAGES

Polly can recover for the emotional harm she suffered when she thought that her cabin was broken into. If there was pain and suffering involved, she can recover monetary damages for that pain and suffering.

SPECIAL DAMAGES

Polly can recover the reasonable cost of any other economic harm that she suffered. Since Dan used her stationery to write a letter, she can recover for that. She can also likely recover for having the cabin sufficiently cleaned. Further, she can recover the reasonable value of the cost to re-install the shelves into the cabin.

PUNITIVE DAMAGES NOT AVAILABLE

Where there are intentional torts, punitive damages may be available to punish the defendant.

Here, Dan was not acting with malice - he was simply trying to stay alive and survive a brutal snow storm. He was not acting with intent to harm - only to stay alive and survive. Polly may argue that he did not inform her of the books that he burned, and that his omission of that fact was malicious. This argument will fail. There is clearly no malice. Thus, punitive damages will not be available.

QUESTION 4: SELECTED ANSWER B

Polly v. Dan

1. Polly's Claims against Dan

Trespass to Land

Trespass to land is the intentional invasion of the land of another without consent or privilege.

Here, the facts state that Dan took the key under the mat at the cabin and "entered to wait out the storm," and he remained in the cabin until leaving the following morning. Thus, Dan's entering Polly's cabin was an intentional invasion, and because the cabin actually belonged to Polly, Dan's entering was into the cabin was thus on the land of another, Polly's.

Dan will argue that he did have consent from Jill to enter her cabin, which appeared virtually identical to Polly's, and thus his entering Polly's cabin was based on a reasonable mistake.

However, mistake as to land ownership is not a recognized defense, as it is the intentional invasion of the land itself which constitutes the tort of trespass.

Here, Dan intended to invade Polly's land, and so Polly will have a claim against Dan for trespass to land, absent a privilege that Dan might have to enter the land (infra).

Trespass to Chattel

Trespass to Chattel is the intentional interference with the personal property of another without consent or privilege.

The facts state that inside Polly's cabin Dan had "removed some built-in wooden bookshelves from the wall and used them to build a fire in the fireplace" in order to stay warm during the blizzard. Dan also "threw in some books" that were on the shelves to keep the fire going.

Because Dan removed the wooden bookshelves and threw in the books for the purpose of making a fire to stay warm, his acts were volitional and so he intended to interfere with these items. Since the books and the bookshelves belonged to Polly, Dan interfered with the personal property of another.

Dan will argue that he had implied consent to interfere with these items from Jill, who told Dan he "could use the cabin should the need arise." However, mistake as to the ownership of the property is not a recognized defense, even if in good faith.

Here, Dan intended to interfere with personal property which belonged to Polly, so Polly will have a claim against Dan for trespass to land, absent a privilege that Dan might raise to interfering with the property.

Conversion

Conversion is intentional interference with the personal property of another which is so substantial as to warrant requiring the converter to pay for the full value of the property converted.

Dan intentionally interfered with the personal property of another, Polly, supra.

Polly will argue that the use of her property amounted to conversion. Since Dan had "removed some built-in" wooden bookshelves from "the wall" of the cabin and threw them into the fireplace, Dan clearly converted the bookshelves as they are now destroyed forever, depriving Polly of their substantial use and value. Moreover, while the facts do not state this, depending upon Dan's removal of the bookshelves from the

wall, Dan may have caused substantial damage to portions of the wall.

Polly will further argue that Dan took her books without permission, and so converted the books as well because by taking them he substantially deprived Polly of their use.

Dan will argue that he did not take the books with him but used them, like the bookshelves, for stoking the fire. However, this is not much of a counter argument as Dan still destroyed the books, depriving Polly substantially of their use and value.

Dan's use of the wooden bookshelves and the books for keeping the fire burning destroyed these items, and so his intentional interference with Polly's personal property is substantial enough to warrant requiring Dan to pay for the full value of the property converted, discussed infra.

2. Dan's Defenses

Consent

As discussed supra, because Dan obtained consent only from Jill and not from Polly--the actual owner of the land and possessor of the property at issue--then Dan has no valid consent from the owner, Polly, to enter her land or use her property.

Dan has no valid consent.

Mistake

Reasonable, good faith mistakes do not serve as a defense to trespass to chattels, trespass to land, or conversion.

Dan's reasonable mistake as to ownership, even though in good faith, still will not serve as a defense to Polly's claims for damages.

Private Necessity

Private Necessity operates as an incomplete defense to trespass to land and trespass to chattel/conversion, and arises when circumstances such as natural disasters render conditions so unsafe and involving risk of great harm or death that there is a privilege to trespass upon and use land and chattels belonging to another if reasonably necessary to avoid harm to oneself. One who trespasses upon property/chattels out of a private necessity is still liable for any damages/harm caused while on the land or while using the chattels.

Because Dan was located "far from civilization" when a "sudden" storm arose, Dan will argue that he had a private necessity to trespass upon Polly's land for the purpose of finding shelter and escaping the "horrific winds" and the blizzard conditions outside, as he knew that such conditions would likely expose him to hypothermia and death. As such, Dan had a privilege to trespass upon Polly's land to avoid great imminent harm to himself from the blizzard.

Moreover, because blizzards create very cold conditions, Dan's using the books and bookshelves inside the cabin in order to build a fireplace was reasonably done out of a necessity to stay warm. Dan had a privilege to trespass upon Polly's chattels to avoid great harm to himself from potential hypothermia.

Dan will not be liable for trespass to chattels, conversion, or for trespass upon Polly's land due to his privileged entry and privileged use of Polly's land and personal property due to his private necessity. However, because private necessity is an incomplete defense, Dan may still be liable for damages caused by his use of land and/or property during the course of the private necessity, *infra*.

3. Damages Recoverable by Polly from Dan

Damage to Books

Damages/harm caused during the course of a private necessity are recoverable.

Because Dan destroyed the books to build the fireplace, the books were converted and Dan is thus liable to pay for their full value, or a "forced sale."

Damage to Bookshelves

Damages/harm caused during the course of a private necessity are recoverable.

Because Dan destroyed the bookshelves to build the fireplace, the bookshelves were converted and Dan is thus liable to pay for their full value, or a "forced sale."

Damages for Use of Polly's Land

Damages/harm caused during the course of a private necessity are recoverable.

Because Dan was only on the land to ride out the storm and left immediately once the storm subsided the next morning, his privileged invasion of Polly's land lasted only so long as the private necessity created by the storm existed, and so because he left when his private necessity was no longer present the next morning, Polly will not recover damages for Dan's trespass upon her land.