



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

**Essay Questions
and
Selected Answers**

October 2012

ESSAY QUESTIONS AND SELECTED ANSWERS
OCTOBER 2012 FIRST-YEAR LAW STUDENTS' EXAMINATION

This publication contains the essay questions from the October 2012 California First-Year Law Students' Examination and two selected answers for each question.

The answers received good grades and were written by applicants who passed the examination. The answers were typed as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors.

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

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October 23, 2012



California First-Year Law Students' Examination

Answer all four (4) questions.

Time allotted: 4 hours

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

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

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

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

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

Question 1

Patricia hired Contractor to build an addition to her home. During excavation, a safety inspector determined that the excavation violated statutory standards intended to protect workers from cave-ins. In response, Foreman shut down the work site.

Foreman stepped away from the work site to call his wife. Just then Stephen, who was Patricia's ten-year-old son, came home from school and climbed into the excavated hole. As he reached the bottom, he screamed as soil caved in around him and he was buried. Hearing the scream, Foreman grabbed a shovel, jumped into the hole, freed Stephen after several minutes of shoveling, found that his heart had stopped, and applied chest compressions to resuscitate him.

Stephen suffered a sprained ankle as a result of the cave-in and broken ribs as a result of the chest compressions.

1. What claims, if any, can Patricia reasonably bring on Stephen's behalf against Contractor? Discuss.
2. What claims, if any, can Patricia reasonably bring on Stephen's behalf against Foreman? Discuss..

Answer A to Question 1

I. Patricia v Contractor

In order for Patricia to assert a claim against Contractor she must be able to show that he was either responsible for Foreman or Contractor failed to perform in a reasonable manner.

A. Respondeat Superior

An employer can be held vicariously liable for the acts of their employees when they act negligently and a harm is caused or when their act is intentional but it must be in furtherance of the employer's purpose. Here, in order for Patricia to bring a reasonable suit against Contractor she must be able to show that Foreman was an employee of Contractor and that Foreman was negligent.

In this case, Foreman worked for Contractor. There are no facts to indicate that Foreman was an independent contractor. Contractor left him in charge of the construction site which included the authority to shut down the work site and make other decisions in regards to the work being performed. As such, Foreman would be considered an employee of Contractor. If Patricia can assert that Foreman was negligent, as discussed below, she will be able to assert a claim against Contractor for vicarious liability for the damages suffered by Stephen and recover from Contractor.

B. Negligence. Patricia can also assert a direct claim against Contractor for negligence. When one takes an affirmative act and fails to act as a reasonable person and a harm results they can be held liable as being negligent. In order to assert her claim she must show that there was a duty, that duty was breached, the harm caused was a result of the breach, damages were suffered and there are no defenses.

1. Duty. When one takes an affirmative act they owe a duty of reasonable care to all foreseeable plaintiffs. Here, Contractor was hired to build an addition to Patricia's home. As such, when he began the excavation he began an act that required him to act with

due care to prevent any injuries that may occur as a result of the construction. Contractor may argue that Stephen was not a foreseeable plaintiff. Under the majority view it is held that a duty of reasonable care is owed to all plaintiffs in the foreseeable zone of danger. Contractor may argue that Stephen was not in the foreseeable zone of danger; however, even though he was at school the excavation was occurring at his house, and as such it is foreseeable that he would be present at some time during the construction as construction of a room addition cannot occur within one day of beginning to completion. Therefore, Stephen would have been in the foreseeable zone of danger and was owed a duty of reasonable care. Under the minority view a duty is owed to all. Under either view, Contractor by beginning the construction owed a duty of care to Stephen.

2. Breach of Duty. When one owes a duty of care, the breach of such duty must be shown in order to show that there was negligence. Here, there are two theories under which Patricia can try to establish that Contractor breached his duty.

a. Negligence per se - When there is a statute in place, that statute can be used to set the duty and if that statute is not followed can be used to show that the duty was breached. In order to show this Patricia must show that the statute was in place to prevent the type of harm that was suffered, and that the plaintiff was in the class of people the statute was designed to protect.

Here, that standard was intended to protect workers from cave-ins. Since the statute was in place to protect from cave-ins, which is what occurred, it was specifically instituted to protect from this type of harm. However, it was specifically put into place to protect workers, which is the class of plaintiff it is designed to protect. Since Stephen was her son, he is not a worker, he is not in the type of class of people the statute was designed to protect; therefore Patricia would be unable to prove breach through the use of the statute.

b. Reasonable standard. When one is shown to have acted unreasonably then they have breached their duty. Unreasonableness can be shown when the burden of avoiding the harm causing activity paired with the social utility of that activity is less than the likelihood that the harm will occur and the gravity of the harm suffered.

Here, Contractor left his employee, Foreman, in charge of the excavation. However, his duty was to ensure that his plans were such that did not pose a risk to either his employees or the people that may be nearby the construction site. Being a contractor, he should be knowledgeable to the statutes within the area and adjust his plans accordingly. As such, since it would take Contractor very little to be knowledgeable of the accepted practices within the industry, as he has been in this industry, he owed a duty of care and reasonable conduct to ensure that his construction sites were safe, especially since he left other employees in charge of the sites. If he can show that Foreman acted outside of his scope and therefore did not comply with his instructions then he can show that he did not act unreasonably and there was no breach of duty. However, if it is found that Contractor should have known of the risk and did not instill practices to prevent harm, such as here, setting up an excavation that is clearly against statute, then he acted unreasonably and breached his duty of care.

c. Causation. In order for there to be an appropriate cause of action Patricia must show that Contractor's breach of duty was both the cause-in-fact of Stephen's injuries and the proximate cause.

i. Cause-in-fact can be shown here through the but-for test.

Here, but for the Contractor failing to comply with statute and conduct a reasonable excavation that was safe, the hole would not have been in the yard and Stephen would not have been able to climb into it and the cave-in would not have occurred.

ii. Proximate cause. When there is a foreseeable, intervening and superseding event that breaks the chain of causation then the person will not be liable for the harm that was caused.

Here, Contractor will argue that there was. It is apparent that there was an intervening superseding event; when Foreman shut down the excavation, he left the hole unattended. This occurred after Contractor's breach of duty, which was the improper excavation site. However, the question is whether or not this was a foreseeable event that occurred. Normally a person will not be held liable for the tortious acts of a third person; however, negligence on the part of another person is foreseeable. Therefore, if it can be shown that Foreman was negligent, as discussed below, then Contractor will not be able to argue that he was not the proximate cause of the injury and Patricia will be able to prove this element.

d. Damages. Damages must be proven in order to be able to recover in a negligence action. Damages must be legally cognizable. Here, Patricia will be able to meet this burden since she will be able to show that Stephen suffered a sprained ankle and broken ribs.

e. Defenses. Under the common law, if a party was contributorily negligent they were barred from any recovery. However under the modern majority the theory of comparative negligence will be applied and the plaintiff's recovery will be reduced by the percentage of their fault. Depending on the jurisdiction, it will depend on whether they will receive recovery no matter the percentage of their fault or if they will be barred if they are determined to be more at fault than the defendant.

Here, Contractor will assert that Stephen was negligent when he decided to climb into an excavated home in a construction area since it is unreasonable to do so. However, Patricia can assert that Stephen should be held to the standard of a child and not an adult, so he should be judged as a child of like age, experience and education and as a 10-year old, he was not aware of the risk associated with the hole. A 10-year old boy normally enjoys digging holes, climbing into them and exploring. As such, if he is judged on the child standard, he will not be determined to have been negligent and Patricia will be able to recover no matter the jurisdiction.

II. Patricia v Foreman

A. Negligence. supra.

1. Duty. supra. Here, Patricia will be able to assert the same standard of care to meet the duty. He took an affirmative act and therefore owed a reasonable duty of care.

a. Professional Standard. One with special skills or knowledge will be held to the standard of care of someone with those same skills and knowledge, not the reasonable person standard.

Here, Patricia can also assert that since Foreman was left in charge of the site he had special knowledge and skills about construction sites and the dangers they pose to people not familiar with the industry; therefore he should be held to the standard of a professional with those knowledge and skills.

Under either theory Patricia can assert that there was a duty owed.

2. Breach. supra

Here, Foreman had shut down the work site; however he had stepped away from the work site to make a phone call to his wife when the injury occurred. Foreman will assert that no one was home when he stepped away from the work site to make the call, therefore there was no likelihood that any harm would occur and he was not unreasonable just to be able to make a call since Stephen had just come home from school. However, since he was aware by the statute that the excavation site could cave in which could result in serious harm or death, when he left it unattended, it was possible for someone he was unaware of to enter the hole, as what happened here when Stephen entered the hole. He could have merely made his phone call by the site, or left it attended by someone or placed a barrier or warning up to stop people from entering the whole. This would have required very little effort on his part, and by the use of a barrier or warning or being present he could have easily prevented Stephen from entering the hole. Since he did not have a large burden on him to take a different course

of action and the gravity of the harm outweighs this burden he acted unreasonably and therefore breached his duty of care.

3. Causation - supra

a. Cause-in-fact. Here, this is clear, but for Foreman stepping away from the hole, Stephen would not have climbed into the hole and had the dirt cave in on him.

b. Proximate cause supra

Here, there were no events between Foreman leaving the hole unattended and Stephen climbing in and being injured; therefore he was also the proximate cause of the injury.

Patricia will be able to show causation.

4. Damages – supra. Patricia will be able to assert the damages as discussed above.

5. Defenses - supra

Here, Foreman can assert the same defenses as Contractor and will either be successful or not as discussed above.

B. Battery is the intentional act causing a harmful contact.

1. Intentional act - When one acts with the intent to cause a contact they have acted with intent. Here, it is clear that Foreman intended to make contact with Stephen. He pulled Stephen out of the hole and applied chest compressions. Therefore his action was intentional.

2. Harmful contact. A contact is harmful if it causes injury. Here, the chest compressions that Foreman performed caused Stephen to suffer broken ribs. He clearly suffered an injury; therefore there was a harmful contact.

3. Consent. When a contact has been consented to, the defendant will not be held liable for the damages that were caused. Consent can be implied where it is a situation in which the plaintiff would have normally consented to the touching; however is unable to either because they are unconscious or something else prevents them from giving such consent.

Here, Stephen was unconscious and his heart had stopped. Foreman acted by giving chest compressions to get his heart started again. In such an emergency situation, where the plaintiff is unable to give consent but it is such a situation that normally the reasonable person would give the consent, it is implied that consent was given. Since this is such a situation, Foreman will be able to assert that he was given implied consent and therefore will not be liable for the battery.

Answer B to Question 1

1. PATRICIA V. CONTRACTOR

Negligence - In order to prove a prima facie case of negligence, plaintiff must show that defendant had a duty to plaintiff, that defendant breached that duty, that defendant was the actual and proximate cause of plaintiff's injuries, and that plaintiff had damages.

Duty - Every person owes a duty of a reasonable prudent person to avoid risk of injury to other people.

Here, Patricia is bringing claims against Contractor on behalf of her 10-year old son, Stephen. Patricia will contend that Contractor owed a duty to Stephen, and the public in general, of a reasonably prudent contractor to keep the job site safe.

Contractor will argue that he did not owe a duty to Stephen since Stephen should not have been in the excavated hole.

A court will side with Patricia and find that Contractor did in fact owe a duty to Stephen.

Breach - In order to prove negligence, the plaintiff must show that defendant failed to fulfill his obligations under his duty.

Here, Patricia will argue that Contractor breached his duty by violating the statutory standards intended to protect workers from cave-ins. See Negligence Per Se below.

Negligence Per Se - Where plaintiff violates a statute intended to protect someone in the same class as plaintiff, and designed to protect against the same harm as that caused to plaintiff, the violation of the statute will be proof of a duty and a breach of the duty in regards to negligence.

Here, Contractor violated statutory standards intended to protect workers from cave-ins. Patricia will argue that the statute was designed to protect against the exact type of harm from which Stephen suffered, which is harm caused by a cave-in. She will also argue that, although Stephen may not have been in the class of persons for which the statute was designed to protect -- i.e., workers -- it was foreseeable that someone other than a worker could have been injured by a cave-in and that the statute should be construed as to protect the general public, as well as workers.

Contractor, on the other hand, will argue that Stephen is not a member of the class designed to be protected, i.e., workers. As such, he will argue that that element of negligence per se is not satisfied.

A court will side with plaintiff and hold that, although Stephen is not a member of the class specifically mentioned in the statute, it is foreseeable that a member of the public could also be hurt by the violation of the statute; and that, as such, the statute should be construed to include members of the public as well as workers.

Actual Cause - In order to prove actual cause, plaintiff must prove that defendant was the "but for" cause of defendant's injuries.

Here, Patricia will argue that but for the fact that Contractor breached his duty to Stephen by violating the statutory standards, the soil would not have caved in around Stephen and he would not have been buried.

A court will agree with Patricia and hold that the Contract is the actual "but for" cause of Stephen's injuries.

Proximate Cause - In order to prove proximate cause, plaintiff must prove that plaintiff's injuries were a foreseeable result of defendant's breach.

Here, Patricia will argue that it was foreseeable that a child might climb into the excavated hole. She will also argue that it is foreseeable that by breaching the standard of care by violating the statutory standards, that the child may be buried in the hole.

Contractor, on the other hand, will argue that it is not foreseeable that a child would climb into an excavated hole at a construction work site; and that, as such, he was not the proximate cause of Stephen's injuries.

A court will side with Patricia and hold that Contractor was the proximate cause of Stephen's injuries.

Damages - In order to prove a prima face case of negligence, the plaintiff must prove that he has damages.

Here, Patricia will argue that Stephen suffered damages because his heart had stopped when he was buried in the hole. In addition, she will argue that he suffered a sprained ankle as a result of the cave-in and broken ribs as a result of the chest compressions applied by Foreman.

Contractor, on the other hand, will argue that the broken ribs were not a direct result of the cave-in, but were an intervening event caused by Foreman. As such, Contractor will argue that he should not be liable for Stephen's broken ribs.

Patricia will counter-argue that it is foreseeable that someone will attempt to rescue a child in distress. As such, she will argue Contractor should be liable for all of Stephen's injuries.

A court will side with Patricia and hold that Contractor is liable for all of Stephen's injuries. As such, Contractor will be held liable for Stephen's economic and non-economic injuries, including physician bills and pain and suffering.

Strict Liability - A person will be held strictly liable when he is involved in an inherently dangerous activity. An activity is inherently dangerous when the risk of danger is great, the activity cannot be done without the risk of danger even with the exercise of due care, and where the activity is not common to the area.

Here, Patricia will argue that excavating is an inherently dangerous activity. She will contend that the risk of danger of cave-ins is great. She will further contend that the activity cannot be done without the risk of danger even with the exercise of due care, because there is always a risk of cave-ins, as evidenced by the fact that a statute was enacted in order to protect workers from cave-ins. She will also argue that excavation is not common to her area.

Contractor, on the other hand, will argue that excavating is not an inherently dangerous activity. He will argue that the risk of cave-ins in fact is not great, and that the activity can be done without the risk of danger when due care is exercised. He will also argue that excavation is common to residential areas when people build additions to their home.

A court will side with contractor and hold that excavation is not an inherently dangerous activity. As such, the court will find that contractor will not be strictly liable.

Vicarious Liability - An employer will be held liable for the torts of its employee under the doctrine of respondeat superior.

Here, assuming Foreman is an employee of Contractor's, and not an independent contractor, Contractor can be held liable for all of the torts of Foreman committed against Stephen.

Conclusion - Patricia can reasonably bring a claim of negligence on Stephen's behalf against Contractor based on negligence per se. In addition, she can bring a claim for negligence against Contractor for the torts of Foreman under the doctrine of respondeat

superior. She may try to bring a claim of strict liability for an inherently dangerous activity, but it most likely will not succeed.

2. PATRICIA V. FOREMAN

Negligence - See rule, above.

Duty - See rule, above.

Here, Foreman had a duty to the public at large to behave as a reasonably prudent person would under the circumstances. As such, Foreman had a duty to Stephen.

A court will agree that Foreman had a duty to Stephen.

Breach - See rule, above.

Here, Patricia will argue that by stepping away from the work site to call his wife, the Contractor breached his duty to the public in general and to Stephen in particular to avoid risk of injury. She will argue that since he knew that the site had failed a safety inspection relating to cave-ins, he should have had someone on duty guarding against someone climbing into the excavated hole when he stepped away to call his wife.

Actual Cause - See rule, above.

Here, Patricia will argue that but for the fact that Foreman stepped away to call his wife, Stephen would not have climbed into the excavated hole and been injured. In addition, she will argue that but for the fact that Foreman applied chest compressions to Stephen, Stephen would not have suffered broken ribs.

The Foreman, on the other hand, will argue that it is not possible to predict whether or not Stephen would have climbed into the excavated hole and been injured if he had not stepped away to call his wife. It is possible that Stephen may have disregarded Foreman's presence, and would have still climbed into the excavated hole and been injured. He will also argue that he was attempting to save Stephen's life, which in fact

he did, which is why he applied chest compressions to Stephen and accidentally broke his ribs.

A court will side with Patricia and hold that Foreman is the actual cause of Stephen's injuries.

Proximate Cause - See rule, above.

Here, Patricia will argue that it was foreseeable that if Foreman stepped away from the excavation site, that a child would climb into the site and be injured.

Foreman, on the other hand, will argue that it is not foreseeable that a child would climb into an excavation site, since children should be monitored by their parents and not be allowed to go near excavation sites.

A court will side with Patricia and hold that Foreman is the proximate cause of Stephen's injuries.

Rescuer - A person has no duty to help out another person, absent a special relationship.

Here, Foreman had no special relationship with Stephen. As such, he had no duty to rescue him. However, since Foreman volunteered to attempt to rescue Stephen, Foreman is responsible for any injuries caused by such rescue in the absence of a Good Samaritan law in the jurisdiction.

Damages - See rule, above.

Here, Stephen suffered when his heart stopped. In addition, he suffered a sprained ankle as a result of the cave-in and broken ribs as a result of the chest compressions.

A court will find that Foreman is liable for all of Stephen's injuries, unless there is a Good Samaritan law enacted in his jurisdiction, in which case Foreman will not be held liable for the broken ribs caused by the chest compressions.

Strict Liability - See rule and analysis, above.

Conclusion - Patricia can reasonably bring a claim on Stephen's behalf against Foreman for negligence. She may try to bring a claim against Foreman for strict liability; however, it most likely will not be successful.

Question 2

Ann was owed \$500 by Victor, a former boyfriend, who refused to pay her. She knew that he kept a large amount of cash at his house. She drove there late one night with a pistol tucked in her waistband to scare him into paying her.

When Ann arrived at Victor's house and rang the bell, he refused to let her in. She went around to the back of the house, broke a window in the back door, and let herself in. She confronted him in the living room and demanded the \$500.

Victor took \$500 from a desk drawer and crossed the room to Ann. But instead of handing her the money, he grabbed the gun from her waistband and pushed her away from him. He pointed the gun at her and said, "I think I will just shoot you and get you out of my hair permanently." He did not intend to shoot her, only to scare her.

Ann was frightened and lunged at Victor's arm. In the ensuing struggle, the gun fired, killing Victor. Ann picked up the \$500 and left. As she was speeding away, she struck and injured a bicyclist.

With what crimes, if any, can Ann reasonably be charged, and what defenses, if any, can she reasonably assert? Discuss.

Answer A to Question 2

(1) For What Crimes Can Ann Reasonably Be Charged

(A) Burglary

Burglary, at common law, required the following elements: (1) a breaking; (2) and entry; (3) of a dwelling; (4) of another; (5) at night; (6) with the intent to commit a felony therein. The elements of breaking and entry was satisfied when Ann broke a window in the back door and entered the building. The building she entered was a dwelling (house) and it was not hers, it was possessed by Victor, therefore satisfying the third and fourth elements. It is stated that this occurred at night, satisfying the fifth element, and so all that is remaining is that she entered to commit a felony, in this case robbery (see below). Therefore, she can reasonably be charged with burglary.

Modern statutory changes to burglary often remove the requirement of breaking, expand the types of buildings that it applies to, and no longer requires that the offense occurs at night. However, since this merely expands potential liability, the fact that all the common law elements are met means that she would still be liable regardless of whether the jurisdiction where this incident occurred had adopted modern changes or not. Burglary is a felony.

(B) Robbery / Attempted Robbery / Aggravated Robbery

Robbery, at common law, required the following elements: (1) obtaining possession; (2) of personal property; (3) by way of intimidation or force; (4) from another's person or presence; (5) with the intent to permanently deprive him of it. Ann obtained possession of \$500 from Victor's home, satisfying the first two elements. While she attempted to use intimidation, she eventually succeeded by way of force, satisfying the third element. Victor was certainly alive at the start of the robbery, and regardless of whether he technically died before or after he died should make little difference because it appears to all have been in a matter of minutes. Considering that he died from her force and she immediately took the \$500, the fourth element should be met. She did not intend to return the \$500, so the prosecution can contend that she intended to permanently

deprive him, therefore meeting the fifth element. Therefore she can reasonably be charged with robbery.

In the event that she claims self-defense with regard to the actual shooting and that she did not use force to obtain the money (and the intimidation did not accomplish obtaining the money either) she could be charged with attempted robbery, because she intended to use intimidation to obtain the money.

Some jurisdictions have the crime of aggravated robbery which includes robbery with a deadly weapon. If this jurisdiction is such, Ann would be charged with aggravated robbery.

(C) First Degree Felony Murder / Homicide

At common law murder is the unlawful killing of a human being with malice aforethought. When a killing occurs during the commission of a felony implied malice will be found and the defendant can be charged with felony murder. One requirement is that the death must be a foreseeable result of the commission of the felony. A death that occurs in the course of a robbery will be found to be foreseeable, especially when the defendant uses a deadly weapon to accomplish the robbery.

At common law there were only a small number of enumerated felonies, any of which could serve for felony murder. Modern jurisdictions have many more felonies than at common law and only certain felonies will result in first-degree felony murder (others will result in second-degree felony murder). Jurisdictions following the Model Penal Code include kidnapping, robbery, burglary, arson, and rape. If the jurisdiction in which this occurred follows modern changes Ann could reasonably be charged with first-degree felony murder. Regardless she can be reasonably charged with murder.

Ann might also be charged with some other form of homicide. She may be charged with murder, depending on who pulled the trigger. It is unclear how the trigger went off in the "ensuing struggle" but if she pulled the trigger she may be charged with murder. Using a

deadly weapon allows a permissive inference of intent to kill (malice aforethought). Even if she did not pull the trigger, she could reasonably be charged with involuntary manslaughter, because she could be found to have caused a death through criminal negligence or recklessness.

(D) Battery

The elements of battery are: (1) the unlawful application of physical force; (2) to another; (3) resulting in harmful or offensive contact. Ann struck a bicyclist while speeding away from Victor's house. It is unclear whether this collision was accidental or intentional. If it was intentional, then all the elements are met--unlawful physical force was applied to the bicyclist resulting in harm while accompanied with the necessary mens rea of general intent. Even if the contact was accidental, it may be found to have been unlawful because Ann was fleeing from the scene of a felony (assuming one was committed) and had not yet reached a place of temporary safety.

(E) Larceny

At common law the elements of larceny are: (1) a taking; (2) and carrying away (asportation); (3) of property; (4) of another; (5) with intent to permanently deprive them of it. Larceny could be charged against Ann in the event that Victor's death prevents the charge of robbery. If robbery cannot be charged, then Ann committed larceny when she took the \$500 from his house and carried it away with the intent to permanently keep it for herself. Even if this property no longer belonged to Victor because he was dead, it did belong to someone else (next of kin) and did not, according to the prosecution, belong to Ann. Note however, that Ann cannot be convicted of both robbery and larceny, as that would be double jeopardy. She can reasonably be charged with both, but the jury can only find her guilty of one at most.

(F) Merger

At common law, misdemeanors committed in the same act as a felony merged into the felony. Depending on how the situation is viewed, it's possible the battery could merge with one of the other felonies. Modern changes no longer follow this rule, so the

jurisdiction that she is charged in will determine how this plays out. However, when a person is convicted of felony murder, the underlying felony merges with the felony murder. Therefore, if Ann is convicted of felony murder, the underlying felony (burglary, robbery) will merge with it and she can only be convicted of the felony murder.

Additionally, a lesser included offense merges with a greater offense. If Ann were convicted of felony murder she could not also be convicted of another form of criminal homicide. If she is convicted of aggravated robbery she cannot also be convicted of robbery.

(2) Ann's Defenses

(A) Defense to Burglary

Ann's best defense to burglary is that she did not intend to commit a felony in the house of Victor. Burglary is a specific intent crime which means that Ann must have held the specific intention to commit a felony in his home when it was combined with her act of breaking and entry. Ann will argue that because the \$500 rightfully was hers, she was not breaking in to commit robbery. Regardless of whether she did or did not commit robbery, she did not believe she was committing robbery, and therefore she did not have the requisite intent when breaking into the house.

(B) Defense to Robbery

Ann's first defense to robbery is similar to her defense for burglary. She will argue that because the \$500 rightfully belonged to her, she had no intention to permanently dispossess Victor of any of his property. This is difficult though, because what she was seeking to reclaim, money, is fungible. She had no way of knowing that the \$500 she took was her \$500. Courts will generally disallow a defense for recovery of fungible items. However, she still will argue that she lacked the intent to permanently deprive him. Because she did not intend to permanently deprive him, she may be able to negate the intent element of robbery.

(C) Defense to First Degree Felony Murder / Homicide

Her best defense to felony murder is that she did not commit the underlying felony of burglary or robbery. With regard to another form of homicide that she could be charged with, her best defense is that she was justified in acting in self-defense. While she was the initial aggressor, she is able to regain her right to self-defense if the other party suddenly escalates the confrontation.

If Victor had pulled out his own gun and she had shot him first, she probably would not be able to claim self-defense. However, because Victor disarmed her and turned her own gun at her while stating an intent to kill her, she was justified in using self-defense. Victor was only allowed to use necessary force in his own self-defense and shooting her once she no longer posed a threat went beyond that. By stating that he was going to shoot her, while having the apparent ability to do so (point the gun), that allowed Ann to regain her right of self-defense and to attempt to take the gun back in order to preserve her own life.

(D) Defense to Battery

Her best defense to battery is that she lacked the necessary intent. Battery requires general intent which is that the actor knew that they were acting in the proscribed way and was aware of all attendant circumstances. She was aware she was speeding, but was probably unaware of the bicyclist until it was too late to avoid her. Speeding could be viewed as negligent or reckless. If it is viewed as recklessness, it must represent a gross deviation of a risk that a similarly situated person would take given the purpose of their conduct. Her purpose--fleeing the scene--would not be an acceptable purpose.

If it is viewed as negligent, it must be criminally negligent which requires a higher degree of fault than criminal negligence. Her ignorance of the risk must have been a gross deviation from what a normal person in her position would realize. Since many people speed, it could be argued that this is not a gross deviation, and fails to rise to the level of criminal negligence or criminal recklessness.

Answer B to Question 2

State v. Ann

Burglary

Under common law, burglary is the breaking and entering of the dwelling house of another in the nighttime with intent to commit a felony or larceny therein.

Here, Ann arrived at Victor's house intending to scare him into paying her \$500. When Victor refused to let her inside the house, she broke a window in the back door and let herself in. This is sufficient to constitute a breaking and entering by Ann. Also, the facts indicate that the home belonged to Victor; therefore, it was the dwelling of another. Additionally, the incident occurred at a time when Ann drove to Victor's house in the nighttime; thus the nighttime requirement is satisfied. Furthermore, prior to Ann arriving at Victor's home, Ann formulated the plan to drive to Victor's house with a pistol in order to scare him into paying her \$500.

However, Ann will argue that because Victor owed her \$500, she was simply trying to recover what was hers to begin with. The State will counter-argue by stating that the particular money that he had inside his house was not the money that he was going to use Ann to pay her back.

Thus, unless Ann can prove that the money was her owned property, then she would be guilty of a burglary.

Under modern law, burglary is the entering of any structure with the intent to commit a felony or larceny therein.

Here, Ann will be found guilty under modern law burglary as discussed above under common law absent any defense such as the \$500 being her actual property.

Thus, Ann will be guilty of burglary under modern law.

Homicide

A homicide is a killing of a human being by another human being

Causation

The State will have to establish that Victor's death was actually and proximately caused by Ann.

Actual Cause

Here, "but-for" Ann lunging towards Victor's arm as he held a gun, the gun would not have fired, killing Victor.

Proximate Cause

Here, the State will show that pistols are intended to be fired using bullets and bullets are intended to strike certain things or persons. Therefore, if Ann struggled with Victor as he held a gun, it was foreseeable that the gun would go off seriously injuring somebody or even killing them.

Thus, Ann was the actual and proximate cause of Victor's death.

Murder

A murder is a the killing of a human being with malice aforethought. Malice aforethought is when the defendant has an endangering state of mind evidenced by one of the following intentions: specific intent, serious bodily harm, depraved heart, or the felony murder rule.

Here, the State will contend because the killing of Victor occurred during the commission of an inherently dangerous crime, burglary, the felony murder rule should be applied to imply malice.

Felony Murder Rule

Under the felony murder rule to apply, the killing of a human being must have occurred during the commission of an inherently dangerous crime such as burglary, arson, rape, robbery, kidnapping, or mayhem.

Here, there was a burglary because Ann broke into Victor's home for the purpose of taking \$500 from him. However, Ann will argue that the \$500 was owed to her; therefore, making it her property. The State will have to prove that the money was not in fact Ann's, but belonged to Victor because it was likely that money Victor had in his possession was not money he was intending to use to pay Ann.

Thus, the felony murder will imply malice.

1st Degree Murder

First-degree murder is the killing of another that is willful, premeditated, and deliberate. Also, the felony murder rule will also make the killing of a human being a murder in the first degree.

Here, with the application of the felony murder rule, the killing of Victor was a killing in the first degree.

Thus, there was a killing in the first degree.

Voluntary Manslaughter

Voluntary manslaughter is the killing of a human being without malice aforethought because of adequate provocation. Adequate provocation is provocation which would cause a reasonable person to lose his normal self-control, causing him to kill another person during an insufficient cooling off period.

Here, there are no facts that would indicate there was adequate provocation to reduce murder to voluntary manslaughter.

Thus, voluntary manslaughter will not apply.

Involuntary Manslaughter

Involuntary manslaughter is the killing of a human being without malice aforethought but because of criminal negligence.

Here, Ann will argue to have murder lessened to involuntary manslaughter because she negligently brought a pistol into Victor's home, which accidentally went off, killing Victor during a struggle.

However, the State will argue that because of the application of the felony murder rule, involuntary manslaughter is not applicable.

Thus, involuntary manslaughter will not apply.

Larceny

Larceny is the trespassory taking and carrying away the personal property of another within intent to permanently deprive the owner thereof.

Here, the State will argue that the \$500 Ann picked up was a trespassory taking of Victor's money. Also, when she left Victor's house with the \$500 it was sufficient to fulfill the carrying away element. Additionally, because the money did in fact belong to Victor because it was in his possession, the \$500 did not belong to Ann, but was the property of another. Furthermore, Ann entered Victor's home for the purpose of taking back \$500 that Victor owed her; therefore, she had intent to permanently deprive Victor of his money.

Thus, Ann is guilty of larceny.

Robbery

A robbery is larceny (Supra) done with force, fear, or intimidation.

Here, because Victor was already dead when Ann actually took possession of Victor's \$500, there was no force, fear, or intimidation at that time.

Thus, Ann is not guilty of robbery.

Battery

A battery is the unlawful application of force.

Here, Ann may be guilty of injuring a bicyclist when she struck him as she sped away from Victor's house. The State will just have to prove that the bicyclist was injured while Ann was driving in an unsafe manner, which caused her to hit bicyclist..

Thus, Ann is guilty for battery.

Ann's Defenses

Self-Defense

Self-defense is when a person may reasonably believes himself to be threatened by imminent bodily harm may use whatever degree of force is apparently necessary to protect himself.

Here, Ann will argue when Victor took Ann's gun from her waistband, pointed it at her, and threatened to shoot her, Ann will state that her actions were necessary to protect herself from death because should reasonably believed that Victor would carry out the act of killing her. However, the State will argue that Victor did not intend to kill her, but to only scare her. Nonetheless, the application of the felony murder rule will not allow a defense of self-defense because Ann killed Victor during the commission of a burglary, which triggered the felony murder rule.

Imperfect Self-Defense

Here, Ann will argue that although her belief to take action when Victor pointed a gun at her may have been unreasonable, she would state this the defense of imperfect self-defense should mitigate her killing of Victor to voluntary manslaughter because she believed her actions were necessary to protect herself.

Thus, imperfect self-defense will fail because of the felony murder rule.

Question 3

Sam decided to sell his interior design business in Town to Betty. While reviewing a purchase agreement drafted by Sam, Betty insisted on a covenant by Sam not to compete with her in the interior design business in Town for a period of two years. In response, Sam drafted the following proposed language on the last page of the purchase agreement:

“Sam hereby agrees that he will not perform interior design services in Town for a period of two years.”

Betty said: “That’s fine. I don’t want to have to compete with your ties to your former clients in Town.” Sam told Betty that he would revise the purchase agreement accordingly.

The following day, Sam sent Betty the original and one copy of the purchase agreement. Betty signed the original without reading it and returned it to Sam along with payment of the purchase price; she kept the copy. Sam never signed the purchase agreement.

Six months later, Betty learned that Sam had recently undertaken four large interior design jobs for clients who lived in Town. When she complained, he explained that, although the clients lived in Town, the jobs were on properties located outside Town. She reviewed her copy of the purchase agreement and discovered that it did not contain a covenant by him not to compete. Sam had mistakenly sent her an unrevised version of the purchase agreement.

1. Does the purchase agreement contain a covenant by Sam not to compete? Discuss.
2. Is the purchase agreement enforceable? Discuss.
3. Assuming the purchase agreement contains a covenant by Sam not to compete and is enforceable, did Sam violate the covenant? Discuss.

Answer A to Question 3

Is the Non-compete clause incorporated into the agreement?

This is a contract for services; therefore the common law applies.

Does a contract exist?

A contract formed through mutual assent supported by consideration.

Mutual assent?

Mutual assent is formed by offer and acceptance

Offer made?

An offer is made by manifesting an intent to be bound to the material terms.

Sam drafted a purchase agreement; this is sufficient to show that he intended to be bound. However the terms were not acceptable as Betty insisted on the inclusion of a new term. Under common law the request for the addition of the term was a rejection.

Sam then sent the proposed language for the non-compete covenant which Betty assented to. Sam then sent a contract to Betty which she signed. This is sufficient to be considered an offer as Sam intended to be bound by the terms of the purchase agreement

Acceptance Made?

Acceptance is manifesting assent to the terms of the offeror communicated in an effective means.

Here it is clear that the offer was communicated in an effective way and that Betty clearly intended to be bound by the contract.

Supported by Consideration?

Consideration is shown by a bargained-for exchange.

In this case Sam was bargaining for money and Betty was bargaining for Sam's business.

This contract is supported by consideration and mutual assent, correspondingly a contract was formed.

Additional term – Non-Compete clause

Generally the offeror is the master of the offer, and in the final contract there was no mention of the non-competite clause. This would seem to indicate that the final contract did not contain the non-competite clause. There was no mention of an integration clause so the court will need to look at the contract to determine if it is a complete integration of the parties' agreement.

Parol Evidence admitted

The parol evidence rule states that not prior or contemporaneous oral agreements could be admitted to vary the terms of a written contract.

In this case the parol evidence rule would bar the admission of the evidence of the if the contract was deemed to be fully integrated.

Full integration?

The contract will be considered partially integrated assuming that the parties would have "normally" have been expected to leave things out.

In this case the non-competite was the essential term that Betty was bargaining for. Because of that it would not normally have been left out. Because of this the court will likely rule that the contract was completely integrated. And it will bar the parol evidence of the compete clause.

Mutual Mistake?

In all contracts there must be a meeting of the minds. If it can be shown that both Betty and Sam intended for the non-compete clause to be in the final draft of the agreement, the court may add that term to do justice using its "blue pencil provision."

In this case clearly Betty believed that the clause was included in the contract as she complained about Sam violating the clause. Sam too believed that the contract contained the clause; he argued the interpretation of the clause, not the clause's existence,

Therefore the purchase agreement will contain a covenant by Sam, not to compete with Betty.

Is the purchase agreement enforceable?

To avoid the enforceability of the validly formed contract a defense would need to exist to its enforcement.

Sam could assert the Statute of Frauds.

Because this contract cannot be completed in 1 year from the time it was made (because it included the non-compete clause) the Statute of frauds would need to apply. The statute can be satisfied by Full or part performance (to the extent of the performance) as well as a signed writing against the party to be charged, or promissory estoppel.

In this case Sam could argue that there is no writing that was signed by him; therefore the agreement cannot be charged against him. However there has been full performance on Betty's and she is able to enforce that contract to the extent she performed. Because she has fully performed, she may fully enforce the contract.

Did Sam Violate the validly formed covenant?

If Sam violated the contract he would be liable to Betty in breach.

Further Examination of Mutual Mistake

Mutual mistake can be used to reform the contract (discussed supra).

In this case the non-compete agreement was placed in the contract by the court according to the mutual mistake. The court can only exercise its blue pencil provision to the extent of the mistake.

Here the merger clause was intended to be included in the contract; however Betty interpreted those terms differently than Sam. During the course of the negotiations Betty expressed that she wanted a non-compete clause in the contract. Sam acquiesced by drafting a clause that Betty agreed with and this agreement was evidenced by the signing of the contract when she thought that the contract contained the clause.

Because of this the clause will be incorporated as it was written, and as Sam did not violate the written clause he will not be liable in Breach.

Answer B to Question 3

Betty v. Sam

1. Is there a covenant?

Controlling Law

The contract is for the sale of an interior design business. Thus, the sale is not for goods and will be governed by common law.

Contract Formation

Preliminary Negotiation

Preliminary Negotiations are invitations to deal.

The facts stipulate that Sam and Betty were reviewing a purchase agreement when Betty wanted a covenant added which included a non-compete clause. The time spent reviewing the agreement and discussions over the purchase of the business would be considered preliminary negotiations.

Offer

An offer is an outward manifestation of present contractual intent containing definite and certain terms communicated to the offeree. Definite and certain terms include quantity, time, interested parties, subject matter, and price.

Betty will argue that when Sam sent Betty the original and one copy of the purchase agreement, he indicated his intent to be bound by the terms of the offer in selling his business to Betty. The offer stipulated Sam would sell his interior design business (quantity of one business and subject matter) to Betty (interested parties) for the contracted purchase price. The facts do not indicate a purchase price but the language

"payment of the purchase price" indicates the price was agreed upon prior to sending the payment. The time can also be inferred by the facts that the offer was sent the next day and Betty signed and returned payment immediately.

The terms are definite and certain. Betty received the offer; thus it was communicated in writing.

There is a valid offer.

Acceptance

Acceptance in an unequivocal assent to the terms of the offer.

The facts stipulate that Betty returned the signed original agreement and returned it to Sam. There are no facts to indicate that she made any changes or additions; thus there was unequivocal assent to the terms of the offer.

Valid acceptance exists.

Consideration

Consideration requires a bargained-for exchange which includes a legal detriment and benefit to both.

The facts stipulate that Sam agreed to sell Betty his interior design business in exchange for Betty's promise to pay Sam.

Betty incurs legal detriment by paying the purchase price and benefit by gaining ownership to the business. Sam incurs legal detriment by giving up ownership of his business and adhering to the non-compete clause. He gains a benefit by getting paid.

Sam's promise to give Betty the business is valid consideration for Betty's promise to pay the purchase price. A valid contract exists.

Covenants

A covenant is a promise to perform under the terms of the contract.

Non-compete Clause

Betty will argue that Sam drafted the proposed language "Sam hereby agrees that he will not perform interior design services in Town for a period of two years" which was an express promise not to compete with her.

Sam will counter that the actual contract does not have the non-compete clause included and Betty's introduction of the evidence is barred by Parol Evidence.

Parol Evidence Rule

Any oral or written agreement made prior to or contemporaneous with the agreement cannot alter the terms of the contract.

Sam will argue that the agreement whereby Sam would include the non-compete language alters the terms of the final contract which was signed because there is nothing in the agreement that says he cannot compete.

Fully Integrated Contract

A contract is fully integrated if it was intended to be the parties' final expression.

Sam will claim that the contract was intended to be the final expression because it was the last step after preliminary negotiations and Betty signed and returned it to him.

Betty will counter that they did not make any expressions that the contract was to be the final statement and there is no merger clause. Thus, the contract is not fully integrated.

Exception: Mutual Mistake

Parol Evidence will be admitted for the purpose of proving a mistake in the contract formation. Mutual mistake occurs when both parties are under a mistaken belief about a material term of the contract.

Betty will argue that Sam mistakenly sent her an unrevised version of the purchase agreement and she did not notice the discrepancy. Further, Betty will argue that both she and Sam agreed to the revision of the agreement prior to final integration, thus it was intended to be included and they both were mistaken as to its location within the contract.

Sam will counter that the mistake of sending the unrevised version was a unilateral mistake on Betty's part because she did not read the contract that he sent her. Thus, the mistake is not a defense.

However, the parol evidence will likely be admitted to show the parties' intent at the time of contract.

Exception: Ambiguity

Parol evidence will be admitted where terms in the agreement can have multiple meanings and the court must determine the meaning of the term at the time of contracting.

Betty will argue that Sam's statement that the jobs he took in town were "were on properties located outside Town" shows the verbiage in the covenant "Sam hereby agrees that he will not perform interior design services in Town for a period of two years" is ambiguous. Betty will claim that she told Sam she didn't want to compete with his "ties to your former clients in town" which referenced the clients, not the location of the service.

Sam will counter that the non-compete clause indicated he could not perform services in town and said nothing about servicing clients who had other properties outside of town as well.

The courts will likely admit Parol Evidence to determine whether the intended agreement was in reference to the clients or the location.

THE AGREEMENT DID CONTAIN A COVENANT.

2. Is the purchase agreement enforceable?

Defense to Contract Formation: Statue of Frauds - Real Property

Contracts for the purchase of real property must be in writing signed by the party to be charged.

Sam will argue that his interior design business was an established business in town. It can be inferred that the business location was real property and Betty agreed to purchase the location in addition to the business. Thus, the contract falls within the Statute.

Sam will continue that he is the person to be charged because Betty is attempting to enforce the contract against him. Moreover, Sam never signed the purchase agreement that Betty mailed to him. Thus, there is no contract.

Sufficient Memo

Betty will counter that she has a copy of the original agreement that Sam mailed to her. In addition, Sam prepared the papers. Thus, it can be inferred that the name of Sam's business was on the agreement and contained all essential terms of the agreement.

Betty's copy will take the contract out of the Statute and it will be enforceable.

3. Did Sam violate the covenant?

The issues here revolve around the Parol Evidence Rule and whether the court will allow evidence to explain the ambiguity. If the Parol Evidence is admitted and Betty's allowed to introduce her statement that she did not want to have to compete with Sam's ties to his former clients, then the term will likely be interpreted to mean clients, not location.

Breach

A breach is an unjust failure to perform which goes to the essence of the contract.

The issue here will be whether Sam's failure to adhere to the non-compete clause is a major or minor breach.

Question 4

Cathy regularly fed neighborhood cats. As a result, she had dozens of cats living around her property. Darla operated a daycare center next door for a number of two-year-olds, including Ethan and Frank. Darla repeatedly asked Cathy not to feed the cats, explaining that they frequently came onto her property, defecated and urinated in a sandbox, and might scratch one of the children. Cathy continued feeding the cats.

Learning that cats are repelled by the smell of ammonia, Darla poured ammonia into the sandbox.

The next day, Ethan was scratched by one of the cats that Cathy fed and sustained a serious injury as a result of an ensuing infection. Frank ate sand while playing in the sandbox and sustained a serious injury as a result of ingesting ammonia.

What is the likely outcome of a negligence claim brought by:

1. Ethan's parents against Cathy, on behalf of Ethan? Discuss.
2. Ethan's parents against Darla, on behalf of Ethan? Discuss.
3. Frank's parents against Cathy, on behalf of Frank? Discuss.
4. Frank's parents against Darla, on behalf of Frank? Discuss.

Answer A to Question 4

I. Ethan's parents v. Cathy?

Negligence?— Negligence is when the defendant fails to conform his or her conduct to the standard of care legally required thereby actually and proximately causing the plaintiff to suffer injuries. Ethan's parents must prove the elements of duty, breach, causation, and damages by a preponderance of the evidence.

Cathy owe a duty to Ethan?— Generally, there is a duty of due care owed to foreseeable plaintiffs within the zone of danger created by the defendant's affirmative conduct.

Cathy fed cats and Ethan was a 2 year-old who went to the daycare that was next door to Cathy's property. First, the danger that feedings cats might result may be argued to be that cats are unsafe animals to be around small children. Second, Ethan's parent's may show that because Darla had told Cathy of the danger presented by bringing around so many cats that she was aware of children next door and should owe a duty to Ethan as a child who stays at Darla's daycare. Since Cathy was told repeatedly that feeding the cats may scratch one of the children, it is likely that Cathy did owe a duty to act reasonably. Lastly, as an adjacent land occupier, there is a duty to act reasonably to protect adjacent properties from activities on land. Therefore, Cathy does owe a duty to Ethan.

Breach?— A breach occurs when the defendant fails to act as a reasonably prudent person under same or similar circumstances.

Here, Cathy continued to feed the cats. Under the Learned Hand Formula, if the burden to avoid creating the risk is less than the probability of harm occurring times the magnitude of injury, then it is said that the defendant may be acting unreasonably. Here, not feeding cats would clearly be a very low burden. Secondly, the magnitude of harm is

that children next door may become scratched by cats or sick from the cats using the sandbox in the daycare. This is a high magnitude of injury created by Cathy. Lastly, the probability that cats may cause harm or illness would also be high because children are prone to disease and especially 2 year-olds would not know how to fend against cat scratches. As a result, it is likely that Cathy breached her duty of due care by continuing to feed the cats.

Actual cause?— Actual cause is when but for the defendant's conduct the harm suffered by the plaintiff would not have occurred.

But for Cathy continuing to feed the cats, Ethan would not have been scratched. Therefore Cathy is clearly the actual cause.

Proximate cause?— Proximate cause is when the harm suffered by the plaintiff is a foreseeable consequence of the defendant's conduct and there are no intervening superseding events to break the chain of causation.

Here, 2 year-olds being around cats presents a high risk that would be foreseeable to cause injury if the two came into contact. In addition, there are no unforeseeable intervening events to break the chain of causation. It is likely that Cathy would be the proximate cause as well.

Damages?— To recover for negligence, the plaintiff must prove actual cognizable injury.

Facts show that Ethan was scratched by one of the cats that Cathy fed and sustained serious injury as a result of an ensuing infection.

Defenses?— There does not seem to be any applicable defenses.

II. Ethan's parents v. Darla?

Negligence?

Land occupier's duty?—Ethan, entering Darla's daycare would be considered an invitee, which is a person who enters with a business purpose. Invitees are owed a reasonable duty of care to warn of natural and artificial conditions, to inspect and repair dangerous conditions, and to come to the aid of an injured invitee. As an invitee, Ethan was owed such duties.

Breach?—The issue here is that Darla would clearly owe a duty, as a daycare operator, to make the premises safe, in that, she must take extra steps to make the premises safe; a mere warning would not be enough. Simply telling Cathy not to feed the cats repeatedly may not have been enough. It may have been unreasonable that Darla did not make some sort of fence to not allow the cats to enter to take other steps necessary to prevent Cathy (maybe a nuisance claim). Therefore, since Darla knew of the danger and failed to protect reasonably, there is a high probability that Darla will be in breach.

Causation—supra. For the same reasons Cathy would be the actual and proximate cause, so will Darla.

Damages—Supra. See discussion under Cathy; Ethan did suffer actual harm.

III. Frank's parents v. Cathy?

Negligence?—The discussion for duty and breach would be the same for Frank as it was for Ethan. The issue here is whether Cathy was the actual and proximate cause of Frank's injury.

Actual cause—(Defined supra) Here, if Cathy had not breached her duty to feed the cats, then Darla would not have poured ammonia into the sandbox. There was a direct

link to show that Cathy is the actual cause because it was the nuisance of the cats entering the property that Darla was trying to prevent. Therefore, even if Cathy is not the only actual cause, she is certainly a substantial factor when combined with Darla's conduct in bringing about Frank's harm.

Proximate cause— (defined supra) Here, there are some larger issues to deal with, in that, Cathy feedings cats may not have caused a situation where it would have been foreseeable that Frank ate ammonia.

Does Darla's conduct cut off liability?— An intervening act is usually not something that breaks the chain of causation unless it is shown that the act of a third person was unforeseeable. The key here is for Frank's parent's to show that it was foreseeable that being told of the cats and the danger to the children next door, that Darla may take precautions to prevent the cats from entering the sandbox. However, Cathy will assert that using ammonia was not a precaution that was foreseeable because there are other ways to prevent cats from entering one's property. In addition, Darla used a chemical that may present a clear danger to children, and that in itself was unforeseeable because Darla is a daycare operator and should have known better. As a result, it is more likely than not that Darla's conduct was a superseding event that broke the chain of causation. Furthermore, the type of harm suffered by Frank was not within the scope created by feedings cats because Frank was injured from ingesting ammonia, which is not a risk that being around cats creates. Cathy will not be the proximate cause.

Damages— assuming Cathy is negligent, Frank's parent would recover because Frank was seriously injured from ingesting ammonia.

Is Contributory/ Comparative negligence applicable here?— If a plaintiff fails to act as a reasonable person in protecting him or herself from defendant's conduct, then under contributory negligence jurisdictions the plaintiff will be barred from recovery. Under comparative negligence jurisdictions, the plaintiff's unreasonableness only reduces recovery in proportion to his or her own fault. (In pure comparative negligence

jurisdictions, any proportion not attributable to the plaintiff may be reduced; however, if the jurisdiction follows the modified comparative jurisdiction, then if the plaintiff's fault is 50% or more, then the plaintiff will be barred from recovery).

Here, Frank is a 2 year-old and will be held to the standard of care to a reasonable child with similar age, experience, and intelligence. Since the standard is for such a young age, it is foreseeable that a 2 year-old might eat sand. Therefore, it would be unlikely that Frank's parents' recovery would be barred or reduced depending on the jurisdiction.

IV. Frank's parents against Darla, on behalf of Frank?

Strict liability of abnormally dangerous activity?— A defendant who engages in an abnormally dangerous activity will be strictly liable for harm suffered by foreseeable plaintiffs. An abnormally dangerous activity is one that the risk of cannot be eliminated by due care and is one that poses a high risk of danger to humans.

Here, putting ammonia in a sandbox may be argued by Frank's parents to be an abnormally dangerous activity because placing harsh chemicals in a sandbox that children play in presents a very high risk of harm to children. Second, placing ammonia in a sandbox in a daycare center is something that usually does not take place in such a manner. Third, Frank's parents will argue that no matter how careful or reasonable Darla was in placing the chemical there, the danger it presented to children could not be eliminated by due care. Furthermore, Frank's parents would have to prove actual and proximate cause.

Actual cause— (supra defined)— But for the ammonia Frank would not have been injured.

Proximate cause— (supra defined)— Usually, a sandbox in a daycare center means that it is highly foreseeable that children will play in the sandbox. Darla, by placing the ammonia in the sandbox created exactly such a risk that caused Frank to suffer harm. It

was clearly foreseeable that Frank may come into contact with the ammonia. Therefore, Darla may be the proximate cause.

Damages— Supra. Frank suffered serious injury.

Defenses— For abnormally dangerous activities, contributory negligence is not followed; however, in most jurisdictions, comparative fault is. Nevertheless, because of Frank's age, 2, it is likely that his fault will not be a consideration for this suit.

Negligence— for the same reasons Darla would owe a duty to Ethan, she would also owe a duty to Frank because Frank was an invitee too.

Breach— Although Darla will assert that she was trying to get rid of the dangerous condition of having cats enter the sandbox to defecate and urinate was reasonable to protect the children from cat scratches, there is also ample room for Frank's parents to assert that the resulting consequence was more harmful than what she was trying to prevent. It was almost certain that children would come into contact with the ammonia because the children play in the sandbox; however, on the other hand, it was not certain that children would get scratched by cats. As a result, it is likely that Darla's conduct does amount to a breach.

Actual cause—supra. Clearly, if Darla had not poured ammonia in the sand, Frank would not have sustained serious injuries as a result of ingesting the ammonia.

Proximate cause— supra. It would be foreseeable that children may come into contact with the sand and suffer harm. There was no intervening events that would break the chain of causation.

Damages— Supra. Frank suffered serious injury and Frank's parents will be able to recover if it is shown that Darla was negligent.

Contributory/Comparative fault— supra. For the same reasons Frank is probably not unreasonable because of his age and the applicable child standard of care, it will be likely that eating the sand, although very unreasonable for an adult, may not be unreasonable for a child of 2 years of age.

Answer B to Question 4

Ethan v. Cathy

What is the likely outcome of a negligence claim brought by Ethan (through his parents) against Cathy? In order to be liable for negligence, it must be shown that Cathy breached a duty owed to Ethan and that breach caused Ethan harm.

1. Duty and Breach. At a minimum, Cathy will owe Ethan the general duty care, which is to act as the reasonably prudent person in same or similar circumstances. It may be reasonable that a person would feel sympathetic toward stray animals and want to feed them. However, Cathy was aware that a daycare facility was operated next door. She was further advised that the cats were entering the daycare property and using the sandbox as a litter box. Finally, Darla expressed concerns that one of the children might become injured. Continuing to feed the cats would obviously encourage the animals to continue to hang around and present a nuisance and potential risk to the children. Additionally, Cathy could have called an animal shelter to take in the animals or sought suitable owners for them who might be willing to take and care for a stray cat. It appears she did nothing to help improve the situation. Thus, Cathy continuing to feed the cats under these circumstances is probably not reasonable and constitutes a breach of the duty owed.

2. Causation. In order for causation to be satisfied, both actual and proximate cause must exist. Actual cause will be satisfied if but for the defendant's conduct, the harm would not have occurred. But for Cathy continuing to feed the cats, the cats would not have been hanging around and Ethan would not have been scratched. Therefore, actual cause is present here.

In order for proximate cause to be satisfied, the harm caused must be foreseeable. The cats may not be domesticated; they are strays. Even domesticated cats can scratch, but if these cats are feral they may be even more inclined to do so. Additionally, Darla made

clear that the cats were coming onto her property and particularly raised concerns that the children could get scratched. Thus, the type of harm caused was foreseeable, and proximate cause is met here.

3. Damages. In order for a cause of action for negligence to be successful, the plaintiff must have suffered damage. Here, Ethan was scratched and suffered an infection, so he was damaged.

4. Defenses. Can Cathy raise a defense of assumption of the risk? In order for this defense to be successful, Ethan would have had to have known and appreciated the risk involved in order to assume it. Ethan is only 2 years old, so he probably thinks the cat is a harmless furry friend. Further, there is no indication that Ethan's parents were made aware of the cat problem so that they could have assumed the risk of continuing to bring Ethan to the daycare. Therefore, assumption of risk is not likely to hold here.

Based on the discussion above, Cathy is liable to Ethan for negligence.

Ethan v. Darla

What is the likely outcome of a negligence claim brought by Ethan against Darla?

1. Duty and Breach. Because Darla is a land occupier, a special duty will apply as to invitees. An invitee is a person who is on the property of a land occupier with consent and is there to confer an economic benefit upon the land occupier or the land is held open to the public at large. Both apply here: Ethan is present on the property as a patron of the daycare services, and daycare centers are open to the public. Therefore, Ethan is an invitee.

In the case of invitees, a land occupier has a duty to make the premises safe, including taking affirmative steps to find problems that pose a risk and to remedy those problems. Darla was aware of the cat problem and that it posed a risk to the children's safety.

Because Darla's requests were 'repeated' and given the number of cats that had congregated around Cathy's home, it can be assumed the problem has existed for some time. Darla attempted to persuade Cathy to stop feeding the cats so that the cats would stop entering the daycare property. When Cathy failed to comply with Darla's requests, Darla tried to fix the issue by deterring the cats with a smell they did not like. This may not have been enough, as Darla could have called an animal shelter to come take the cats or erecting barriers that would prevent the animals from entering the property. However, it is probably sufficient to show that she was trying to make the property safe. Therefore, there will not be a breach of duty with respect to Ethan.

2. Causation. Rather than the but-for test, it may be more appropriate in this lawsuit to use the substantial factor test here to show actual causation. Under this test, the defendant's conduct will be the actual cause of the plaintiff's harm if the defendant's conduct was a substantial factor that materially contributed to the plaintiff's harm. If it is found that Darla should have done more to ensure that her property was safe as to invitees, her conduct will be factored in Ethan's harm. However, the real origin of the problems lies with Cathy feeding the cats; this is probably a greater factor in what has caused the danger to exist. Therefore, actual cause would be difficult to meet here.

Proximate cause is met, because getting scratched by a stray cat is foreseeable.

In this instance, causation would not be met.

3. Damages. Damages exist because Ethan was scratched and had an infection.

4. Defenses. If Ethan were able to make the prima facie case for negligence, Darla would probably not have any defenses.

Based on the discussion above, Darla would not be liable to Ethan for negligence.

Frank v. Cathy

What is the likely outcome of a negligence claim brought by Frank against Cathy?

1. Duty and Breach. The duty Cathy owes to Frank is the same as she owes to Ethan, discussed above. Cathy breached this duty as to Frank in the same manner as she did for Ethan, discussed above.

2. Causation. But for Cathy's conduct, cats would not have been on the property, and Frank would not have been injured. Actual cause is met here.

However, while children eating sand (whether deliberately or inadvertently while playing around in the sandbox) is foreseeable, ingesting ammonia is not a foreseeable harm from having cats on the property. Additionally, when there is an intervening act that is highly improbable and extraordinary, it will cut off the defendant's liability. It is highly improbable that a daycare operator would pour a seriously toxic chemical into the children's sandbox, knowing that it may come into contact with the children's skin or that it may be ingested. Therefore, Darla's act in pouring the ammonia into the sandbox is a superseding, intervening event which cuts off any liability on the part of Cathy for Frank's injuries.

3. Damages. Frank was damaged when he ingested the ammonia tainted sand and sustained serious injury.

4. Defenses. If Frank were able to make out his prima facie case, Cathy would not have any defenses.

Based on the discussion above, Cathy will not be liable to Frank for negligence.

Frank v. Darla

What is the likely outcome of a negligence claim brought by Frank against Darla?

1. Duty and Breach. The duty owed to Frank by Darla will be the same land occupier duty as Darla owes to Ethan. In this lawsuit, Darla was attempting to better the situation with the cats, but she chose a method that actually posed considerable risk to the children's safety. In doing so, she made the premises unsafe, and, thus, breached the duty owed to Frank.

2. Causation. But for Darla pouring ammonia into the sandbox, Frank would not have ingested it and become injured.

4. Damages. Frank was damaged when he suffered serious injury.

5. Defenses. If Frank is able to make his prima facie case for negligence, Darla will have no defenses.

Based on the discussion above, Darla is liable for negligence.