



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

**Essay Questions  
and  
Selected Answers**

**June 2016**



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

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180 Howard Street • San Francisco, CA 94105-1639 • (415) 538-2300  
845 South Figueroa Street • Los Angeles, CA 90017-2515 • (213) 765-1500

## **ESSAY QUESTIONS AND SELECTED ANSWERS**

**JUNE 2016**

### **CALIFORNIA FIRST-YEAR LAW STUDENTS' EXAMINATION**

This publication contains three of the four essay questions (Question 1, Question 2 and Question 4) from the June 2016 California First-Year Law Students' Examination and two selected answers for each of those three questions. No selected answers for Question 3 are included.

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

<u>Question Number</u>	<u>Subject</u>
1.	Torts
2.	Contracts
3.	Not Included
4.	Torts

**June 2016**

**ESSAY QUESTIONS**



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

**Answer all 4 questions.**

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

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

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

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

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

## QUESTION 1

Tenant rents space in a Cityville office building from Landlord. Six months ago, a fire broke out at night in the office building and Tenant, who was working late, was overcome by smoke in the building.

A responding firefighter found Tenant unconscious and, while carrying Tenant out of the building, dropped him, breaking Tenant's leg. The building and all its contents were destroyed.

Cityville fire marshal's investigative report stated: "Fire apparently originated in basement. Apparent cause: faulty wiring. Accumulation of old newspapers in basement was a principal source of fuel, and probably resulted in rapid spread of fire to remainder of building."

The old newspapers mentioned in the fire marshal's report had been left by a previous tenant three years ago. Some of the basement hallways were nearly impassable. Landlord was aware of this, but hadn't gotten around to cleaning them up.

One of Cityville's fire safety ordinances provides: "Any person who permits any article to remain in a stairway or hallway so as to impede entering or leaving the building, or any area within it, shall be punished by a fine of not more than five hundred dollars."

1. On what theory or theories might Tenant reasonably sue Landlord? Discuss.
2. What types of damages, if any, might Tenant recover from Landlord? Discuss.

# QUESTION 1: SELECTED ANSWER A

## 1. Tenant v. Landlord

### Negligence

Tenant will likely sue landlord on the basis of negligence. An action for negligence will lie if the defendant (D) owed a duty of due care to the plaintiff (P), D breached that duty, D's breach was the actual and proximate cause of P's damages, and P suffered actual damages.

### Duty - Lessor of Land

A lessor of land has a duty of due care to warn or make safe dangers of which it should reasonably know in common areas of the property.

The fire originated in the basement, which is presumably a common area of the building, and so the landlord had a duty to warn of or make safe any latent dangers. In addition, since the building was an "office building," presumably the wiring is shared among various tenants and is therefore also a common aspect of the building, particularly since the place it failed was in the basement.

Since tenant as a lessee has a right to occupy the building, he is within the foreseeable zone of danger of a fire in the building, and so is considered a foreseeable plaintiff under both the majority Cardozo test (specific P must be foreseeable), as well as the Andrews test (if duty is owed to anyone, a duty is owed to the P).

Landlord owed a duty of due care to keep the common areas of the building safe.

## Duty – General

Everyone owes a duty to act reasonably so as not to expose others to an unreasonable risk of harm. Modernly, land owner/occupier duties are being replaced in many areas with a general duty standard.

Under the general duty, Landlord owed a duty to act reasonably to prevent undue risk of harm to those occupying the building.

## Breach

The P must show that the D's level of care fell below the reasonable standard required by his duty. This requires showing what happened, and a showing that the D's conduct was unreasonable.

Tenant will argue that Landlord breached his duty in two ways. First, he did not maintain the wiring in the building in a safe condition. Lessors should reasonably inspect the property for such dangers. The fact that the wiring was so faulty that it sparked a fire demonstrates that maintenance had not been kept up. Second, Landlord left an extreme amount of highly-flammable newspapers in the hallway, and he was aware of this. Even had the wiring not been faulty, any type of flame could have lit the newspapers resulting in a catastrophic fire such as that that occurred.

Whether the conduct was unreasonable may be determined by the Learned Hand Formula. In this test, the utility of the D's conduct as well as the burden it would place of the D to reduce the risk of harm must be weighed with the magnitude of the danger and the probability of injury.

Here, it would be a relatively minor burden to remove the newspapers and properly upkeep the wiring system. All buildings require electricity, so this is a burden all owners of buildings share. The risk is grave - a fire causes an extreme risk of death and injury,

in addition to property damage. It appears the risk far outweighs the burden of making the building safe by repairing the wiring and removing the newspapers.

Landlord may argue that he was unaware of the faulty wiring, and that he is not responsible for the newspapers since they were left by a prior tenant. However, in this case, Landlord had a duty to do a reasonable inspection for such dangers in common areas, and he breached this duty.

### Negligence Per Se - Violation of Statute

Another way to prove duty and breach is to show that a D violated a criminal statute. The P must show that the legislature intended the statute to protect safety, that the P was in the class of persons whom the statute was intended to protect, and that the injury was of the type the statute was intended to prevent.

Here, the cited statute does appear to be intended to protect safety since blocking the entry or exit to a building would impede anyone trying to escape in a dangerous situation or to rescue those in the building.

Tenant, as a foreseeable occupier of the building, is one who the statute is intended to protect in the event of an emergency because she may need to escape or be rescued.

However, the type of injury does not appear to coincide with the statute's intent. The papers that were blocking the hallway were in the basement, and no facts indicate that they blocked anyone from exiting or entering the building. The injury was caused by a fire, not by being trapped.

Tenant will not succeed on a negligence per se argument for breach; however, the general duty does apply.

## Actual Cause

Tenant will argue that but for the Landlord's failure to maintain the wiring, as well as his negligence in leaving a source of readily flammable fuel to feed the fire, the building would not have burned and Tenant would not have suffered damages.

Landlord will argue that the fire marshal qualifies the report with the word "probably resulted" and therefore, actual cause cannot be established.

It is highly likely that Landlord's negligence led to the resulting fire and damages to Tenant, however, Tenant may require additional evidence if the court finds the report inadequate proof due the qualifying language.

## Proximate Cause - Smoke Inhalation

A D will be held liable if his act directly caused a foreseeable result.

Assuming that actual cause has been established, Landlord's negligence was a direct cause of the fire starting. The wiring ignited the fire, directly leading to the newspapers burning, and resulting in "rapid spread to the remainder of the building." There were no intervening forces, and a fire was very foreseeable, given that both a source of fire and the fuel for that fire were present, and Landlord was negligently responsible for both conditions.

Landlord will argue that the fact that a previous tenant left the papers is an intervening force. However, the newspapers were present before the fire happened, and therefore, the fire acted on a "set stage," rather than an intervening force.

Landlord's negligence is the proximate cause of Tenant's direct injuries from the fire - smoke inhalation leading to unconsciousness.



## Proximate Cause - Broken Leg

An intervening act did occur related to Tenant's broken leg. The firefighter's conduct in dropping Tenant was an intervening force.

The firefighter's conduct will be deemed a dependent intervening force because it was brought about by the Landlord's negligence. Danger invites rescue. The firefighter would not have been present had Landlord's negligence not led to the fire - his presence was foreseeable.

Landlord will argue that the firefighter was negligent in dropping Tenant and therefore he should not be held liable. However, even if the firefighter was negligent, a normal level of negligence during a rescue is also considered foreseeable. Since the firefighter was forced to carry Tenant out of the building to save his life, it is foreseeable that he could get further injured during that act. The firefighter's negligence would have had to rise to an unforeseeable level of blameworthiness for this to be a superseding cause of Tenant's injuries.

Landlord's negligence was therefore also the proximate cause of Tenant's broken leg.

## Damages

A finding of negligence typically requires actual damages to person or property resulting from the negligent conduct of the D.

Here, Tenant has suffered both unconsciousness due to smoke inhalation, as well as a broken leg. In addition, since the building's contents were destroyed, he presumably also lost any property he had left in the space he was renting.

Tenant has suffered damages sufficient for a claim.

## Defenses

Defenses to negligence include assumption of the risk, contributory or comparative negligence.

There is no evidence that Tenant consented in any way to Landlord maintaining faulty wiring or newspapers in the basement, nor that Tenant was in any way negligent.

Landlord will have no defenses.

## **2. Damages**

### General Damages

General damages directly result from the negligence.

Here, Tenant suffered physical injuries to his person for which he may claim pain and suffering. Although no facts specifically mention emotional damages, the trauma of this experience may also call for such damages.

In addition, the destruction of his property is also directly flowing from the negligence, and he will be entitled to compensation.

### Special/Consequential Damages

Special damages are costs that occur as a consequence of the P's injuries.

Tenant will have medical costs for treating his leg and smoke inhalation. He may also miss work or lose profits if he has a business.

Therefore, Tenant likely also has a claim for special damages.

# **QUESTION 1: SELECTED ANSWER B**

## **TENANT v. LANDLORD**

### **NEGLIGENCE**

Negligence is the failure to conform to a duty of care of a reasonable person in similar circumstances. The elements of negligence are the existence of a duty of reasonable care; breach of that duty; actual and proximate causation; and damages.

### **DOES LANDLORD OWE TENANT A DUTY OF CARE?**

In general, one person does not owe another a duty of care. However, there are certain circumstances that give rise to a duty of reasonable care. Where there is a special relationship between the parties, a duty of care will be established. One of these special relationships is that of landlord and tenant, wherein a landlord will owe his tenant a duty of care to act as a reasonable landlord and ensure that the subject premises are safe and suitable for habitation.

Here, Landlord is a landlord, and Tenant is his tenant, renting space in the office building, so Landlord owes Tenant a duty of care to ensure that the office building in Cityville is safe and suitable for his purposes.

### **IS TENANT AN INVITEE?**

A landowner owes invitees on his land a duty of care to inspect the land for any knowable hidden dangerous conditions, and to warn and/or make safe the land where these conditions are not patent. An invitee is one who is on the land for any commercial purpose, or where the land is open to the public.

Here, Tenant is on the land -- i.e., the office building -- for a commercial purpose. Tenant is there to operate his business from Landlord's building. Landlord is a landowner who has permitted Tenant to be on the land for a commercial purpose. Therefore, Tenant is an invitee.

Therefore, Landlord owes Tenant a duty of care to inspect the building in which Tenant leases space, to discover any hidden, knowable dangerous conditions that are in the building, and to warn or make them safe. Here, those conditions are the faulty wiring and the presence of a large "accumulation of old newspapers in the basement" that became a principal source of fuel for the fire that occurred.

### **DID LANDLORD BREACH HIS DUTY OF CARE TO TENANT?**

A party will breach his duty of care to another if his conduct fails to conform to that of a reasonable person in similar circumstances.

Breach is often established by using the "Learned Hand" analysis, which states that breach will be established where the burden of acting to prevent harm (B) is outweighed by the probability of the harm occurring (P) in light of the gravity of the harm (L). If the burden is lower, then the defendant will have breached his duty of care.

Here, Landlord owed Tenant a duty of care to inspect the building and discover any hidden dangerous conditions and warn of and/or make them safe.

### **DISCOVERY OF THE NEWSPAPERS**

In the office building, Landlord had permitted the basement hallways to become nearly impassable due to the presence of old newspapers left by a previous tenant. The newspapers had been in the basement for at least three years. This amount of newspapers would be easily discoverable -- in fact, obviously patent -- by a landlord who was discharging his duty of care to his tenant by inspecting the premises to

determine if there were any dangerous conditions upon his land. Instead, Landlord permitted the newspapers to accumulate and remain unperturbed for at least three years, where they caused a serious hazard, both in terms of flammability and safe passage through the basement hallways.

Landlord could argue that it is not incumbent upon him to check his building on a daily or weekly basis, so theoretically it is possible that he would not have known of the accumulation. However, this is a specious argument. The last tenant -- the one who placed the newspapers there -- had left the building three years ago. Three years is more than enough time to discover their presence, especially when the dangerous condition they posed was so obvious. Further, Landlord knew they were there, "but hadn't gotten around to cleaning them up."

The burden of discovering and removing the newspapers was relatively low. Landlord could have removed them himself over a few days at most. The probability of harm resulting from their presence is moderate to high, given that the newspapers pose a risk of harm from their flammability and from possibly toppling over and harming someone, or preventing ingress or egress from the basement. The gravity of harm is moderate to high, because a fire could result (as it did) and burn the premises, its contents and inhabitants, or the newspapers could topple over and injure someone.

Therefore, Landlord breached his duty of care to Tenant as the burden of removing the newspapers was lower than the risk of harm in light of the gravity of the harm.

## **DISCOVERY OF THE FAULTY WIRING**

Landlord also had a duty of care to inspect, warn of and/or make safe the wiring in his building. If wiring is faulty, it could spark and ignite flammable material.

While there is no indication from the fact pattern that Landlord did not regularly inspect his building for faulty wiring, the fact pattern implies that the presence of the large

amount of newspapers in the basement made the hallways therein "nearly impassable." Given that the faulty wiring would have had to have been close enough to the newspapers in order for a spark to ignite them, it is is very possible that Landlord had not inspected the basement's wiring in three years because he could not access it.

The burden of inspecting the building for faulty wiring and making it safe (warning here is probably not enough) is low to moderate -- moderate only in that Landlord would have had to have removed the newspapers first. However, as discussed supra, the burden of removing the newspapers is quite low. The probability of harm resulting from faulty wiring is moderate to high, given that fires could start from such wiring. The gravity of harm is high, given the presence of a large number of old newspapers, which are easily ignited. Therefore, the burden of inspecting for faulty wiring and making it safe is outweighed by the probability of harm and the gravity of harm.

Landlord could argue that the presence of the newspapers made it very difficult to inspect for the wiring. This is also a specious argument, since it was he who made it difficult to inspect the premises by failing to remove the newspapers. A reasonable landlord would have removed the newspapers for safety reasons.

Therefore, Landlord has breached his duty of care to Tenant by failing to inspect and make safe the wiring in the basement.

### **NEGLIGENCE PER SE?**

Under the doctrine of negligence per se, the breach of a statute may establish a breach of a duty of care if the statute establishes a duty of care, the party harmed by the breach is of the class the statute sought to protect, and the harm that occurred is of the type that the statute sought to prevent.

Here, there is a Cityville fire safety ordinance that provides that "Any person who permits any article to remain in a stairway or hallway so as to impede entering or

leaving the building, or any area within it, shall be punished by a fine of not more than five hundred dollars."

Here, Landlord permitted an accumulation of newspapers to exist in the basement hallways of his office building, making the hallways nearly impassable. This condition will "impede entering or leaving the building." Therefore, Landlord has breached the statute.

Further, Tenant is an occupant of the building. The ordinance seeks to protect those inside the building, so that in the case of emergency, it is possible for such people to escape the building easily. Therefore, Tenant is of the class the statute sought to protect.

However, the type of harm the statute sought to prevent was an occupant being trapped in the building because he or she was unable to leave the building. Here, there is no indication that Tenant was in the basement and unable to leave because of the newspapers. Tenant was unable to leave of his own accord because he was unconscious from smoke inhalation. A firefighter was able to remove Tenant from the building (albeit with some clumsiness). The statute did not seek to protect against smoke inhalation or fires.

Tenant could argue that he suffered a broken leg, and the statute was intended to protect against just that kind of harm. However, he did not suffer the broken leg because he was unable to get through the newspapers in the hallways. The broken leg resulted from being dropped on his way out of the building as he was saved. Further, the loss of his contents in the fire was not the type of harm the statute sought to prevent.

Therefore, the type of harm suffered was not the type the statute sought to prevent. Recovery under a theory of negligence per se is not possible. Instead, Tenant will have

established breach of a duty of care under the Learned Hand analysis, as discussed supra.

### **ACTUAL CAUSATION**

Actual causation will be established where the plaintiff would not have suffered harm but for the defendant's failure to conform to a duty of reasonable care in the circumstances.

Here, but for Landlord failing to inspect the building and remove the newspapers and fix the faulty wiring, Tenant would not have suffered a broken leg on his way out of the door, smoke inhalation leading to unconsciousness, or the loss of his contents in the fire.

Therefore, there is actual causation.

### **PROXIMATE CAUSATION**

Proximate causation is established where the plaintiff's harm is the natural and foreseeable consequence of the breach of the defendant's duty of care, without any superseding causes to break the chain of causation.

Here, Tenant suffered smoke inhalation due to a fire caused when a spark from faulty wiring ignited a large amount of old newspapers in the basement. Smoke inhalation is a common consequence where a fire is caused. There is no superseding -- i.e., unforeseeable intervening cause to break the chain of causation. Therefore, there is proximate cause for Tenant's smoke inhalation.

Also, Tenant's chattels were destroyed as a result of the fire, as discussed supra. The burning of a large number of old newspapers can foreseeably result in a conflagration large enough to destroy all the contents of a building. Therefore, there is proximate cause for the loss of Tenant's chattels.



Further, Tenant's leg was broken as a result of the firefighter rescuing him and dropping him. Landlord will argue that Tenant being dropped and his leg breaking was an unforeseeable consequence, and therefore the chain of causation was broken. However, negligence of others -- like the firefighter's here -- is always foreseeable. Therefore the chain of causation has not been broken and there is also proximate cause for Tenant's broken leg.

## **DAMAGES**

Tenant may claim for general damages for the pain and suffering he suffered as a result of the fire. He may also claim for special damages for his medical expenses, and for the market value replacement of the chattels he lost in the fire.

## **DEFENSES**

### **CONTRIBUTORY NEGLIGENCE**

Contributory negligence will bar the recovery of a plaintiff who has in any way contributed to his own harm.

There is no indication that Tenant contributed to his own harm. It was not his duty to inspect, warn or make safe the building.

Therefore, this defense will fail.

### **COMPARATIVE NEGLIGENCE**

Where a plaintiff has contributed in some way to his own harm, where a jurisdiction has adopted pure comparative negligence, his recovery will be reduced by the amount he has contributed. Under a modified comparative negligence theory, where adopted, if

the plaintiff's contribution to his own harm is less than 50%, he will recover only in the amount to which he has not contributed; if it exceeds that amount, his recovery will be barred.

Tenant did not contribute to his harm, so this defense will fail.

### **ASSUMPTION OF THE RISK**

There is no indication that Tenant knowingly and willingly assumed the risk of being in the building. Therefore this defense will also fail.

Landlord may argue that due to the

## QUESTION 2

Sara is a doctor who collects, buys, sells, and trades baseball cards for profit, averaging 15 transactions a week. She is a recognized expert in the 1939-50 era.

Bill operates a store that regularly sells baseball cards. Bill claims he phoned Sara and offered to buy a 1939 Denny Wilson card for \$550, and that Sara accepted.

Immediately after their phone conversation, Bill sent Sara an unsigned, typed letter confirming the contract, and identifying the parties, the Denny Wilson card and the price. Bill's letter had a letterhead identifying the name of his business, *Beyer's Baseball Cards and Collectibles*. The letter included the following term: "Seller shall provide a certificate of authenticity from the Baseball Trading Cards Association." Certificates of authenticity cost \$100 and significantly increase a card's value. Sara's card was not certified, and the parties had not discussed this before.

Sara received and read the letter but did not respond to it. When Bill called later, Sara said she had sold the card to another party for \$575. Bill sued Sara for breach of contract, seeking \$250 in damages (based on \$800 as the fair market value of a certified card).

Sara denies the existence of a contract, alleging that Bill only asked, "Would you consider taking \$550" for the card, and that she replied, "Okay, send me something in writing." Alternatively, she claims that the phone agreement was unenforceable and that the so-called letter of confirmation had no legal effect. She also contests Bill's calculation of damages.

1. Can Bill prevail in his lawsuit? Discuss.
2. If so, what damages, if any, is Bill entitled to recover? Discuss.

## QUESTION 2: SELECTED ANSWER A

### Bill v Sara

#### Applicable Law - Uniform Commercial Code

Contracts for the sale of goods, which are tangible, movable items will be governed by the Uniform Commercial Code (UCC).

Here, the contract is for the sale of a 1939 Denny Wilson baseball card which is a good.

Therefore, UCC applies.

#### Merchants

Where parties to a contract hold themselves out to be experts or as having specialized knowledge in the area of which the contract pertains the parties will be seen as merchants and held to a higher standard of good faith and fair dealing and the sections of the UCC pertaining specifically to Merchants will apply.

Here, Sara is a doctor who collects, buys, sells and trades baseball cards for a profit averaging 15 transactions a week and is a recognized expert in the 1939-50 era. Typically, collectors will not be seen as merchants especially when they make their living by other means, as evidenced here in that Sara is a doctor, but Sara's recognition of being an "expert in the 1939-50 era" along with her frequency of transactions, 15 transactions a week will likely place her in the eyes of the court as a merchant since a typical collector, non-merchant, would not be recognized as an expert nor would they engage in 15 transactions a week. Further Sara's expertise pertains to the contract in question, a 1939 Denny Wilson card.

Therefore Sara will be seen as a merchant.

Bill operates a store that regularly sells baseball cards. Bill's business is that of selling baseball cards and will also be seen as a merchant.

Therefore, both parties will be seen as merchants.

### **Contract Formation**

For there to be a valid, enforceable contract the plaintiff must show that there was mutual assent, offer and acceptance, backed by consideration and that no valid defenses exist.

### **Offer - Bill's Phone Call to Sara**

An outward manifestation of present contractual intent to be bound by the terms which are definite and certain effectively communicated to the offeree creating the power of acceptance.

Here Bill will argue that he phoned Sara and offered to buy a 1939 Denny Wilson card for \$550. Under the UCC only the quantity is required to establish a valid offer but here we have most of the essential terms as follows:

Quantity - 1 baseball card

Identity of parties - Bill and Sara

Price - \$550

Subject matter - 1939 Denny Wilson baseball card

The only material term which is not given in the facts is that of time for performance; under the UCC a reasonable time will be imputed as a gap filler.

The offer was communicated to Sara, the offeree, by telephone and thus created the power of acceptance.

Sara will argue that Bill only asked "would you consider taking \$550" for the card and that she replied okay send me something in writing, which she will argue would be a written offer as contracts for the sale of goods in excess of \$500 need to be in writing.

The court will have to decide whether or not Bill's phone call to Sara was in fact an offer or an invitation to negotiate. It is likely that under either party's interpretation of the phone call a valid offer was made because Sara's saying "okay" to Bill's alleged question of "would you consider taking \$550" will equate to an acceptance and mere acknowledgement of the Statute of Frauds requirement that it be in writing.

Therefore, valid offer.

### **Termination**

Termination can happen in one of three ways; either by rejection, revocation, or destruction of subject matter.

### **Rejection**

An offeree is free to reject an offer at any time prior to acceptance by either expressly communicating a rejection to the offeror or by conduct inconsistent with the terms of the offer.

Here, Sara will argue that her selling of the baseball card to another party should be seen by the court as a valid rejection to the terms of the offer, selling Bill the same card, and that it was done prior to acceptance.

Bill will argue that Sara accepted his offer to buy the card for \$550 prior to Sara's selling of the baseball card to another party and thus makes the rejection invalid.

As discussed above, the courts will likely view Bill and Sara's phone conversation as having culminated in a valid acceptance and Sara's argument for rejection will fail.

Therefore, no rejection.

### **Acceptance**

An unequivocal assent to the terms of the offer.

Bill will argue, as the facts state, that he phoned Sara and offered to buy a 1939 Denny Wilson baseball card for \$550 and that Sara accepted.

Sara will argue that Bill only asked "would you consider taking \$550 for the card" and that she only accepted an invitation to negotiate and not an offer.

As discussed supra, it is likely that under either party's interpretation of the phone call a valid offer was made because Sara's saying "okay" to Bill's alleged question of "would you consider taking \$550" will equate to an acceptance because she made no reference to needing to think about it or review the terms prior to acceptance and statement "send me something in writing" will equate to a mere acknowledgement of the Statute of Frauds requirement that a contract for the sale of goods in excess of \$500 be in writing.

Therefore, valid acceptance.

### **Differing Terms - UCC 2-207 "Battle of the Forms"**

Where a merchant sends a letter of confirmation containing different or added terms that adds to, varies or materially alters a contract the different or added terms will be "knocked out" and only the agreed upon terms will be retained within the contract unless the other party fails to reject the added terms in a reasonable amount of time, typically within 10 days of receipt.

Here, Bill sent a confirmation letter including the following term: "Seller shall provide a certificate of authenticity from the Baseball Trading Cards Association." This additional term will likely be seen by the court as materially altering the contract because the

typical cost of such a certificate is \$100, nearly 20% of the original agreed upon price, and would significantly, or materially, alter the value of the card from \$550 to \$800. Bill and Sara had not discussed the additional term of a certificate of authenticity and thus no agreement had been made.

Under UCC 2-207 the additional term would normally not be allowed to enter the contract and the card will be seen to have a fair market value of \$550. However, if it is found that Sara did not respond to the confirmatory memo within 10 days the added term could enter the contract as she failed to object within a reasonable amount of time.

The facts state that "Bill called later" and it is reasonable to infer that the statement means he called later that day and not later that month, i.e. after 10 days. Based on this presumption the added term of a certificate of authenticity will be barred from entering the contract.

Therefore, no added term.

### **Consideration**

A bargained-for exchange of legal detriment.

Here Bill promised to pay \$550 and Sara promised to supply a 1939 Denny Wilson card.

Therefore, valid consideration.

### **Defenses to Formation**

#### **Statute of Frauds**

The statute of frauds state that certain contracts must be in writing to be enforceable. One such type of contract is that for the sale of goods in excess of \$500.



Here, the contract was for the sale of a baseball card for \$550 and thus must be in writing.

Therefore, Statute of Frauds applies.

### **Confirmatory Letter between Merchants**

There are, however, exceptions to the Statute of Frauds that when satisfied will take a contract "out of" the Statute of Frauds. Once such exception is a confirmatory letter between merchants: a letter confirming a prior agreement to enter into a contract typically within the statute of frauds. The Defendant has 10 days to object to the confirmatory letter after which it becomes binding as a matter of law.

As discussed above, both Sara and Bill will be seen as merchants in the eyes of the court and thus Bill's unsigned, typed letter confirming the contract and identifying the parties and subject matter written on a letterhead identifying the name of Bill's business will be seen as satisfying the statute of frauds. The fact that the letter was "unsigned" is of no consequence because the letterhead will suffice as the signing and only one party, not the party to be charged needs to sign.

Sara will have 10 days to object to the confirmatory letter after which it becomes binding as a matter of law. The facts state that "Bill called her later" the court will have to decide whether it was later that day or after 10 days had passed.

Sara's argument that the letter of confirmation had no legal effect will be valid if she objected within 10 days of its receipt but the facts state that she "did not respond to it" and the courts are likely to view Sara's failure to respond in a reasonable time to the letter of confirmation satisfying the statute of frauds as matter of law.

Therefore, statute of frauds is satisfied.

## **Constructive Condition of Good Faith and Fair Dealing Between Merchants**

Merchants are held to a higher standard of good faith and fair dealing under an implied constructive condition.

Bill will argue that Sara's failure to respond to the letter of confirmation was a breach of the implied covenant of good faith and fair dealing because a reasonable merchant would let another merchant know of their intent.

The court will likely view this as a breach of the implied constructive condition under the UCC.

## **Breach**

A failure to perform under the obligations of the contract.

Here Bill will argue that because Sara sold the card to another party when she was contractually obligated to sell the card to him she is in breach of their contract for the sale of the card for \$550.

The court will view Sara as being in breach of the contract and will hold her liable for all foreseeable damages naturally flowing from her breach absent any valid defenses.

## **Defenses**

### **Parol Evidence Rule**

Any oral or written communication made prior to or contemporaneous with a fully integrated writing will be barred by the parol evidence rule.

Here Sara may attempt to admit her recollection of the phone conversation to combat the legal effectiveness of the acceptance; however, as discussed above her argument is likely to fail.

## **2. What damages, if any, is Bill entitled to recover?**

### **Remedies**

Where a party has breached their contractual duties the aggrieved party is able to recover damages that naturally flow from the breach.

### **Expectation Damages**

An aggrieved party to a contract may recover for damages they expected under the contract. The formula utilized by the court is the fair market value of the subject matter minus the contract price.

Bill will seek damages in the amount of \$250 which he considers his expectation damages under the contract due to the fair market value of the card being \$800. However, since that price was conditioned upon a certificate of authenticity and that was an additional term, the court may or may not allow it which would alter his ability to recover.

If the court allows the additional term, Bill will be able to recover the \$250; but if they bar the additional term under the UCC 2-207 then Bill will likely only recover \$25 as evidenced by the fact that Sara sold the card to another party, as-is without a certificate of authenticity, for only \$575. The contract price was \$550 so the difference between the contract price and the fair market value, \$575, would be \$25.

### **Consequential Damages - "Hadley v Baxendale"**

The non-breaching party may recover any damages that were foreseeable at the time of formation.

Bill will be able to recover consequential damages if he has any.

### **Incidental Damages**

A non-breaching party can recover incidental damages for out-of-pocket expenses naturally flowing from the breach; i.e. hiring a broker, placing an ad, etc.

Here the facts do not indicate that Bill has suffered any damages of this kind but if he were to he would be able to recover those damages as well.

## QUESTION 2: SELECTED ANSWER B

### Bill v. Sara

#### Applicable Law

The UCC applies to the contract involving the sale of goods. Goods are tangible movable items at the time of identification of the contract. Any contracts not governed by the UCC are governed by the common law.

Here, the subject matter is a baseball card, which is a tangible movable good.

Consequently, the UCC applies.

#### Merchant

A merchant is a person who regularly deals in these kinds of goods or who otherwise holds themselves out as having special knowledge as to these goods.

Here, Sara is a doctor who collects, buys, sells and trades baseball cards for profit, averaging 15 transactions a week. She is a recognized expert in the 1939-50 era. Though Sara is a doctor by trade, it can be established that Sara regularly deals with baseball cards and possesses special knowledge of baseball cards. Thus, Sara would be considered a merchant.

Bill operates a store that regularly sells baseball cards. Bill regularly deals with baseball cards and it would be implied that he possesses special knowledge as to these goods. Thus, both Sara and Bill would be considered merchants as it pertains to baseball cards and they will be held to a higher standard of good faith and fair dealing.

## Contract Formation

### Valid Contract

A contract is a promise or set of promises, for the breach of which the law provides a remedy, or the performance of which the law recognizes as a duty. A valid contract consists of offer, acceptance, consideration and no defenses.

### Offer

An offer is a manifestation of present contractual intent to be bound by certain and definite terms, communicated to the offeree. Under the UCC, an offer may be found with the identification of subject matter and quantity and UCC gap fillers can supply any missing terms.

Here, Bill claims he phoned Sara and offered to buy a 1939 Denny Wilson card for \$550. Bill will argue he sufficiently identified the subject matter and price and thus, under the UCC his offer was valid. Sara will argue Bill only asked, "Would you consider taking \$550 for the card." Sara will argue Bill's language is neither certain nor definite and is only an inquiry for negotiation.

Per Bill's version of the correspondence between him and Sara, a valid offer would be found under the UCC. Per Sara's version of the correspondence, it is likely Bill's language would be deemed too uncertain to constitute an offer and would be considered an inquiry.

Though it is uncertain whether there is a valid offer per the correspondence and differing stories, an enforceable contract can be found due to subsequent conduct of the parties, discussed infra.

### Acceptance

An acceptance is unequivocal assent to the terms of an offer. Under common law, the acceptance must be a precise mirror image of the offer and any additional or different

terms constitute a rejection or counteroffer. Under the UCC, a reasonable and definite expression will operate as a valid acceptance even if it contains different or additional terms, as between merchants, unless the acceptance is conditioned on acceptance of the offeror's terms.

Here, Bill will argue when he made his offer over the phone Sara accepted. Sara will argue her reply was, "Okay, send me something in writing." Sara will argue her response does not operate as valid acceptance as she did not unequivocally assent to any deal terms.

Per Bill's version of the correspondence, there was a valid acceptance by Sara. Per Sara's version of the correspondence, she has not provided a valid acceptance, and her communication has simply invited a valid offer from Bill.

Though it is uncertain whether there is a valid acceptance per the correspondence, an enforceable contract can be found due to subsequent conduct of the parties, discussed infra.

### Consideration

Consideration is legally sufficient, bargained-for exchange, which induces current performance, is a detriment to the promisee and a binding obligation on both parties.

Here, sufficient consideration would be found if Bill is promising \$550 in exchange for Sara's 1939 Denny Wilson card. This is bargained-for exchange.

With a valid offer, acceptance and consideration, there is an enforceable contract absent viable defenses.

### Statute of Frauds

The statute of frauds requires certain kinds of contracts to be in writing, signed by the party to be bound, to be enforceable.

Here, the contract is for \$550 worth of goods. Thus, the statute must be satisfied.

### Merchant's Confirmatory Memo

A merchant's confirmatory memo can satisfy the statute of frauds if a merchant provides a signed memo summarizing an oral agreement, which sufficiently confirms the terms of the deal.

Here, Bill provided Sara an unsigned, typed letter confirming the contract, identifying the parties, the Denny Wilson card and the price. Sara will argue this letter does not serve as a sufficient merchant's confirmatory memo because it was not signed. Bill will argue the letter was provided on letterhead identifying the name of his business, Beyer's Baseball Cards and Collectibles.

The required signature or authentication to satisfy the statute of frauds can be satisfied by an electronic signature, such as a company logo on letterhead. This letter would suffice in evidencing Bill's intent to be bound and would be considered an acceptable authentication.

Thus, the statute of frauds is satisfied and there is an enforceable contract per the terms of the merchant's confirmatory memo provided by Bill unless Sara objects within 10 days.

### Contract Terms

#### Additional Terms Under UCC

Here, Bill's confirmatory memo included the following additional term - "Seller shall provide a certificate of authenticity from the Baseball Trading Cards Association." Bill will argue this term is part of his enforceable contract with Sara, as Sara did not provide timely objection. Additionally, he will argue that Sara did not object to the confirmatory memo within 10 days and thus, their enforceable agreement is on the terms of the memo.



Between merchants, additional or different terms become part of the contract unless acceptance is conditional to the terms of the offer, the term has a material effect on the agreed upon exchange, or the offeree provides timely objection.

Here, Sara will argue the additional term in Bill's confirmatory memo is a material term, as certificates of authenticity cost \$100 and significantly increase a card's value. Sara will argue her card was not certified and the parties had not previously discussed this term.

It is likely this term would be considered to have a material effect on the agreed upon exchange and consequently, the term is likely not part of the contract.

### Contract Performance

#### Breach

A breach occurs when a party fails to perform an absolute duty in accordance with the contract terms and the duty has not been discharged.

Here, when Bill called Sara, Sara said she had sold the card to another party for \$575.

Bill will argue this is a breach whereby Sara has failed to perform under their enforceable contract. Sara will argue their phone agreement was unenforceable and the letter of confirmation had no legal effect.

The confirmatory memo would overcome the shortcomings of finding a valid offer and acceptance with the phone conversation.

Thus, Sara has breached and Bill will prevail on a breach of contract suit against Sara.

## Remedies

### Equitable Remedies

#### Specific Performance

Specific performance is an equitable remedy whereby a court requires a party to perform under the contract. Specific performance is typically awarded if monetary damages are inadequate to make the aggrieved party whole or where the subject matter is particularly unique.

Here, Bill will seek specific performance in order to obtain the 1939 Denny Wilson card. He will argue this item is particularly unique and monetary damages will be inadequate compensation.

As the facts stipulate Sara sold the card to another party, if Sara has already tendered the goods and concluded the transaction, it is likely a court would not disrupt an additional contract with a good faith buyer. If Sara has not yet tendered the goods, then a court may award specific performance if the baseball card is deemed unique.

#### Compensation Damages

Compensation damages must be reasonably foreseeable and the plaintiff must mitigate.

#### Expectation Damages

Expectation damages are awarded to provide the aggrieved party with the benefit of the bargain.

Here, Bill will seek his expectation under the contract. Bill will seek \$250 in damages (based on \$800 as the fair market value of a certified card). However, as the certification requirement is likely not part of Bill's agreement with Sara, it is likely he would be awarded damages based on the fair market value of an uncertified card. If the fair market value of the uncertified card is the contract price Sara had with a different

buyer, \$575, then Bill would be awarded the difference between the fair market value and his contract price, \$25. Based on the inadequacy of the expectation damages, Bill will seek specific performance.

## QUESTION 4

Cindy and Shelly Smith, 35-year-old identical twins, look exactly alike.

Cindy was a straight-A student in high school, went to college, and then to law school. She is presently campaigning for election to the State Senate.

Shelly got into the wrong crowd in high school, became addicted to cocaine, and moved to Europe without graduating from high school.

Cindy and Shelly have not spoken for years, and very few people know that Cindy has a twin.

Debbie, a high school classmate of Cindy and Shelly, dislikes Cindy and does not want Cindy to win her election. Debbie obtained an old photograph of Shelly snorting a line of cocaine and sent it to Newspaper the day before the election, with an anonymous note that read, "Ms. Smith is a cokehead." The photograph was very clear and looked exactly like Cindy.

Newspaper, unaware that Cindy had an identical twin sister, published the photograph of Shelly the same day, with a caption that read, "Cokehead for State Senate?" Newspaper reported that it had received the photograph of "Cindy Smith" anonymously earlier that day. Cindy was very distressed about Newspaper's publication and subsequently lost the election.

Thereafter, Cindy filed defamation claims against both Debbie and Newspaper.

1. What is the likely outcome of Cindy's defamation claim against Debbie? Discuss.
2. What is the likely outcome of Cindy's defamation claim against Newspaper? Discuss.

## QUESTION 4: SELECTED ANSWER A

Cindy v. Debbie

Defamation

Defamation is a defamatory statement of or concerning the plaintiff published to a third party that results in damages.

Defamatory statement

A defamatory statement is a false statement that when published might tend to harm one's reputation or standing in the community.

Here, Debbie claimed that Cindy was a cokehead. Doing cocaine is looked down upon and the statement made about Cindy will surely make people look down upon her. This is injurious to one's reputation and could affect Cindy's relationships, and business advantages. The statement is also false. This will be considered a defamatory statement.

Of or concerning plaintiff

In order for a cause of action for defamation to be upheld, the defamatory statement must be about the plaintiff, and the receiving party of the statement must realize that the statement is about the plaintiff.

Here, Cindy is running for the State Senate and is currently campaigning. Therefore, people in the community know who Cindy is, and recognize her face. When Debbie sent the note to Newspaper, it said "Ms. Smith is a cokehead." This, in itself, might not be enough to satisfy this requirement of the defamation claim. Newspaper might not have known who Ms. Smith was. Coupled with the picture of Cindy's twin sister, who

looks exactly like Cindy, makes it clear that Debbie was intending to tell Newspaper that Cindy was a cokehead. The newspaper interpreted the statement as being about Cindy. This is evidenced by the fact that they published an article about it later on.

Published to a third party

The defamatory statement must be published to a third party to support a defamation claim. Publication requires that the intended recipient be able to hear, read, or understand the statement.

Here, Debbie sent the note containing the statement to Newspaper, a third party. They were able to read the note written by Debbie, and understand that Debbie was calling Cindy a cokehead, by reference to the picture.

Damages

The type of damages Cindy is entitled to is dependent on the type of defamation that occurred here.

Libel

Libel is defamation that is written.

In a case for libel, general damages are presumed, and plaintiff will recover those general damages. Plaintiff can also produce evidence of other damages, such as pecuniary loss, to increase his or her damage award.

Here, Debbie wrote the note to Newspaper, which qualifies as libel. Because the defamatory statement was in the form of libel, Cindy will be able to recover general damages for past, present, and future pain and suffering. If Cindy offers evidence of her pecuniary loss she may be able to recover lost wages as well.

## Slander

Slander is defamation that is spoken. In a case for slander, the plaintiff will have to prove actual pecuniary loss to recover any damages, unless the slander is slander per se. Slander per se is a defamatory statement referencing the plaintiff in a professional capacity, accuses him or her of a crime of moral turpitude, accuses a woman of being unchaste, or of having a loathsome disease.

Debbie will argue that although her statement was in the form of a note, it was not something that would be permanent. The note was later just going to be tossed in the trash, and thus wouldn't have the same effects as libel. Libel is written and damages are measured differently because it is assumed that a written statement will reach a wider audience. This little note would not reach that wide audience. Debbie would argue that this is simple slander, and that Cindy would need to offer evidence of actual damages. Debbie will not prevail in that argument because she wrote the note to the Newspaper, who she was sure would publish an article about it.

Even if Debbie prevailed in her argument, this would be considered slander per se because Debbie is accusing Cindy of committing a crime. Cindy would still be able to recover presumed general damages.

Will Debbie be liable for the republishing of the defamatory statement by Newspaper?

Debbie's liability will not stop at her note that she wrote to Newspaper: she will be liable for the information published by Newspaper, because she was the actual and proximate cause of Newspaper publishing the defamatory statement.

## Actual cause

Actual cause is measured by the but-for test. But for Debbie writing the note to Newspaper with the picture, Newspaper would not have published an article about it.

## Proximate cause

Proximate cause is measured by foreseeability. It was foreseeable that if Debbie supplied the Newspaper with information about a person running for the Senate, that they would publish it.

Debbie will therefore be liable to Cindy for the Newspaper publishing the information.

## Defenses

### Qualified privilege

Debbie might argue that she had a qualified privilege to publish the information about someone who was running for the Senate because it is in the public's interest to know if the person that they are voting in to office to represent them is a "cokehead". While this might be of interest to the public if the fact were true, the statement was not true, so Debbie exceeded the scope of her privilege.

### Truth

If the defamatory statement is true, it will act as a defense to a defamation claim.

Debbie will argue that the statement she published to Newspaper was, in fact, true. She stated that "Ms. Smith" was a cokehead. She included a picture of Cindy's twin sister Shelly. Debbie might contend that she was actually talking about Shelly Smith when she sent the letter. Her argument will fail. The facts tell us that Debbie does not like Cindy, and that she did not want Cindy to win her election. She sent the note to the Newspaper intending that they interpret the information as being about Cindy Smith, which they did. The statement as represented was therefore not truthful.



## Constitutional privileges

The First Amendment protects freedom of speech. The amendment protects people who are speaking fact or opinion, but does not permit people to publish false, injurious statements about others freely. Due to constitutional requirements, there may be additional factors in a defamation claim if the statement was made about a public concern.

## Public Concern

Here, the defamatory statement is a matter of public concern because the public has a right to know whether the person they are electing into office is a cokehead. Because this is a matter of public concern, the plaintiff must prove fault with respect to the defendant. If the plaintiff is a public figure, he or she must prove that the defendant acted with malice.

## Public figure

Here, Cindy is a public figure as she is within the public eye. The public knows who she is, as she has interjected herself into public view with her campaigning efforts. Because she is a public figure, Cindy will have to show that Debbie acted with malice to recover.

## Malice

A defendant acts with malice if he or she intentionally publishes a defamatory statement, knowing it is false, or published it with reckless disregard as to its truth.

Here, Debbie published the statement to Newspaper with the intent that they construe it to be about Cindy Smith, and they did. She knew that the information was false when construed that way, and sent it anyway. Debbie therefore acted with malice, and Cindy can recover damages as discussed supra.

Cindy V. Newspaper

Defamation

defined supra

Defamatory statement

defined supra

As to the statement "Ms. Smith is a cokehead", coupled with the picture, discussed supra. The Newspaper published a similar statement, "Cokehead for State Senate?" This statement is defamatory in that it would be harmful to one's reputation who is running for State Senate to be considered a cokehead. People will most likely not vote for one who is a cokehead, and it would injure Cindy's reputation in the community.

Of or concerning plaintiff

defined supra

Here, the Newspaper published the article containing the picture of Shelly Smith, who the Newspaper believed to be Cindy Smith. The two look exactly alike, and hardly anyone was aware that Cindy had a twin sister. They included the caption "Cokehead for State Senate?" Although the Newspaper does not include Cindy's name, it can be implied that they are referring to Cindy, when the caption is coupled with the picture. The public would interpret the caption to be about Cindy, as Cindy has been campaigning for election and her face is known.

Published to a third party

defined supra

Here, the statement by Newspaper was published in the newspaper, and possibly distributed, and available for purchase by the public. As discussed supra, the public would understand that the statement was about Cindy, and anyone who can read would understand the statement as saying that Cindy was a cokehead.

Damages

defined supra

Libel

defined supra

Here, the statement was written in the Newspaper and published to a third party, the public. The Newspaper is a fairly permanent form of publication. Damages here will be presumed, and as discussed supra.

Constitutional privileges

discussed supra

Public concern

discussed supra

Public figure

discussed supra

Malice

defined supra

Here, the Newspaper did not intentionally publish a statement that they knew was false. They had no reason to believe the statement to be false, as there was a picture with Ms. Smith snorting cocaine. They did not know, or have reason to know, that Cindy had a twin sister. Because Cindy cannot show that the Newspaper acted with reckless disregard, she cannot prove malice. She can at best prove negligence, which is not the standard here. She will not recover from Newspaper.

Qualified privileges

Same as Debbie discussed supra

Cindy will not recover from Newspaper, but will recover from Debbie, who will also be liable for the republishing done by Newspaper.

## QUESTION 4: SELECTED ANSWER B

1. What is the likely outcome of Cindy's defamation claim against Debbie?

### Defamation

A defamatory statement of or concerning plaintiff published to a third party who understood it and caused damages to plaintiff.

### Defamatory Statement

A defamatory statement is one that causes plaintiff to lose creditability in the community and thus causes damages to her reputation.

Here, Debbie sent Newspaper an old photograph of Shelly (Cindy's identical twin sister) wherein Shelly was snorting a line of cocaine. The fact pattern states that Debbie went to high school with Cindy and Shelly and dislikes Cindy and does not want her to win her election. Here the statement is defamatory because a published photo of a person doing drugs would be disgraceful and make the person in the photo lose creditability in the community.

Therefore the statement was defamatory.

### Of or Concerning Plaintiff

The defamatory statement must be of or concerning plaintiff.

Here the statement is concerning plaintiff as she was running for election and Debbie purposefully sent a photo to Newspaper of Shelly who is Cindy's identical sister for the purposes of making Cindy lose her election. Thus the statement is concerning plaintiff.

Therefore the statement is concerning plaintiff.

Published to a third party who understood it

Here the statement was sent to Newspaper who did not know that Cindy had an identical twin sister named Shelly but rather understood it to be Cindy on the photograph because Debbie submitted the photograph the day before the election with a note that read "Ms. Smith is a cokehead." Here the facts indicate that Newspaper was "unaware that Cindy had an identical twin sister"; thus it understood that the picture was Cindy.

Therefore it was published to a third party who understood it.

### Damages

Plaintiff must prove actual damages or pecuniary damages to prevail in a defamation suit unless Libel or Slander Per Se can be proven.

### Libel

Libel is written defamation and damages are presumed under this type of suit because they are in written form and published to third parties and are presumed to damage plaintiff's reputation.

Here, Debbie anonymously sent Newspaper the photo of Shelly and wrote "Ms. Smith is a cokehead"; thus constitutes libel defamation. Cindy was running for State Senate; thus this type of publication would demolish Cindy's reputation in her community. She may be entitled to recover actual damages as well as any pecuniary damages she suffered from the defamatory statement.

### Constitutional Limitations

When a matter is of public concern or the plaintiff is a public figure two additional elements must be proved: 1) fault of defendant and 2) falsity of statement.

Here, the defamatory statement is one of public concern as Cindy is running for State Senate and is newsworthy to the public. Second Cindy would likely be considered a Public Figure.

#### Public Figure

A public figure is a person who has gained recognition in the community through fame or public interest or is a central person in a political movement.

Here Cindy is running for a State Senate position and is likely a famous figure in the community as she has campaigned and traveled throughout her community for election purposes. Further the newspaper knows of her status; thus she is likely a public figure.

Therefore Cindy is a public figure.

#### Fault

Plaintiff must prove that defendant was at fault for the defamatory publication.

Here, Cindy can show that Debbie was at fault for publishing a false picture of her to the Newspaper. Further she can argue that Debbie knew that the picture was of her twin sister Shelly and not her.

Therefore Debbie was at fault.

#### Falsity

Plaintiff must prove that the defamatory statement was false. A public figure must prove that defendant acted with malice, which is the reckless disregard for the truth or falsity of the defamatory statement.

Here, Debbie knew that the photo she published to Newspaper was false because the picture was in fact of Shelly, who is Cindy's identical twin sister. Therefore Cindy may

prove that Debbie acted with malice as it relates to the truth or falsity of the defamatory statement published to Newspaper.

## Damages

Cindy may recover from Debbie any lost earnings that she may have encountered as a result of the defamatory statement published by Debbie.

## Defenses

### Qualified Privilege

A qualified privilege is not a complete defense and may be used if the defamatory statement is in the interest of the public and publisher or it regards a public concern that the public considers newsworthy.

Here, Debbie may argue that this picture is newsworthy because it concerns the State Senate position; thus the public would likely find it newsworthy and thus the statement was a qualified privilege. This argument is not likely to prevail as the picture was not in fact of Cindy but rather her twin sister who was understood as Cindy, thus not valid. Although publicly newsworthy, it lowered Cindy's reputation and more importantly it was a false statement and done with malice on Debbie's part.

Therefore this defense will not prevail.

Therefore Cindy may succeed in a defamation claim against Debbie.

2. What is the likely outcome of Cindy's defamation claim against Newspaper?

## Defamation

A defamatory statement of and concerning plaintiff published to a third party who understood it and caused damages to plaintiff.



Defamatory Statement (defined above)

Here, as noted above Newspaper republished the photo which it received anonymously from Debbie of Cindy's twin sister snorting coke. This picture is defamatory as it would lower the reputation of any reasonable person in their respective community if published to a third party.

Republishing Party

A party who republishes a defamatory statement may be held liable for defamation for republishing such defamatory statement; this includes newspapers and retailers.

Here, Newspaper will remain liable to Cindy for republishing the photo that Debbie sent them.

Opinion

A defense to a defamatory statement is that the defendant made the statement as an opinion rather than a defamatory remark.

Here, Newspaper may argue that it was making an opinion of Cindy rather than a defamatory remark as the written language illustrates "Cokehead for State Senate?" This argument is not likely to prevail as the picture is self-explanatory and the third parties would likely understand that Newspaper is saying that Cindy is a cokehead rather than giving a biased opinion.

Therefore the statement was defamatory.

Of or Concerning Plaintiff (defined above)

Here, as mentioned above the statement was concerning plaintiff as Debbie intentionally published the statement to Newspaper and Newspaper republished the

statement by publishing the photo of Shelly with the caption that read "Cokehead for State Senate".

Therefore the defamatory statement was concerning plaintiff.

Published to a third party who understood it (defined above)

As mentioned Newspaper will remain liable for the photo it published of Shelly with reference to Cindy. The people who read their newspaper article understood the photo to be of Cindy and not Shelly; thus it was understood that the photo which Newspaper republished was of Cindy, who was running for State Senate.

Therefore the third party did understand the photo was in reference of Cindy.

Damages (defined above)

Libel (defined above)

Here, damages are presumed as the defamatory statement damaged Cindy's reputation in her community because a photo of a person doing drugs would lower the creditability of an individual in the community; thus the defamatory statement caused Cindy damages. Cindy may be able to recover actual damages as well as pecuniary damages sustained as a result of the defamatory statement. Lastly the loss of her election.

Constitutional Limits (defined above)

Public Figure (defined above)

As mentioned above Cindy would be considered a Public Figure because of her campaign and fame in the community. Further this is a matter of public concern; thus it

is newsworthy to the public. Cindy must prove malice on the part of Newspaper to prevail.

Fault (defined above)

Here, Cindy may prove that Newspaper was at fault in republishing the photo without taking adequate care of informing itself as to the truth of the photo. Newspaper may argue that they published the photo immediately the same day as they received it because the election day was the following day and they could not wait to clarify its truth and they were not aware of the twin sister. This argument may not suffice as Newspaper has a duty to reasonably report prompt news.

Fault is proven here.

Falsity (defined above)

Cindy must prove Newspaper acted with malice.

Here, it will be difficult for Cindy to prove that Newspaper acted with a reckless disregard to the truth or falsity of its statements because Newspaper did not know that Cindy had an identical twin sister, unlike Debbie who went to high school with them. Further Newspaper could not make a reasonable inference to its truth as the election was the next day and was in the interest of the public to know of this photo because Cindy was running for State Senate.

Falsity not present here.

Therefore Cindy may not prevail against Newspaper.

## Defenses

### Qualified Privilege (defined above)

As mentioned above, Newspaper may too argue that it was in the interest of the public to know of this photo as Cindy was running for State Senate and was in the interest of the public as well as the publisher; thus they had a qualified privilege. Lastly, Newspaper may argue that it did not act with malice, which is the standard of falsity Cindy must prove; thus it cannot be liable to Cindy under a defamation claim.