



# **JULY 2015 EXAMINATION ANSWERS**

**APPLICANTS' ANSWERS TO QUESTIONS  
NEVADA BOARD OF BAR EXAMINERS**



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**- EXAM 1, QUESTION 1 -**

1)

Did Doug commit a Robbery?

Doug (D) likely committed robbery when he threw the bottle at Steve while he was escaping. Robbery is the unlawful taking and carrying away of personal property of another, by force or threat of force, in the victim's presence, with the intent to permintaley deprive the victim of possession. Robbery is a specific intent crime, which requires the defendant to have the specific intent to take the person's property and the intent to permately deprive them of their property. The person must have the intent to permately deprive them at the moment they take the property.

In this case, D physcially took the bottles from the bar when he when behind the bar and helped himself to the two bottles. At this time, D had the intent to permantly deprive the casino of its alcohol by drinking the bottles himself. D did not have the right to take take the bottles as he did not pay for the bottles and he was not allowed to be behind the bar, therefore the taking was unlawful. While the enital taking did not happen in the presense of an employee, D did take the bottles out of the hotel in the presense of Steve. Steve was an employee of the casino and thus Steve had an interest in the property and the taking would be considered to take place in the victim's presence. D used force when he threw the bottle at Steve and hit him while he was escaping. Since force was used to escape while taking property, the element of force woudl be present. Since D's actions were unlawful, he took the property of

another, he used force when he threw the bottle at Steve while he was escaping, he did so in the presence of another, and he sought to permanently deprive the owner, D had committed robbery.

D may argue that he did not use force at the time of the taking and that there was no bartender present when the taking occurred, therefore he did not commit robbery.

While these are true at the time of the taking of the property, the robbery would be considered to continue until D had left the property. Also, D seeing the event on camera 30 minutes after it took place would not be considered in the presence of another, however, as stated above, the robbery continued until D had escaped and left the property. Since D used force and tried to escape in the presence of Steve, this would all satisfy robbery.

Did Doug Commit a Robbery if One of the Customers at the bar had tried to Stop Doug

D would not have committed robbery if another customer at the bar had tried to stop him and he used force to get away. The force or threat of force of a robbery must be against the owner of the property. The force or threat of force that is used is an attempt to have the owner of the property give you the property. In this case, the customer does not have an interest in the bottle, he would just be acting as a good citizen. The force that D would be using would not be an attempt to gain possession to the property, but would be used only to escape. Because a customer does not own

the bottle or have an interest in the bottle, using force against that person would not constitute a robbery.

#### Did Doug Commit a Robbery if a Bartender had been Present

If D used force to get away from a bartender who was present and tried to stop D, this would also be a robbery. This would be a robbery for the same reason there was a robbery against Steve. A bartender is an employee and an employee has an ownership interest, if only temporary, in the property of his employer. The employee is responsible for the well being of the employer's property. Because an employee has an interest in the property, he is responsible for making sure that the property is not stolen.

In this case, the bartender has an interest in the bottles behind the bar that he is responsible for selling and making sure do not get stolen or damaged. Because the employee has an interest in the bottles, D taking the bottles in his presence with force would be a robbery. As stated above, force can be used to gain possession, which includes escaping. Because the bartender has an interest in the bottles, D took the bottles in his presence with force, and he sought to permanently deprive the owner, this would be a robbery and D would be found guilty.

#### Other Felonies

## Battery

D likely committed battery against Steve when he threw the bottle at him while escaping. Battery is the unlawful harmful or offensive touching of another without consent. Battery is a general intent crime, meaning that the defendant can have a reckless mind state and still be guilty. For battery, a person need only consciously disregard a risk with his actions to be guilty for battery. A touching occurs when defendant touches the victim with his person or when the defendant causes an object to touch the victim's person.

In this case, D threw a bottle at Steve while he was escaping and the bottle hit Steve. D was reckless when he threw the bottle at Steve as it was likely that throwing something in the direction of another would cause that thing to hit the person. In this case, the bottle did hit Steve and while it does not state whether the bottle caused injuries that would not matter. In order for a touching to be harmful, injuries are not required as a bruise or pain would be enough. However, being hit with a bottle would be offensive to any reasonable person, therefore, there was a battery in this case even without harm. Assault is a specific intent crime which requires the defendant to have the intent to cause reasonable fear in the victim with his actions.

## Assault

D would be guilty of assault when he swung the bottle at the officer. A person is

guilty of assault when the defendant places the victim in reasonable apprehension or fear that a battery is imminent. The action by the defendant must be an action that would place a reasonable person in fear that a battery is imminent. There must be some action for a battery by the defendant as mere words alone are not sufficient.

In this case, D swung a bottle at the officer, just missing him, thus this would likely be assault. Hitting someone with a bottle, as noted above, would be a battery. Here, while D missed, the officer likely saw the bottle coming at him, thus there was reasonable apprehension of a battery. Finally, D had the specific intent to commit assault as he purposeful swung the bottle at the officer. Therefore, D has committed assault.

D may argue that he did not have the intent since he was drunk. Voluntary intoxication is a defense to a specific intent crimes. The defendant must be so intoxicated that he has no recollection or memory over what he has done.

In this case, while D was drunk it seems he had recollection of what he was doing. Assault is a specific intent crime, however, D had given the officer reasons for why he stole the bottle while he was in the car. This would show that D had recollection of his action. Since D was not so intoxicated to not form the intent for the crime, he could not use voluntary intoxication as a defense to the crime and he would be guilty of assault.

## Larceny

D is likely guilty of larceny for taking the bottles from the casino. Larceny is the trespassory taking and carrying away of personal property of another with the intent to permanently deprive. The defendant must have the intent to permanently deprive at the time of the taking. A taking is the slightest movement of property that does not belong to the defendant and to which he has no right to possess.

In this case, as soon as D picked up the bottles from behind the bar he had taken the property and carried it away. D had the intent to permanently deprive the casino because he was going to drink the bottles and not return the contents, at least in a matter the casino wanted the contents returned. Therefore, D has committed larceny. D would be charged with larceny even if he is found guilty of robbery. Since there are different elements to robbery and larceny, mainly the threat or use of force, the crimes are different and they do not merge.

## Burglary

D would likely not be guilty for burglary. Burglary is the unlawful entering of a protective structure of another with the intent to commit a felony or other crime, such as petit larceny, therein. A person is generally not liable for entering a protective structure of another if the structure is a commercial building. However, if the person has committed larceny or other felonies in the past 7 years in Nevada, he will be



found guilty of burglary in such a case.

In this case, the casino is a commercial building and there are no facts as to whether D had committed any burglary or felonies in the past, therefore, it is unclear whether he would be found guilty of burglary. Even if he had committed a burglary or other felony in the past 7 years, D did not enter the building with the intent to commit a crime. The facts stated that he was in the casino before hand and he only stole the bottles when he ran out of money. Therefore, at the time of entering of the casino, D did not have the intent to commit the crime.

Bar Would be empty

The fact that D knew the bar would be empty goes to the intent that he was going to commit robbery or larceny by making sure no one saw him take the bottles.

Did the Trial Judge Err

The judge likely erred when he admitted the statements of D because the statements were likely not given before Miranda warnings. The Fifth amendment to the U.S. Constitution protects the people from making incriminating statements to the police. If a person is subject to custodial interrogations, the person must be given Miranda warnings. A person is subject to custodial interrogations when he is in custody, which occurs when a reasonable person would not feel free to leave, and subject to

interrogations, which occurs when the police ask question that are likely to give an incriminating response by the defendant. A person may waive their Marianda rights, however, the waiver must be made knowingly and volutnary, which requiries that he perosn be given his rights.

In this case, the facts do not state whether the officer gave D his Miranda warnings. Assuming he did not, D's statements should not have been admitted. D was in coustody because he was arrested and was in the back of the cop car. A reasonable perosn would not feel free to leave in such a situation. The quesiton by the officer "Dude, what were you thinking," woudl be considered interrogaiton. While the statement might have been conversatinal with the statement "dude" the officer was asking him about a crime that just happened. The officer would know that any answer would be an incriminating one. Therefore, without a Miranda warning, D would not know of his rights not to answer the quesiton if he does not want to, and the statement was illegally obtained.

Since it was illegal, the court should have not allowed the statement to come in, unless for impeachment purposes. Since D did not take the stand, he could not be impeached, therefore, the statements should not have been amitted.

Doug's Drinking

D's attorney would want the jury to know about D's drinking because this woudl be a

defense to the crime of robbery. As noted above, robbery is a specific intent crime which requires the defendant to have the intent to commit the robbery and permanently take the property of another. Voluntary intoxication is a defense to a specific intent crime as a person would not be able to form the intent to commit the crime if he is too drunk. If D's attorney could prove that D was so drunk that he could not form the intent to commit the crime, the state could not meet the intent element and he would be found not guilty of robbery.

However, for the same reason that he could be found guilty for assault even though drunk, D would be found guilty of robbery even though he was drunk. D knew what he had done by his statement to the cops. D stated that he took the bottle because he did not have any more money. Also, D was staking the place out, which shows that he knew what he was doing. Therefore, while drunk, D is still guilty of robbery.

**END OF EXAM**



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**- EXAM 1, QUESTION 2 -**

2)

All of the disputes here arise out of contract law. Contract law is governed by either the UCC or common law. The UCC governs goods and has special rules for merchants. All other contracts are under the common law. If UCC and common law are both at issue and the contract is not divisible, the most relevant law controls. Here, a scholarship is not related to goods, and therefore all of the contracts are governed by the common law.

A contract requires offer, acceptance, and consideration. An offer is a manifestation of present intent to enter into a contract with another. Acceptance requires unambiguous assent to the terms. Consideration must be a bargained for exchange of legal value or detriment. Under the common law, the mirror image rule applies. Any offer must precisely mirror the acceptance. With these principles in mind, we turn to the four scholarship offers.

#### Abby v. CNU

Central Nevada University (CNU) made a written offer of a "four year, full ride scholarship" to CNU. As discussed above, the mirror image rule requires acceptance mirror the offer. The question here is whether Abbey's statement that "she wanted to accept, but the scholarship must include the cost of books", acted as counter-offer and rejection of the original offer. Acceptance to an offer must be unambiguous. Under the common law, mere inquiries into the terms do not act as a rejection,

however required conditional, new terms may act as a counter-offer and rejection. Abbey's statement likely acted as a rejection. However, At the scholarship ceremony, the President mentions that Abbey's tuition, fees, room and board" would be paid for as long as she maintains a 3.0 GPA. This likely acted as a new offer, which abbey did not originally accept. If a contract does not specify timing of acceptance, the offeree has a reasonable time to do so.

A week after the ceremony, Abbey was informed that the cost of books would be added to her scholarship. Abbey replied "i'll be there this fall". Acceptance must be unambiguous, as stated prior. However, the phrase "ill be there this fall" should be reasonably interpreted to be an unambiguous acceptance because a party would not reasonably choose to attend a school and not accept a scholarship. At issue is whether Abby's scholarship satisfies the statute of frauds.

#### Statute of frauds

The statute of frauds requires that any contract relating to marriage, contracts over a year, for the sale of land, executory interests, goods over 500 dollars and sureties be in writing, with the material terms of the contract, signed by the party to be charged. Here, a scholarship for four years is over one year, and must satisfy the statute of frauds. Emails can satisfy the writing requirement. Abbey will argue that the oral offer at the scholarship ceremony was a new offer, including tution, fees, room, and board". The email referenced the scholarship by mentioning that the "books will be added to the contract". Abbey's acceptance of the scholarship as orally stated in the

ceremony, and reduced to writing by the email with the additional terms, created a valid offer and acceptance. In this case, the signature of the party to be charged could be satisfied by an official insignia or notation within the email.

## Breach of contract and interpreting terms

### Terms

Abbey will argue that CNU breached the contract by later refusing to include room and board. CNU asserts the terms are not included specifically in the scholarship. The parol evidence rule generally bars the introduction of evidence of prior and contemporaneous statements related to the formation of the contract if a contract is fully integrated, as it is assumed they have been integrated into the contract. The original written agreement, if it is considered to be incorporated into the contract, stated the scholarship was for a "full ride". Courts may allow extrinsic evidence to clarify an ambiguous term. Abbey will argue the meaning of full ride includes room and board. The university will counter that it does not, and the email does not reference them specifically. However, Abbey may be able to introduce evidence of the statement made at the scholarship ceremony that "Abbey's tuition, fees, and room and board" will be paid for provided she maintains a 3.0 GPA. This was arguably reduced to writing in the email CNU wrote also including books by incorporation.

### Detrimental reliance as consideration

Abbey will sue for the terms of the contract to be enforced, including the room

and board. Abbey will likely prevail, as the court will interpret the scholarship to include the items promised at the ceremony as well as the email. CNU may attempt to argue there is no contract due to lack of consideration, as the scholarship was merely gratuitous and Abbey provided no consideration. Abbey will argue that she detrimentally relied on the promise of the scholarship by substantially changing her position when she committed to attend CNU and arrived there to attend. The court will find it equitable to enforce the scholarship as a contract providing room, board, books, tuition and fees.

#### Buffy v. CNU

As discussed above, a contract that cannot be completed in less than a year must be in writing, signed by the party to be charged. Here, Buffy received a written offer to attend CNU for tuition and fees for four years provided she uses her best efforts to participate as a member of the fencing team and maintain a 3.0 GPA. Here, Buffy unambiguously accepted the offer by signing the letter at the scholarship ceremony. CNU is attempting to rescind the contract. For a contract under the common law, adequate performance requires a party substantially perform the material provisions of the contract. Here, the contract asked Buffy to give her best efforts on the fencing team and maintain a 3.0 GPA.

Buffy will argue that she has been substantially performing the contract in good faith. She was injured seriously, keeping her from competing, but she is diligently



participating in physical therapy and keeping in contact with her fencing coach. This is an indication that she is giving her best efforts. CNU will argue that her inability to be on the team due to injury has frustrated the purpose of the contract, and as such, the contract should be voided. Buffy will counter that the contract merely required she gives her best efforts to participate as a member of the team. By committing to physical therapy and keeping in contact with the coach, she is likely giving her best efforts to participate on the team and the scholarship will be enforced, assuming she is also maintaining a GPA of 3.0 or higher.

#### Cam v. CNU

Cam properly accepted the offer at the graduation ceremony. The question here is whether his scholarship can be properly rescinded. The school will argue Cam's acceptance was predicated on a mutual or unilateral mistake by virtue the error in the test score that got him into the school with the scholarship. A mutual mistake is grounds for rescission of a contract if the mistake goes to the heart of the contract. Here, a scholarship based on a test score deemed to be incorrect later presumably goes to the heart of the contract. The university may also assert that if not a mutual mistake, it was a lateral mistake. A lateral mistake makes an offer voidable if one party knew or should have known of a mistake. Here, Cam was shocked by his test score, as was everybody. If a reasonable person would have known the test score could not have been correct, it would be adequate grounds to void the contract. Cam could also argue that CNU should have had notice of his test score, as they received the information prior to the scholarship, and thus are estopped from rescinding it.

Regardless of the outcome, Cam is not entitled to any further scholarship, as he breached the terms by having a 2.75 GPA. If the court determines there was no meeting of the minds and thus no contract, the court may assume a quasi-contract to require Cam to reimburse the school for unjust enrichment. This is unlikely, unless Cam should have reasonably known of the mistake in his score to begin with.

#### Derek v. CNU

Derek similarly signed the offer at the scholarship ceremony, offering to pay his tuition, so long as he maintain a 3.0 GPA and pursue a music major. Derek decided to change his major to change his major to environmental science and vows to never play music. The express terms of the contract require he be a music major, and that is likely predicated on the fact that he was a talented musician. A court will find that Derek materially breached the contract and thus the scholarship is unenforceable. CNU may also argue that the contract is void because Derek has not reached the age of majority. This argument will fail because, while minors can disaffirm contracts up until a reasonable time after they reach the age of majority, they are only voidable at the option of the minor. Because Derek is seeking to enforce, not void the contract, this argument will not prevail. Either way, Derek is in material breach of the contract and will be unlikely to enforce the contract or recover.

**END OF EXAM**



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**- EXAM 1, QUESTION 3 -**

3)

### Joint Representation in a Criminal Case

A lawyer may not jointly represent co-defendants in a criminal case because the potential for diverging defenses is great. A lawyer may not try to represent two clients when the representation could substantially impair his professional judgment. If the attorney believes that he can adequately represent both clients, he must obtain their informed consent-- after explaining the potential for conflicts and the lack of confidentiality and the inapplicability of the attorney-client privilege as between them-- in writing. Here, Abraham ("A") cannot represent Beverly ("B") and Claude ("C") because their defenses to the crime are likely to raise issues for the other defendant. The reasonable lawyer in A's place would not undertake this representation. A has a conflict of interest and should not represent both of them. Since they have jointly consulted him already, he may only continue to represent one defendant with the informed consent of the other defendant.

A could be subject to discipline for attempting to represent clients who very likely have a serious concurrent conflict of interest.

### Claim to Be an Expert

A lawyer may not claim to be an expert or a specialist in any field unless he is certified as an specialist by an ABA or Nevada-approved orgnaization, and the organization must be identified in the document. Furthermore, a specialist must

dedicate at least 1/3 of his practice to the area of specialty, dedicate 10 CLE hours to it, maintain \$500,000 in professional malpractice (unless exclusively in public law), and comply with annual reporting requirements. Here, A did not identify the organization that certified him as an "expert," or provide any way for the clients or Nevada to verify this claim. Without more information about A's practice, it is unclear whether A could even claim to be a specialist in criminal law.

Furthermore, a lawyer may not make false or misleading statements, including those that set an unreasonable expectation of success. A's claim to be a "criminal defense" expert is misleading because it could be relied upon by B and C when it cannot be verified. B and C may feel that hiring an expert for a misdemeanor will make it easy for them to escape conviction. That belief is not true.

A is probably subject to discipline for this claim.

#### Reasonable Fee

A lawyer may only charge a reasonable fee under all of the circumstances. To set this fee, the lawyer should consider: the complexity of the case, his own skill and experience, his caseload, the urgency of the case, and other relevant circumstances. While many of these facts are not given for A, charging \$100,000 with \$20,000 bonus for a not guilty is probably unreasonable. This is a misdemeanor offense. It carries a very small penalty for conviction. A will probably not spend too much time on this case and is-- admittedly-- very busy with other cases. Without some showing that

this case is different from another petit larceny case, this fee is unreasonable.

Furthermore, charging \$100,000 while excluding post-trial work (as paragraph 9 does) makes this case even easier.

Contingency fees, those dependent on the outcome of the case, may not be charged in criminal cases. The bonus is a contingency fee under another name because it is only "earned" if B and C are not guilty. It is contingent upon the outcome. The bonus is also unreasonable because the lawyer is not being paid for his work but for the result obtained. The reasonable factors all relate to the work or the attorney-client relationship; not the result. A should be certain that B and C are informed that he cannot promise any result and A should be scrupulous about avoiding anything near a pledge, promise, or warranty.

A is subject to discipline for this practice.

#### Fee Sharing with Richard

A lawyer may not share fees with non-lawyers, though they may pay their employees' wages. Richard is not A's employee; he is A's partner. A lawyer may not partner with a non-lawyer in the provision of legal services. If A had hired Richard on B and C's behalf and B and C had agreed that the cost of Richard's work as a private investigator for the defense would pass through A, that could be permitted. But A cannot split fees with Richard or partner with him.

If Richard is an attorney, then they could share fees if the split is disclosed to B and C and they give informed consent in writing. The amount of the fee does not need to be proportional to the work done by these two lawyers.

A may be subject to discipline for this practice.

#### Unauthorized Practice of Law

If Richard is not a lawyer, he cannot engage in the unauthorized practice of law by negotiating a plea deal for B and C. As a lawyer, A cannot authorize or ratify or assist Richard in the unauthorized practice of law. Thus, the fee agreement may not authorize Richard to do these things. A must negotiate for B and C as their lawyer.

A may be subject to discipline if he allows Richard to act this way.

#### Scope of Representation and Settlement Authority

A lawyer must counsel with his clients about settlement offers and abide by the client's decision on settlement offers. This fee agreement allows Richard to settle the case without speaking to A, B, or C. That is inappropriate even if Richard is an attorney associated with A. The client must decide when or if to settle.

A may be subject to discipline if he allows Richard to act this way.

#### Conflict of Interest and Prospective Acquisition of Media Rights

A lawyer may not acquire an interest in the litigation because that may influence how the case proceeds to the detriment of the client. Specifically, lawyers may not take a literary or media right in litigation until it has concluded. This provision is inappropriate.

A will be subject to discipline.

#### Conflict of Interest and Prospective Waiver of Malpractice

A lawyer cannot prospectively ask his clients to waive malpractice claims against the lawyer unless the client is represented by independent counsel. A tried to have B and C waive a malpractice claim. They are not independently represented and A has not informed them of the likely or probable claims. Thus, this provision is improper.

A will be subject to discipline.

#### Duty to Communicate with Clients

A lawyer must communicate with clients to keep them reasonably informed about the status of their case and timely respond to reasonable requests for information. A wants the clients to only speak to his secretary and does not plan on updating them.

If he follows this practice, he will be subject to discipline.

#### Withdrawal



A lawyer must withdraw when a conflict of interest arises, but can only withdraw with court permission for cause. A lawyer has a duty to competently and diligently represent his client. Here, A wants the right to withdraw whenever he decides to do so.

This would subject A to discipline.

#### Formation of the Attorney-Client Relationship

An attorney-client relationship is formed when a prospective client consults with a lawyer and the lawyer either accepts representation or fails to make it clear that he is declining representation. It appears that B and C have consulted with A because they have met with him and discussed their case with him. If B and C sign this fee agreement, A has not indicated that he will not be their attorney. Therefore, an attorney-client relationship exists as soon as B and C sign the agreement. A should inform A and B of this fact.

#### Sample Requirements

When a Nevada lawyer presents a sample fee agreement to the prospective client, it must include the word "SAMPLE" on every page and "DO NOT SIGN" on the signature line for the client. Since the clients were "presented" with this fee agreement, but may sign it and digitally return it, it is unclear under what conditions A sent this to B and C.

If it is a sample fee agreement, it should be labelled correctly. Otherwise, A is subject to discipline.

#### Limitation of Representation

A lawyer may communicate when his representation is expected to end. Here, A has unequivocally limited the representation to exclude certain activities. If the clients have this limitation explained to them and give their consent, this is a proper limitation.

A will not be subject to discipline.

#### Costs

A lawyer may not advance costs for a client unless they are indigent or repayment is contingent upon victory. Here, B and C are agreeing to pay at least \$100,000, so they are not indigent. The costs deposit is proper. To avoid misleading his clients, however, A should be sure to explain what costs are, what they should reasonably be, and how those differ from attorneys' fees.

If A does not obtain informed consent, he will be subject to discipline.

#### Competence

A lawyer may only take cases he has the skill, knowledge, and time to handle. He may not take on more than he can handle without associating with a lawyer to assist him. A repeatedly states that he is busy and that law is stressful. He may have too much on

his caseload and need to decline repr

B and C should find another lawyer. They should not agree to A's terms.

**END OF EXAM**



# **JULY 2015 EXAMINATION ANSWERS**

**APPLICANT'S ANSWERS TO QUESTIONS  
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**- EXAM 3, QUESTION 1 -**

1)

1. Consequences of Alvin ("A")'s grant of deed of trust to Friendly ("F"):

In order for a joint tenancy ("JT") to be effectively formed in Nevada, the conveyance language must state "joint tenants WITH RIGHT of SURVIVORSHIP". Additionally, JT requires for other elements. To be a valid JT, the interest must have 4 unities: 1. unity of title (title taken together by owners); and 2. Unity of Time: title taken at the same time by other owners; and 3. Unity of Interest: owners have the same interest; and 4) Unity of possession: owners share the same/equal right of possession of the property

Here, A and Brand ("B"), are joint tenants per the express language of the grant: JT with right of survivorship. Additionally, all of the 4 requirements are met: 1. they took title together under the same document; 2. They both took title at the same time; 3. They both share the same/equal interest; and 4. they both equally share possession.

Next, a question arises as to what are the consequences of the "deed of trust" and A's loan. Technically, a loan obtained via a deed of trust is effectively a mortgage, except that title is given to a third party who in case of default on the loan can step in and implement a foreclosure sale without judicial involvement (the foreclosure sale must still abide by other requirements of such procedures: notice to all with interest, and proper commercial liquidation procedures). Nevada is a lien theory state: meaning that execution of a mortgage does not amount to an actual transfer of title to the

mortgagee (lender).

Here, because NV is a lien theory state, the deed of trust, as a mortgage, does not break the unity of title as between A & B. Accordingly, after obtainment of the loan, A & B continue to be JT (until other events as described below).

Additionally, it should be noted that since only A executed the mortgage deed of trust, only A's interest is encumbered. B is not obligated to pay this mortgage and in case of default, B's interest is not accessible by the lender.

## 2. Consequences of Brad's Deed

In order for a conveyance in land to be effective, the owner must execute a written deed (sufficiently describing/identifying the property). The owner must sign the deed which must also include language that the owner intended to transfer title.

Additionally, the owner must deliver the deed to the new party and the deed must be accepted by that new party.

Here, B has made a conveyance in writing, signed it and expressed an intent transfer part of his interest to Doris ("D") (and assuming that it properly identified the property). Although B has done all of this, he has not yet "delivered" the deed to D. So, until he delivers it to D, no transfer has taken place.

Even if a transfer to D is deemed to have occurred, the language of the conveyance fails to create a joint tenancy. In NV, "right of survivorship" must be expressly stated in the conveyance, otherwise the interest created will just amount to ownership as tenants in common.

If the conveyance is valid (only as tenants in common), then unity of ownership as between A & B will be broken. As such, each of them, A+B+D will be viewed as tenants in common. B & D would still not be obligated to F.

### 3. Print's ("P") exercise of option

A lease is the transfer of possessory interest in real estate by its legal owners to a third party for a set period of time (subject to specific time period or periodic). If for more than one year, it must be in writing in compliance with Statute of Frauds.

Here, the lease to Carl's is in writing (SF satisfied) and the A & B have conveyed right of possession to P properly for the set period of 10 years. So, it is valid transfer pursuant to a valid lease.

The question next arises as to the consequences of the no assignment clause.

Assignment (as opposed to a sublease) requires the transfer of the entire estate by lessee to a third party for the entire duration of the remaining time of the lease. A sublease, distinguished, would be deemed to have formed if the lessee either transfers

less than the entire parcel or less than the entire term. Under a valid assignment, the assignee steps in the shoes of the lessee and had all the lessee's rights under the lease.

Here, the transfer has occurred for the entire term of the lease. So, there are no issues in this regard. But, the fact that Carl retained an office raises an issue as to whether the entire estate was transferred. Based on the available facts, it is reasonable to view that Carl has transferred the entire interest. This transaction is effectively a whole transfer to Carl and subsequent sublease by P to Carl of a small portion of the estate. This finding is supported by the fact that a) Carl pays his rent to P and b) Carl obtained this permission from P. So, there is a true assignment here.

The lessor can prohibit assignments of a lease. But, courts (because of a general dislike for alienability of property interest) narrowly interpret assignment prohibitions. Specifically, if the landlord accepts rent payments from the assignee, then the landlord is deemed to have waived its right under the no assignment clause.

Here, A & B repeatedly accepted rent payments from P. As such, A & B have waived their right to protest the assignment. The assignment is valid and effective. Carl is entitled to enforce the terms of the lease as a valid assignee. The exercise of the option by Print is valid and must be honored.

4. Who owns the property now?



As stated above, since the transfer by B to D was not effective because B never delivered to D and the deed of trust mortgage transaction did not break unity of title as between A & B, both A & B continue to be joint tenants until A's death. Upon A's death, title automatically passed to B. This is valid since the foreclosure sale did not actually take place prior to A's death. This extinguishes F's security interest in the property. If completed prior to A's death, then F would have a valid interest.

If unity of ownership was deemed to be broken because of the deed of trust, A & B would have been tenants in common. F would then have a valid interest to be enforced against A's estate -- but only as to A's interest. B would still keep his interest.

As to consequences of D's recording: D did not have a valid title so the recording could be challenged. If D is viewed as a valid tenant in common owner along with B, then both B & D continue to keep their interest. F can only foreclose on the interest held by A (if not already extinguished due to his death.).

**END OF EXAM**



# **JULY 2015 EXAMINATION ANSWERS**

**APPLICANT'S ANSWERS TO QUESTIONS  
NEVADA BOARD OF BAR EXAMINERS**

**- EXAM 3, QUESTION 2 -**

2)

## #2 Evidence: NV Rules

### Owen's (O) Testimony

Relevance: Evidence is relevant if it has any tendency to make a material fact of consequence more or less probable than it would be without the evidence. Here, O's testimony is relevant since it tends to prove that D did in fact have sex with Amy, and that is what D is charged with so it is extremely relevant.

Hearsay (HS): HS is an out of court statement made by a person offered for the truth of the matter asserted in that statement. The general rule is that HS is inadmissible unless there is an exception or exclusion. Here, the statement made by D to O is HS since it was made outside of the courtroom and is offered to prove the truth of the matter, that D sexually assaulted A. Therefore there must be an exclusion or exception in order for the statement to be admissible.

Party Admission: A party admission in Nevada is considered non-hearsay and it is a

statement made by a party and being offered against that party. It does not have to be made with personal knowledge or against that person's interest and it can also be a statement of fault or negligence as well. Here, O testified that D told him he had sex with Amy. Since the statement was made by D and is being offered by the prosecution against D in his trial for sexual assault, it constitutes a party admission and is nonhearsay.

Thus, O's statement is admissible.

#### Bree's (B) Testimony

Relevance: (see rule above). Bree's testimony is relevant since it tends to show that because D groped her against her will, and thus he is more likely to have committed the sexual assault against Amy, thus the statement is relevant since it would make a material fact more probable than without it.

Legal Relevance: Even if evidence is logically relevant, it still may nonetheless be excluded if the court finds the probative value is substantially outweighed by the danger of unfair prejudice. In Nevada, if the court finds that the probative value is outweighed, the court must exclude the evidence, there is no balancing test permitted in that instance. Here, D may argue that admitting B's statement that he groped her is

extremely prejudicial to him and the probative value is outweighed since it does not have much probative value to a sexual assault case since he only groped her.

However, it seems this argument will fail since groping still has a sexual conduct in nature, that the probative value is high and will probably not be outweighed by the danger of unfair prejudice.

Character Evidence: In Nevada unlike the federal rules, the prosecution may not offer specific instances of prior sexual assault cases. Thus, even though B's testimony would be permitted under the FRE as a prior instance of sexual conduct, it would not be in Nevada since they do not have a similar rule. Thus, there must be some non-character purpose in order for this testimony to be admissible in the P's case in chief.

Limiting Instruction: Here, the court gave the limiting instruction only to use B's testimony for the purpose of whether it tends to establish D's identity as the perpetrator of a sexual assault or a common plan or scheme. Identity and common plan or scheme fall under non character purposes, and if the prosecution can prove the testimony is being offered for a non character purpose then it will be admissible. The limiting instruction about D's identity however was improper. Saying of whether the testimony establishes if he is a perpetrator of sexual assault tends to prove conduct in conformity with character not his identity, thus it does not seem that part of the instruction was proper. The second part about common plan or scheme may work as

long as the jury considers it for only that purpose and nothing else to do with character.

Thus, if the court finds that the entire limiting instruction is valid, then the testimony will be admissible under non-character purpose, however since the first part tends to show conduct in conformity with D's character, it seems B's testimony will not be admissible unless the judge redefines the limiting instruction.

#### Dan's (D) Testimony

Relevance: (see rule above) Dan's testimony is relevant since it shows that he did not commit the crime he is charged with and would tend to make the facts less probable than without it.

Character Evidence (CE): The defendant is allowed to prove good instances of his character with reputation or opinion evidence but not specific instances of his behavior. Here, D is offering testimony that he has never been accused of any sex

crime against anybody before this case. This would be the defendant offering good character evidence which is allowed, but it has to be opinion or reputation evidence, and this would be considered specific instance since he is saying he has never been accused of any crime of sexual assault. Also, because D has testified he has now put his character for truthfulness in issue. Yet, due to the specific instance nature of this statement, it seems the court will not admit the statement under the Nevada rules of evidence.

Thus, the D's statement is inadmissible as improper CE.

#### Chloe's (C) Testimony

Relevance: (see rule above). Chloe's testimony is relevant since it again shows that D tried to remove her clothes against her will, thus he is more likely to have committed the sexual assault against Amy, thus the statement is relevant since it would make a material fact more probable than without it.

Character Evidence: Once the defense has presented evidence of D's character, P is



allowed to rebut that character of the defendant. Since D has offered testimony about his character that he has never been accused of any sex crime against anybody, P can offer this character evidence by C and it allowed to rebut with specific instances as well since D has put his character in issue. Thus, the admission of the character evidence was proper in this case.

Impeachment: Prior Bad Act: Since D has now offered his character into issue the prosecution in rebuttal can now impeach his credibility as a witness. Here with C's testimony, the prosecution is trying to impeach D with a prior bad act that tends to show that what D said on the stand was not true considering the prior bad act.

However, prior bad acts can only be asked about on cross examination, it cannot be proved with extrinsic evidence. Here, the prosecution is trying to prove a prior bad act by D (that he tried to remove C's clothes against her will) with extrinsic evidence using C's testimony. This is not allowed the prosecution should have asked D about this on cross and had to accept whatever answer he gave.

Thus, since this was improper impeachment, C's statement is inadmissible.

### Rhonda's (R) Testimony

Relevance:(see rule above) R's testimony is relevant since it tends to show that D is untruthful as a witness, which now matters since D has put his character in issue by testifying.

Impeachment of D's Character for Truthfulness: The prosecution is allowed to offer opinion evidence as to D's character for truthfulness to impeach his credibility if he puts his character in issue on the stand. In Nevada, only opinion evidence is allowed to impeach his character for truthfulness, not reputation or specific instance. Here, R's testimony is that because she has rented to Dan for over 3 years, she has come to believe you cannot trust anything he says. This is opinion evidence since she believes it thus it is her opinion. This is proper impeachment evidence since D put his character for truthfulness in issue when he testified that he has never been accused of any crime and now the prosecution is offering evidence that he cannot be trusted.

Thus, R's statement is admissible as proper impeachment.

### Sam's (S) Testimony

Relevance: (see rule above): S's testimony is not very relevant to this case. He is trying to show that D is honest since he reports overpayments on his paychecks over 5 years. However, honesty has nothing to do with the crime at issue or his character for truthfulness. Thus, it seems this testimony is not relevant and should not be admitted. However, the defense might argue that because it relates to his honesty and veracity that it tends to show he is truthful.

Rehabilitation of Credibility: If the court finds that this statement is relevant, then the defense will be offering it for purposes of trying to rehabilitate the defendant's credibility as a witness. Because his credibility has now been attacked on the stand, the defense wants to offer evidence to show that the defendant is a truthful person. They are trying to offer evidence that he is truthful, but offering evidence of his honesty might not work for rehabilitation of his character.

If the court finds this testimony to be relevant, it may be admissible.

**END OF EXAM**



# **JULY 2015 EXAMINATION ANSWERS**

**APPLICANT'S ANSWERS TO QUESTIONS  
NEVADA BOARD OF BAR EXAMINERS**

**- EXAM 3, QUESTION 3 -**

3)

### 1. Validity of Thelma's Will

Formation: A will is valid if it the testator had intent to create a will, capacity, signed the will in the presence of two witnesses, and witnessed their signatures as well. The witnesses can be interested in Nevada, but there must be two.

Intent: Thelma had testamentary intent to create a will as evidence by meeting with an attorney, discussing the terms of her will, and arriving at the attorney's office to sign the document.

Capacity: A testator has capacity when she knows the nature of her property and generally how much of it she has. There do not appear to be any capacity issues on these facts. Thelma appears to have been of a healthy mind at all times prior to her death.

Signature: The signature on a will may be any valid mark in the testator's hand, anywhere on the document. Thelma reviewed the will and signed it at the attorney's office. Therefore, the signature element is met.

Witnesses: The issue is whether the attorney counted as a second witness to Thelma's will. There is no requirement in Nevada that the will be notarized. Thelma was in the presence of both the attorney and the secretary when she signed, although only the secretary signed as a witness. However, the attorney was present during the signing, as required of notaries, and presumably affixed his signature to the document as well. Most likely, a court would construe the attorney's signature as a second witness to the will and a valid will is the result.

## 2. Distribution of Assets

Henderson Home: At the attorney's office, Thelma said she wanted to leave her house to Connie. The attorney presumably included that in Thelma's will with a valid address and other identifying information, which was drafted prior to Thelma's acquisition of the Lake Tahoe condominium. As such, there will be no confusion about which residence Thelma intended to leave to Connie.

Thelma's children may argue that Connie exercised undue influence over their mother. When a testator is in a relationship of confidence, of the kind live-in caregivers provide, there is a presumption that any gifts to the caregiver are the result of undue influence. Connie must show that she did not exert any pressure on Thelma to leave her a gift in her will. The attorney may testify on her behalf to Thelma's appreciation for Connie in his office and Connie's statement of "Bless you Thelma. I won't be homeless!" Because this statement was made after Thelma decided to make the gift, it is unlikely the children would succeed in their will contest absent more facts. Further, the burden would be even higher for a showing of duress, which is not present on these facts. For duress, the children would have to show that Connie threatened to withhold care (or something similarly egregious) to force Thelma to act in a particular way.

With respect to the \$10,000 mortgage remaining on Thelma's home at the time of her death, Connie has two options. She may take the house subject to the mortgage, or she may reject the gift altogether. If she rejects the gift, it passes by representation

to Darla and Samuel in equal shares. The parties may force a sale of the property and split the proceeds, or they may take ownership as tenants in common. However, Connie may argue that the mortgage should be paid from the residuary estate. Absent testamentary intent to transfer the house free of the mortgage, the residuary will not be obligated to pay this debt for Connie.

Bank Account: There is a conflict because Thelma has left a "sizable bank account" to Darla, but Samuel is listed as the beneficiary on the account. The terms of a will are insufficient to change the intended beneficiary status on her bank account. Therefore, Samuel will take the money in the bank account as an intended beneficiary. Darla will challenge this distribution, arguing that her mother's later wishes should control. However, the court will not find in her favor because Thelma could have changed the beneficiary status prior to her death.

New Car: Thelma had one car when she drafted her will and another when she died. It appears from the facts that Thelma left the residuary of her estate (any gifts not specifically devised) to Darla. The new car was titled in Thelma's name and will pass to Darla through the residuary. However, if the will does not have a residuary clause, and the old car was left to Darla as a specific gift, it will have been adeemed by its absence at the time of Thelma's death. In that case, the gift to Darla will fail and it will pass through probate to Darla and Samuel. If there is no residuary clause and the gift was a general gift, Darla will inherit whatever car her mother possessed at her death. Connie has no claim to the car because she was merely its driver while engaged in her paid duties as a live-in caregiver.

Condominium at Lake Tahoe: The condominium is not specifically provided for

in the will because Thelma purchased it after the will's execution. Nevertheless, Darla will take the property in fee simple because she is listed as a joint tenant with Connie. There are not enough facts to contradict a valid joint tenancy, so one will be assumed here. Because Thelma took the property as a joint tenant with Darla, the daughter possessed a right of survivorship and took ownership of the condominium outside of the probate proceedings. Even if they had been tenants in common, Darla would have taken under the will's residuary clause.

Insurance Policy: Absent an intended beneficiary, an insurance policy will pass to the testator's residuary estate, rather than passing by intestacy to her heirs. Here, Thelma did not have a beneficiary for the \$50,000 insurance policy. Her will indicates that she intended to leave her residuary estate to Darla. Thus, Darla will inherit the policy through her mother's residuary estate.

Acme Stock: Nevada is a community property state. All property acquired during the marriage is presumed community property (CP) unless proven to be separate property (SP) by clear and convincing evidence. Property left by a testator without a will passes by the rules of intestacy. A surviving spouse is entitled to 1/2 of the community property upon the decedent's death and the other 1/2 passes to his heirs by representation. His separate property is left 1/3 to the surviving spouse if he had two children or more and the issues take the remaining 2/3 by representation.

Here, Thelma and her late husband owned 60 shares of common stock. As tenants in common, they each owned the entirety of the 60 stocks. Upon his death, she became entitled to half of the stocks (30) outright as well as her own SP and 1/3 of his SP. As such, Thelma possessed at her death  $30 + 15 + 5 = 50$  shares and Darla and



Sam each inherited 5 stocks by representation. At her death, the remaining stocks pass by residuary clause to Darla. Therefore, Samuel is entitled to 5 shares and Darla receives the remaining 55.

**END OF EXAM**



# **JULY 2015 EXAMINATION ANSWERS**

**APPLICANT'S ANSWERS TO QUESTIONS  
NEVADA BOARD OF BAR EXAMINERS**

**- EXAM 3, QUESTION 4 -**

4)

#### Question 4

Adam ("A"), Bess ("B"), and their child Cole ("C") decided to stay at Family Fun ("FF") for their vacation. Upon arrival, bellman Eddy ("E") an employee of FF, took A's wallet and the room key card. A reported the theft and got a new key, but the old key was not deactivated. Later in the trip, C trip on a broken pool tile and cut his toe, the hotel doctor stiched him up free of charge. That night B realized the cocktail she was sipping on had a dead mouse on the bottom of her glass, immidiately felt ill and went to the room to lie down. After B got to the room to lie down, E used the key card that had not been deactivated and went into B's room, and slid into bed next to B. When B awoke to find E in bed next her she screemed and E knocked her unconscious. The following examines all of A, B, and C's claims against FF and the defenses F will assert.

#### Conversion

Conversion is an intentional tort. In order to show conversion the plaintiff must show a wrongful and intentional interference with personal property and damages. Damages will be inferred when there is a loss of possession. The remedy for conversion is the fair market value ("FMV") of the item converted at the time of conversion.

Here, E took A's wallet, which held \$200 and the room key card. When E did the act of taking the wallet he satisfied the intent element, it is very difficult to accidentally stick your hand in someone's pocket and take the wallet. No one in the family knew that E had taken the wallet indicating that E did so without permission making it a wrongful taking. A was deprived of possession of his wallet, the \$200 that was in his wallet, and the room key which took his time to go get replaced.

Therefore, E converted A's wallet and A will be entitled to \$200 plus the FMV of the wallet at the time E took the wallet.

Next, the court will examine if FF can be held liable for E's intentional tort of conversion.

### Vicarious Liability

Under the doctrine of respondeat superior, and employer can be held liable for the torts of their employee if the tort was committed in the ordinary scope of business. An employer is generally not responsible for intentional torts of the employee unless the employer expressly authorized the tort, the nature of the business is one that requires friction (such as debt collection or a bouncer at a club), or if the employee was acting in the best interest of and with the intent to further the employer's business.

Here, E committed an intentional tort of conversion so FF will only be liable if it fits an exception to the general rule that employers are not liable for their employee's torts. E was a bellman for FF, which required him to help guests to their room and assist them with carrying their luggage, indicating E's employment was not of the nature where friction was part of the job. Although FF knew that E had previously taken money from guest's hotel rooms, they did not expressly authorize E's taking. Furthermore, E most likely kept the money for himself, rather than to give to FF, and also used the room key for his own purposes of sneaking into the hotel room later.

Therefore, FF will not be vicariously liable for E's conversion.

However, FF may be liable for negligence in failing to deactivate the old card.

#### Negligence- FF's Negligent Entrustment

A prima facie case of negligence requires the plaintiff to show duty, breach of duty, actual causation, proximate causation and damages.

#### Duty

There is a general duty of care to not create an unreasonable risk of injury to people in the plaintiff's position. Under the majority Cardozo view, a defendant owes

a duty to everyone in the zone of danger, under the minority Andrews rule, and duty of care is owed to everyone. Here, A was a guest at FF, which would indicate that A was in the zone of danger, under the majority rule. Therefore FF owed a duty of care to A.

### Applicable Standard

Generally a defendant has a duty to act as a reasonable person in the same or similar circumstances. NV, has abolished the traditional landowner standard distinctions and generally applies a reasonable duty of care for landowners. Common carriers, however, are generally held to a higher standard and must act as a reasonable common carrier in the same or similar position.

Here, FF is a hotel, which is a common carrier. Therefore, FF will have to act as a reasonable hotel in hiring and retaining employees.

### Breach

Conduct that falls below the applicable standard for duty of care will be a breach of the duty of care.

Here, FF knew that E had previously stolen money from people's hotel rooms, however they continued to let E walk alone to escort guests to their rooms and carry

their personal belongings. There is no indication that there was any video monitoring system or else FF would have caught the theft most likely. Given the high standard of care expected from hotels to care for their guests, a reasonable hotel most likely would not have left an employee who they knew had previously stolen from guests alone with the guests in the room and carrying their property alone. FF should have had someone accompany E when he was handling guest property or going into guests rooms or moved him to a position where he would not have had such easy access to guests.

FF will argue that the theft was not a result of E being a bellman, and that he could've stolen A's wallet even if he was a waiter or a host. However, being a bellman gave E the opportunity to be in the privacy of the hallways and easier for him to get away with it.

Therefore, FF breached their duty.

#### Actual Causation

The breach of duty must have been the but for cause of the Plaintiff's damages.

Here, E stole A's wallet while escorting A, B, and C up to their room as a bellman. If FF had not breached their duty by allowing E to escort them in the privacy

of the hallway, E most likely would not have had the opportunity to steal the wallet.

Therefore, the breach was the actual cause of A's damages.

### Proximate Causation

A Defendant is responsible for the natural consequences and incidents of their action. The breach will be a proximate cause if the damages are a foreseeable result of the D's breach of duty.

FF's breach of negligently entrusting E to escort A is the proximate cause. E, who was negligently entrusted, doing a bad act of conversion is a natural consequence of the act of entrusting someone that they shouldn't have.

### Damages

A defendant is liable for all of the plaintiff's reasonable damages. Under the eggshell theory, the defendant is liable for the plaintiff as they found them, even if the plaintiff has extreme sensitivities or vulnerabilities. However, in NV, there is generally no liability in negligence for purely economic damages, there must be damage to property or person.

Here, A suffered damages by loss of his wallet, the time he had to spend to get a



new key, the loss of the money, and most likely emotional distress of being stolen from.

Therefore, FF will be liable for negligent entrustment.

## Defenses

### Contributory Negligence

Under Nevada's partial contributory negligence rules, a plaintiff also has a duty to act as a reasonable person in the same or similar situation. A finding of the plaintiff's negligent will reduce their recovery by the amount their negligence is responsible for the action. If Plaintiff's negligence is found to be more than that of the defendant's the plaintiff will be barred from any recovery.

Here, FF will argue that a reasonable person would not have held their wallet out in such away to allow someone to easily take it without their knowledge, or their family member's knowledge who were in the vicinity. Absent facts that A left his wallet in the open making it easy for E to take, this argument will likely fail. It is not clear where A's wallet was at the time of the taking, but if it was in A's pocket, that will be in conformance with the reasonable person who usually carries their wallet in their pocket.

## Negligence - C's tripping on the Broken Pool Tile

A prima facie case of negligence requires the plaintiff to show duty, breach of duty, actual causation, proximate causation and damages.

### Duty

There is a general duty of care to not create an unreasonable risk of injury to people in the plaintiff's position. Under the majority Cardozo view, a defendant owes a duty to everyone in the zone of danger, under the minority Andrews rule, and duty of care is owed to everyone. Here, C was a guest at FF, which would indicate that C was in the zone of danger, under the majority rule. Therefore FF owed a duty of care to C.

### Applicable Standard

Generally a defendant has a duty to act as a reasonable person in the same or similar circumstances. NV, has abolished the traditional landowner standard distinctions and generally applies a reasonable duty of care for landowners. Common carriers, however, are generally held to a higher standard and must act as a reasonable common carrier in the same or similar position.

Here, FF is a hotel, which is a common carrier. They were operating a swimming pool, where they know people and children will be running around bare foot. A had watched another child trip on the same broken pool tile the day before C did which indicates that FF most likely had notice of the broken pool tile. Therefore, FF will be held to the standard of care of a reasonable hotel with notice of the broken pool tile and knowledge that kids frequent the pool without shoes.

### Breach

Conduct that falls below the applicable standard for duty of care will be a breach of the duty of care.

Here, FF most likely had knowledge of the broken pool tile. Although the facts don't state that an FF employee saw the pool tile, a pool has lots of employees in the area and they should've noticed, especially since the edge was so jagged that it required stitches for C, the other kid may have had to seek medical attention as well which would put FF on notice. Although NV does not retain traditional landowner standards of care, a reasonable hotel would conduct inspections of their hotel to make sure there is nothing that would generate legal liability. FF most likely had notice of the broken pool tile and did not do anything to fix it.

Therefore, FF breached their duty of care.

### Actual Causation

The breach of duty must have been the but for cause of the Plaintiff's damages. Here, C tripped and cut his toe on the broken pool tile. If FF had fixed the pool tile, C would not have fallen and cut his toe, requiring stitches. Therefore, but-for FF's breach in not repairing the tile, C would not have cut his toe.

### Proximate Causation

A Defendant is responsible for the natural consequences and incidents of their action. The breach will be a proximate cause if the damages are a foreseeable result of the D's breach of duty. Here, it is foreseeable that someone would trip over a broken pool tile, especially if the pool is such where kids are running around like at FF. In fact, the prior day, another kid did trip on the tile. It is also foreseeable that in tripping over the tile, someone might get hurt, as is typically the case when they fall. Therefore, FF's breach was a proximate cause of D's injury.

### Damages

A defendant is liable for all of the plaintiff's reasonable damages. Under the eggshell theory, the defendant is liable for the plaintiff as they found them, even if the plaintiff has extreme sensitivities or vulnerabilities. However, in NV, there is generally

no liability in negligence for purely economic damages, there must be damage to property or person.

Here, C cut his toe so severely that he needed stitches. FF may try to assert that the doctor stitched him up free of charge so there are no damages, but that argument will fail. C suffered a personal injury and still has a cut that is now stitched up on his toe.

Therefore, C suffered damages.

In conclusion, FF is liable for negligence for failing to repair the pool tile.

## Defenses

### Contributory Negligence

Under Nevada's partial contributory negligence rules, a plaintiff also has a duty to act as a reasonable person in the same or similar situation. A finding of the plaintiff's negligent will reduce their recovery by the amount their negligence is responsible for the action. If Plaintiff's negligence is found to be more than that of the defendant's the plaintiff will be barred from any recovery.

Here, A saw a child trip over the broken pool tile the day before C fell on the

same pool tile. FF will assert that a parent would not have allowed their child to run around in the area with broken pool tiles if he had notice of the danger. However, A will assert that there are many children in the pool area and it is hard to control C the whole time when he is on vacation. Furthermore, although A had seen another child trip on the pool tile there is no indication that C had notice of it and A's notice will most likely not be imputed on C.

Therefore, FF's contributory negligence defense will most likely fail. If they do succeed a court will most likely only reduce recovery very minimally because as a common carrier they have a higher standard of care for their guests.

#### Negligence Per Se - Reno Municipal Code

Under Negligence per se, if there is an applicable criminal statute, the state will replace the applicable duty of care in a typical negligence action. Where there is an applicable statute, violation of the statute will establish breach of duty, but causation and damages will still have to be shown. A court will only apply the applicable standard of care from the criminal statute if the statute intends the class of persons who were injured, and the harm protected by the statute is the harm suffered in the negligence action.

Here, C may try to establish negligence through the Reno Municipal Code. The

code prohibits more than 40 people in a pool area at any given time and any violation carries a \$1,500 fine. This statute most likely was enacted to protect those in the pool area. C was in the pool area when the injury occurred indicating he was part of the class of people to be protected. However, the statute most likely exists to protect from things like drowning in an overcrowded pool, and not a broken pool tile which would cause injury no matter how many people were in the pool area. That means C's injury was not of the type the statute intended to protect.

Therefore, FF will likely not be liable for negligence per se.

### Intentional Infliction of Emotional Distress

Intentional Infliction of Emotional Distress (IIED) is an intentional tort. It occurs when the defendant's extreme or outrageous conduct causes P emotional distress. Extreme or outrageous conduct is conduct beyond the realm of human decency. Intent or reckless conduct will suffice and P does not need to show physical injury, Psychological injury will suffice.

Here, B was enjoying dinner with her family when she realized that the cocktail she was sipping had a dead mouse at the bottom of the glass. Causing someone to drink a cocktail with a dead mouse in it is beyond the realm of human decency as no one would expect someone to be ok with that. There is no indication that anyone intentionally put the mouse in her glass, but IIED does not require intentional

conduct. Reckless conduct will suffice. Most cocktails are served in a clear glass which means that someone who brought the glass to the table to serve a hotel guest would have been able to see a dead mouse floating on the bottom of it. Continuing to serve the cocktail with the mouse is reckless at best, and not noticing the mouse is also reckless. FF may argue that B was in as good of a position to see the mouse before she started sipping the drink, however, it is extreme and outrageous conduct to even bring the glass with the mouse to the table. B immediately felt ill, excused herself from the table, and went to the room to lie down.

Therefore, B has a cause of action for IIED. However, it is not clear if FF will be liable.

### Negligent Infliction of Emotional Distress

Negligent Infliction of Emotional Distress (NIED) occurs when the defendant's conduct places the plaintiff in the zone of danger and the plaintiff suffers physical injury as a result. Here, as discussed above, an employees act of serving B a drink with a dead mouse in it placed B in the zone of danger of getting sick by drinking a drink with a dead mouse in it, or the emotional injury of doing so. B felt so ill she had to go to her room indicating physical injury.

Therefore, B has a claim for NIED. FF's claim for contributory negligence will likely fail, because the emotional distress would have been the same had B noticed the



rat prior to drinking the drink.

### Vicarious Liability - IIED and NIED

Under the doctrine of respondeat superior, an employer can be held liable for the torts of their employee if the tort was committed in the ordinary scope of business. An employer is generally not responsible for intentional torts of the employee unless the employer expressly authorized the tort, the nature of the business is one that requires friction (such as debt collection or a bouncer at a club), or if the employee was acting in the best interest of and with the intent to further the employer's business.

Here, IIED is an intentional tort. However, it only requires recklessness. The IIED was committed by an employee who was acting in the best interest by serving FF's guests with cocktails they had requested as was part of their job. Because IIED only requires recklessness, and the employee's recklessness in failing to see the mouse was in the scope of employment the court may find FF vicariously liable.

However, NIED is a negligence tort for which FF will be liable if the employee was acting in the scope of employment. Here the employee was acting in the scope of employment by serving B her drink.

Therefore, FF will be liable for NIED, and may be liable for IIED.

### Tresspass - E entering the room

Tresspass is the intentional wrongful entry onto the land of another. This is a tort against possession so the cause of action lies with the person who has rightful possession.

Here, B paid for the hotel room at FF and therefore had rightful possession of the room. E used the hotel key that stole to enter the room. E may argue that he used a key to enter the room so it was not wrongful, but the taking of the key was wrongful and he did not have consent to go into the room. E intentionally entered the room when he used the key and walked in. Damages are found by the interference with possession which occurred when E entered.

Therefore, E is liable for tresspass.

### Assault - E sliding into Bed

Assault occurs when the plaintiff has reasonable apprehension an imminent harmful or offensive touching. Reasonable appprehension just means knowledge that the touching is imminent.

Here, E slid into bed next to B, when she woke up she knew that E was there

satisfying the reasonable apprehension element. Generally a person would not slide into bed next to someone unless they were trying to touch them. It is reasonable for B to think that E was going to make a wrongful advance, that she would've considered offensive when she noticed him indicating that the apprehension was reasonable and the touching was imminent and offensive. E intentionally got into bed satisfying the intent element, it is not necessary that he intended to cause apprehension.

Therefore, E is liable for Assault.

#### Battery - Punching B in the face

A battery is a harmful or offensive intentional touching with damages.

Here, E punched B in the face after she woke up and started screaming. E did so because he was afraid someone would hear her screaming indicating that the touching was intentional. B was knocked unconscious by the punch indicating the touching was both harmful and caused damages.

Therefore, E is liable for Battery.

#### Vicarious Liability for E's trespass, assault, and battery

Under the doctrine of respondeat superior, and employer can be held liable for

the torts of their employee if the tort was committed in the ordinary scope of business. An employer is generally not responsible for intentional torts of the employee unless the employer expressly authorized the tort, the nature of the business is one that requires friction (such as debt collection or a bouncer at a club), or if the employee was acting in the best interest of and with the intent to further the employer's business.

All of E's torts were intentional torts. As discussed above, they will not fit into any of the exceptions for vicarious liability of an employee's tort.

Therefore, FF will not be vicariously liable for E's intentional torts. However, they may be liable for negligence for failing to deactivate the room key.

### Negligence - Failure to Deactivate the room Key

A prima facie case of negligence requires the plaintiff to show duty, breach of duty, actual causation, proximate causation and damages.

#### Duty

There is a general duty of care to not create an unreasonable risk of injury to people in the plaintiff's position. Under the majority Cardozo view, a defendant owes

a duty to everyone in the zone of danger, under the minority Andrews rule, and duty of care is owed to everyone. Here, B was a guest at FF, which would indicate that B was in the zone of danger, under the majority rule. Therefore FF owed a duty of care to B.

### Applicable Standard

Generally a defendant has a duty to act as a reasonable person in the same or similar circumstances. NV, has abolished the traditional landowner standard distinctions and generally applies a reasonable duty of care for landowners. Common carriers, however, are generally held to a higher standard and must act as a reasonable common carrier in the same or similar position.

Here, FF is a hotel, which is a common carrier. A reasonable hotel would've deactivated the room key. In fact, it is typical of hotels to deactivate room keys any time a guest asks for a new one. A reported the key as stolen and not lost, it is foreseeable that someone who would steal a room key would later use it to wrongfully enter the room. FF knew that E had previously stolen money from guest rooms, if A reported the stolen room key immediately after encounter with E, there is even more reason to think a reasonable person would've deactivated the old key so that E could not do the same thing again.

Therefore, FF will have to act as a reasonable hotel in deactivating room keys

when lost.

### Breach

Conduct that falls below the applicable standard for duty of care will be a breach of the duty of care.

Here, A reported the room key as stolen and got a new key, but FF did not deactivate the room key as a reasonable hotel would have done, indicating FF's conduct fell below the applicable duty of care.

Therefore, FF breached their duty.

### Actual Causation

The breach of duty must have been the but for cause of the Plaintiff's damages.

Here, E stole the room key, but it was not deactivated when A got a new room key. If FF had deactivated the room key, E would not have been able to use it to enter B's room and commit the trespass, assault, and battery. But for the breach, B would not have been injured.

Therefore, FF's breach was the actual cause of B's injuries.

### Proximate Causation

A Defendant is responsible for the natural consequences and incidents of their action. The breach will be a proximate cause if the damages are a foreseeable result of the D's breach of duty.

Here, it is foreseeable that someone who steals a room key will use it to gain wrongful entry into the hotel room. FF will assert that intentional torts are not natural consequences of an action, however in this case they will be wrong. FF knew that E had once stolen money from a guest's room. There is no indication that E rightfully gained access to that room, so FF likely knew that E would use wrongful means to enter into a room and that once in the room would commit intentional torts like conversion. Because the hotel had knowledge of E's propensities, and it is foreseeable that someone who would steal a hotel key would use it to do other wrongful things in the room, proximate cause will most likely be established. Especially in light of the high standard of care of a hotel.

Therefore, FF's breach was the proximate cause.

### Damages

A defendant is liable for all of the plaintiff's reasonable damages. Under the

eggshell theory, the defendant is liable for the plaintiff as they found them, even if the plaintiff has extreme sensitivities or vulnerabilities. However, in NV, there is generally no liability in negligence for purely economic damages, there must be damage to property or person. Here, B suffered injuries of fear and being knocked unconscious.

### Contributory Negligence

FF may try to argue that B was negligent in not putting the safety lock on the door when she went to the room herself allowing anyone with a key to gain access. This is especially true because she had knowledge that a room key had been stolen. However, this argument will likely fail. She probably would not put on the lock so that if A and C tried to use the key to get into the room while she was sleeping they would be able to. Because hotels almost always deactivate lost or stolen hotel keys prior to issuance of a new one there is no reason for B to take precaution against FF's negligence (this argument also would work to defeat FF's assumption of the risk defense)

Therefore, FF does not have any defenses.

END OF EXAM