



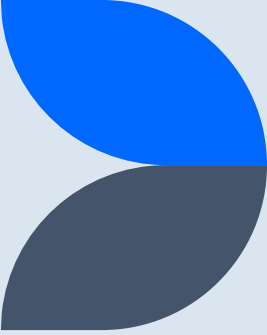
# Torts and Contracts Refresher

Melanie Crenshaw, UNC School of Government  
One-Day Civil Law Seminar 2023



# Objectives

- Review the elements of the tort of negligence
- Explore in more depth the two-part element of causation
- Review the steps to analyze a contracts case
- Explore in more depth the importance of establishing the terms of a contract





# Torts

Focus on Negligence

# A tort is a civil wrong.

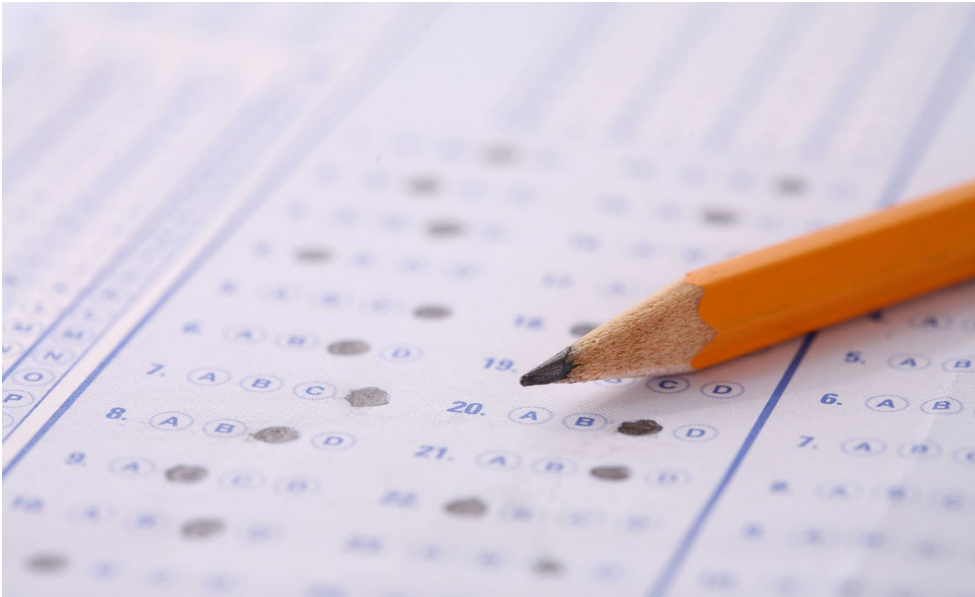
Torts are divided into two big classes: intentional and negligence. (Also note “strict liability”)

Most – but not all – intentional torts involve behavior that is also a crime.

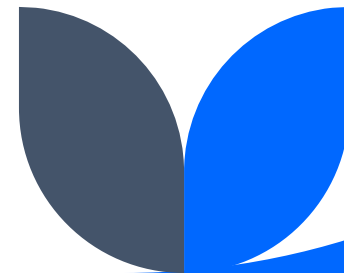
The same action may be both a crime and a tort. (Remember the rule: “either, neither, or both.”)

Each intentional tort has different essential elements (just like a crime does).

# Test for Negligence



**What would a reasonably prudent person, acting with due care and diligence, do under the same circumstances?**





# Traditional Negligence Analysis

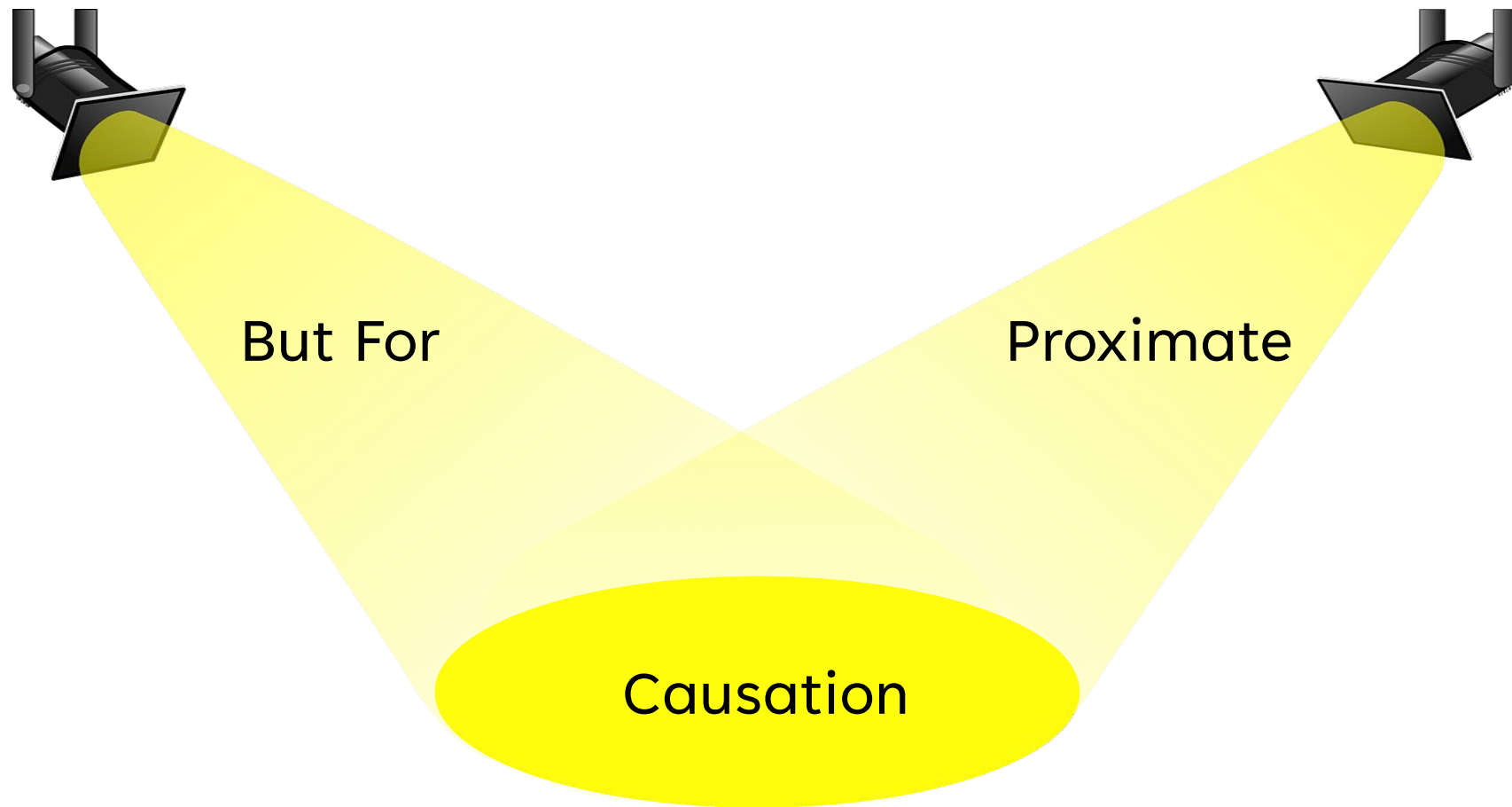
- Did defendant have a duty of reasonable care to the plaintiff?
- Did defendant breach that duty (i.e., was defendant negligent)?
- Was defendant's negligence the proximate cause of injury to plaintiff or plaintiff's property?
- What damages did plaintiff suffer?



# ELEMENTS OF NEGLIGENCE

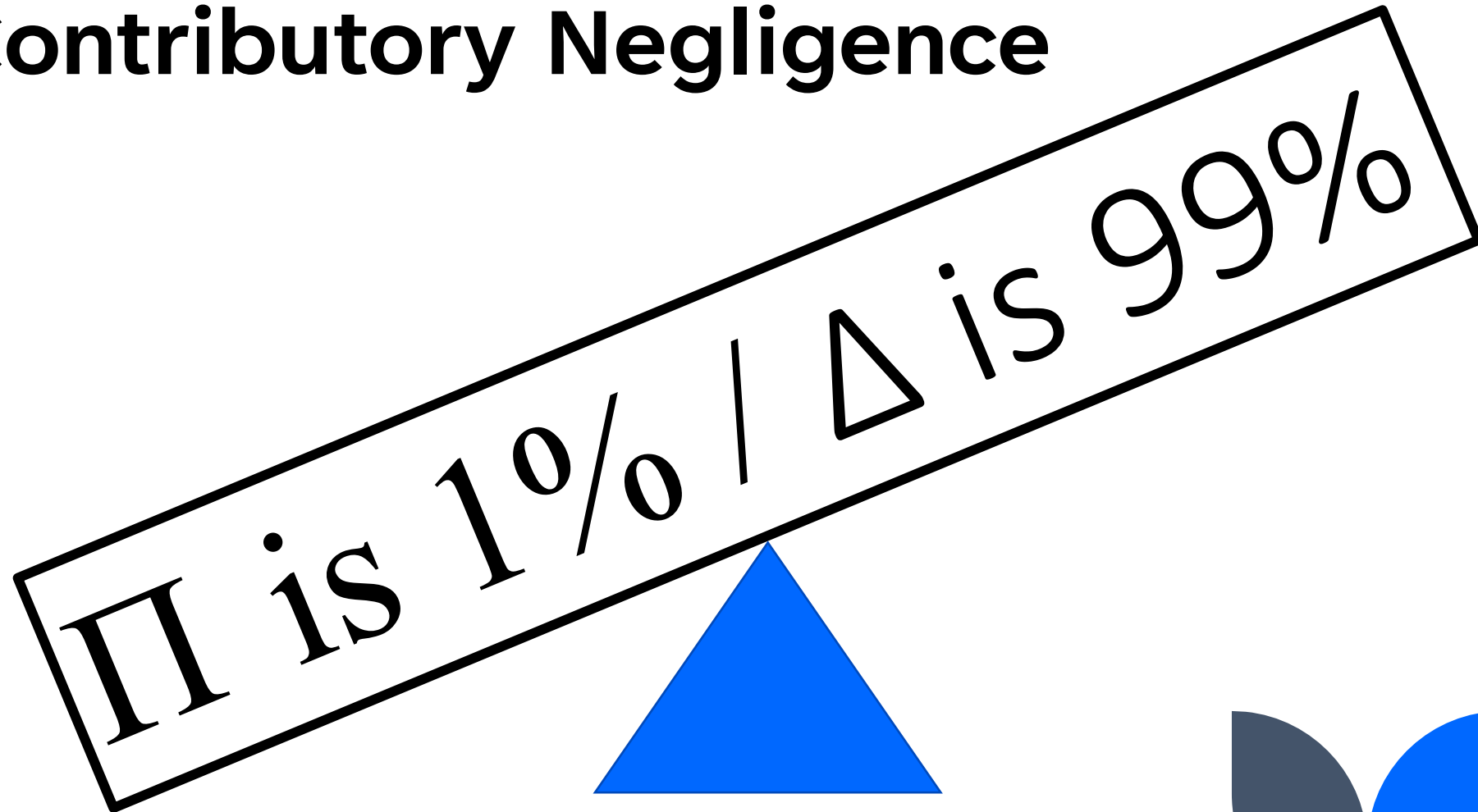
- Duty=exercise amount of care that would be taken by a reasonably prudent person under the same or similar circumstances
- Breach=violates duty standard
- Causation
  - Actual=but for defendant's negligence, plaintiff would not have been injured
  - Proximate=defendant should have foreseen plaintiff might be harmed if defendant did not exercise reasonable care
- Damages=actual physical injury or property damage or out-of-pocket loss

# Spotlight on Causation

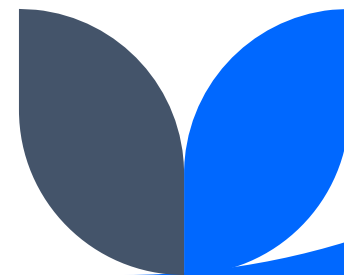




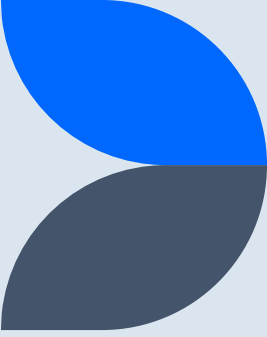
# Most Common Defense: Contributory Negligence



Π is 10% / Δ is 99%



# But Wait...Don't Forget About Last Clear Chance



- An exception to Contributory Negligence
- Applies if plaintiff can prove:
  1. Plaintiff's negligence put plaintiff in a position of peril from which plaintiff could not escape;
  2. Defendant knew, or by the exercise of reasonable care should have recognized, the plaintiff's position of peril and inability to escape from it;
  3. Defendant had the time and the means to avoid injuring the plaintiff and failed to use reasonable care to do so; and
  4. That failure proximately caused plaintiff's injury or damage.

# Measure of Damages

## ❖ COMPENSATORY DAMAGES

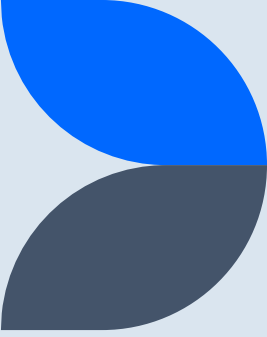
- ❖ Effort to make plaintiff whole
- ❖ Personal injury damages include medical expenses, pain and suffering and lost wages
- ❖ Damage to property damages include diminution in value and intrinsic value

## ❖ PUNITIVE DAMAGES

- ❖ Only for intentional torts
- ❖ Clear and convincing evidence
- ❖ Willful and wanton, fraudulent, or malicious tortious conduct

## ❖ PRE-JUDGMENT INTEREST





# Four Last Things to Remember:

Vicarious Liability

Animal Liability

Measure of Damages

Collateral Source Rule

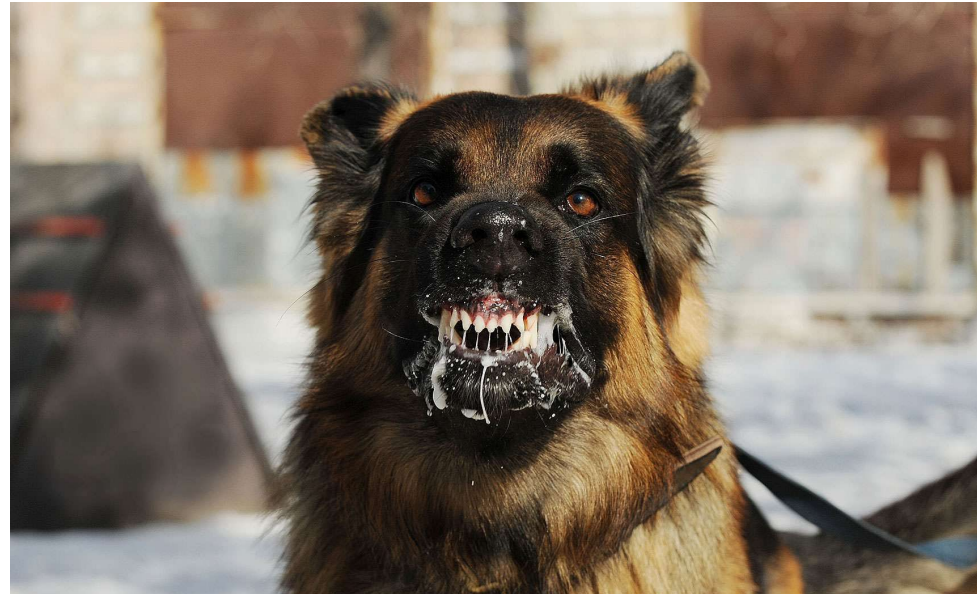
# Vicarious Liability

- Liability based not on a person's own wrongdoing, but rather on that person's relationship to the wrongdoer
- Parents are liable for the willful and intentional torts of their children up to \$2,000 (G.S. 1-538.1)
- Employer may be responsible for acts of employees
- Owner of a car may be responsible for acts of driver

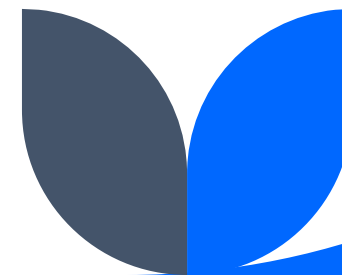


# Animal Liability

- Owner or keeper of vicious animal is responsible for injury caused by vicious behavior of animal if owner/keeper had knowledge
- Negligent failure to control animal
- Violation of a safety statute
- G.S. 67-4.1 Dangerous Dog Statute



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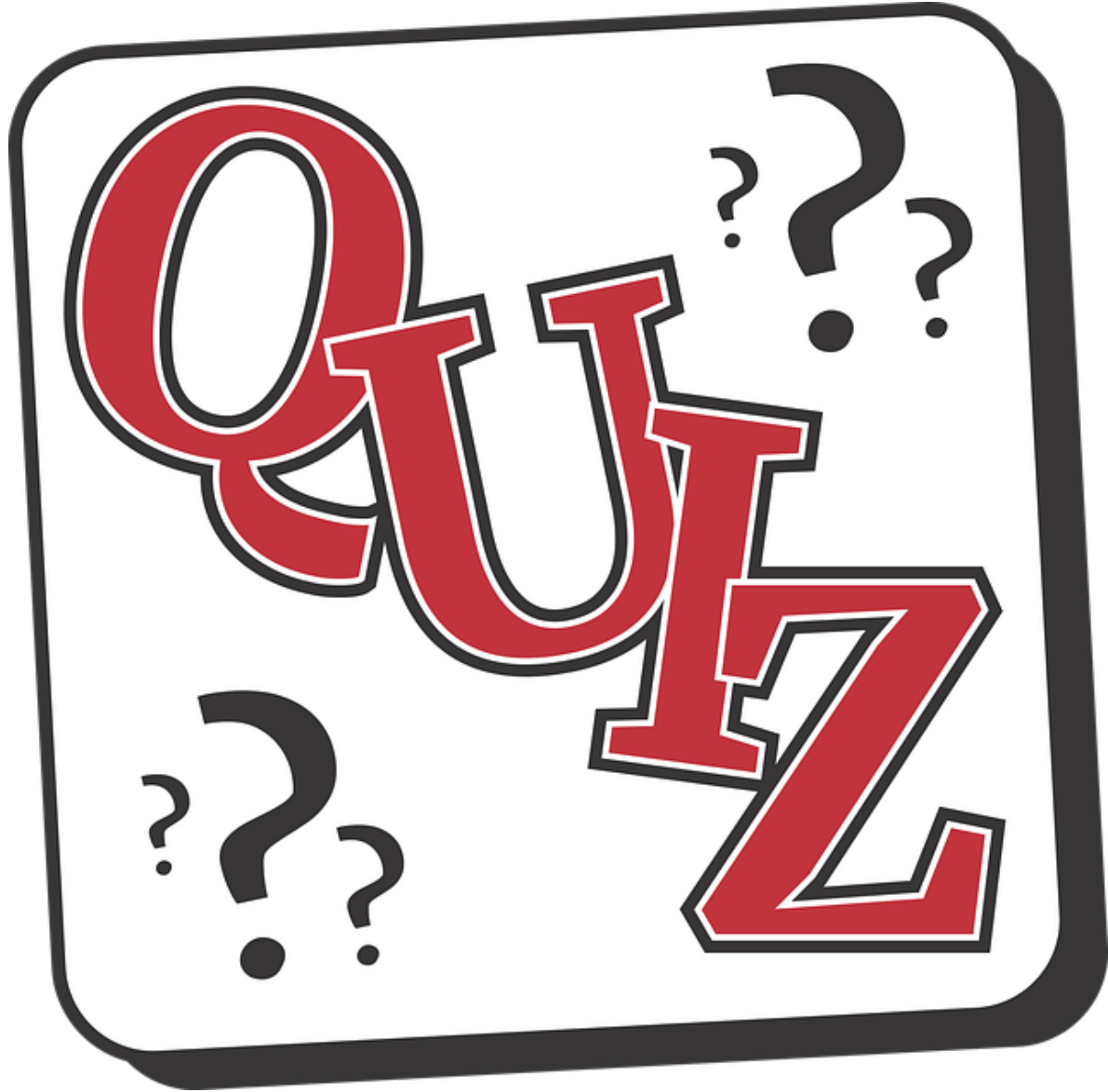
# Collateral Source Rule



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- Wrongdoer's liability should not be reduced by compensation plaintiff receives from an independent source
- Defendant prohibited from even introducing evidence that plaintiff has received payment from some other source





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# Contracts

Focus on Terms

# How to Analyze a Contracts Case

1. Is there a contract?
2. Who are the parties to the contract?
3. What are its terms?
4. Did defendant breach the contract?
5. What damages is the plaintiff entitled to recover?



# 1. Is there a contract?



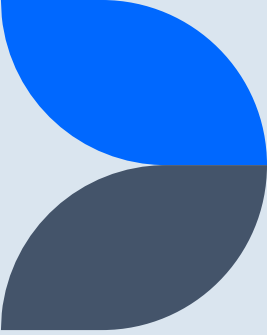
Offer



Acceptance



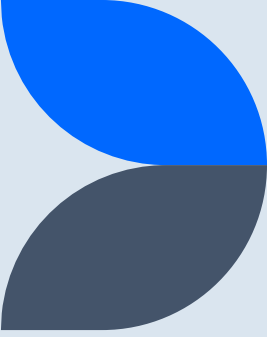
Consideration



## 2. Who are the parties?

Lawsuits for breach of contract have a fundamental requirement that the parties who are bound by the contract should be the parties who are suing and are sued.

So, it's important to figure out who is actually bound by the contract.



# 3. What are the terms?

If the agreement is in writing, ask for a copy and read it carefully.

Are the terms clear?

If the agreement is not in writing, listen to the testimony about the terms.

What rules of evidence should the magistrate be mindful of in determining the terms?

Are there additional or different terms written into the agreement by the law?

# Best Evidence Rule

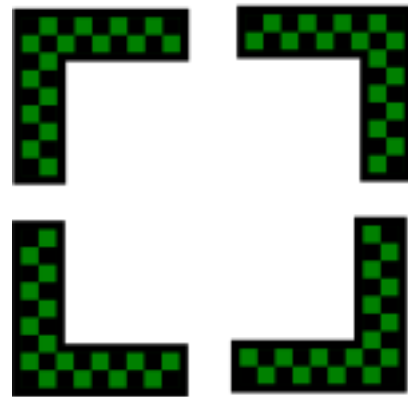
“To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute.”

-N.C. Rules of Evidence, Rule 1002



# Parol Evidence Rule

When a contract is in writing, a court will not consider evidence contradicting the written terms.



# NOT the Parol Evidence Rule

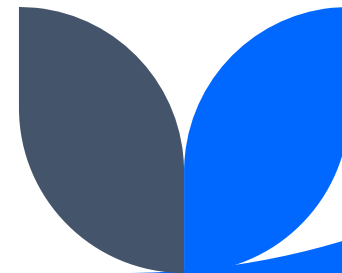
- Evidence to explain an ambiguous term



How about them apples?

- Evidence of modification

John joined the Club and signed a one-year contract. John wants to cancel and stops paying. The Club sues John. John wants to testify that the Club offered him a “buy-out,” allowing him to pay \$250 and be released from liability.





# Making Decisions about Evidence



Is it admissible?

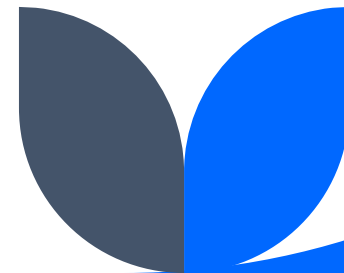
Is it relevant?

Is it reliable?

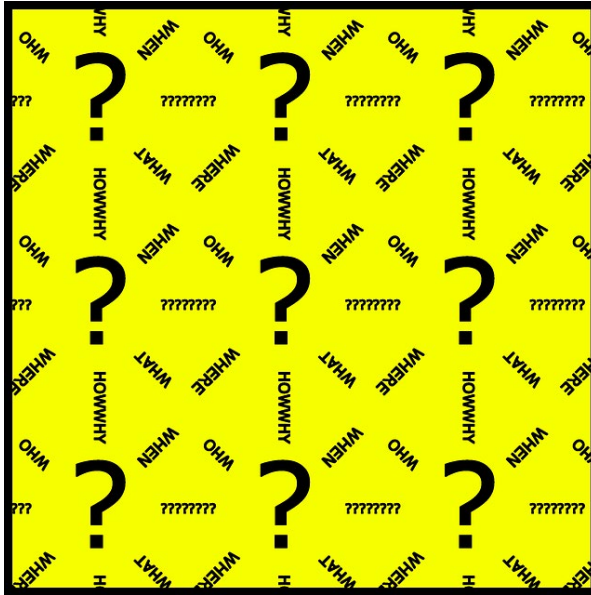
What weight should it be given?

Is it credible?

Is it barred by a rule of evidence or privilege?



# Eliciting Truthful Information



Avoid suggesting the answer.

Use a series of questions, if necessary.

Slow your pace.

Pause.

Ask clarifying questions.

Use reflective statements to redirect the witness.



# Assessing Credibility



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1. Written corroborative evidence
2. Internal and historical consistency
3. Consistency with evidence offered by others
4. Degree to which witness had reason to be attentive and was able to observe
5. Presence or absence of motivation to lie
6. Witness's ability to answer questions related to details
7. Absence of evidence
8. Demeanor?



# Points to Remember about Evidence



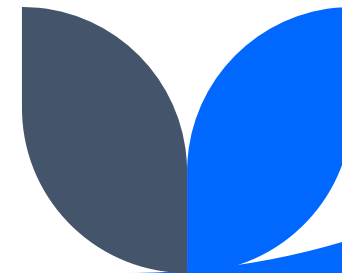
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Distinguish between admission and weight

Freely admit evidence unless it is objected to/might improperly bias your decision

Instruct attorneys to hold repeated objections to the close of evidence

Rules of Evidence 611 and 614



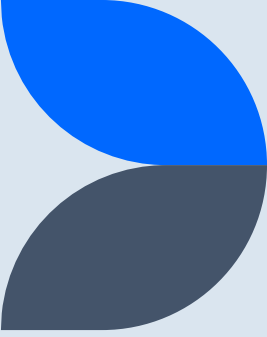
# 4. Did Defendant Breach the Contract?

Once you have determined the terms of the contract, whether a breach has occurred is not hard to determine.

HOWEVER, if you skip the other questions and go straight to the question of breach, you increase the chances of making a wrong decision. Resist the temptation to move on to breach if you can't figure out what the terms are. If you can't figure out what the terms are, the plaintiff loses.

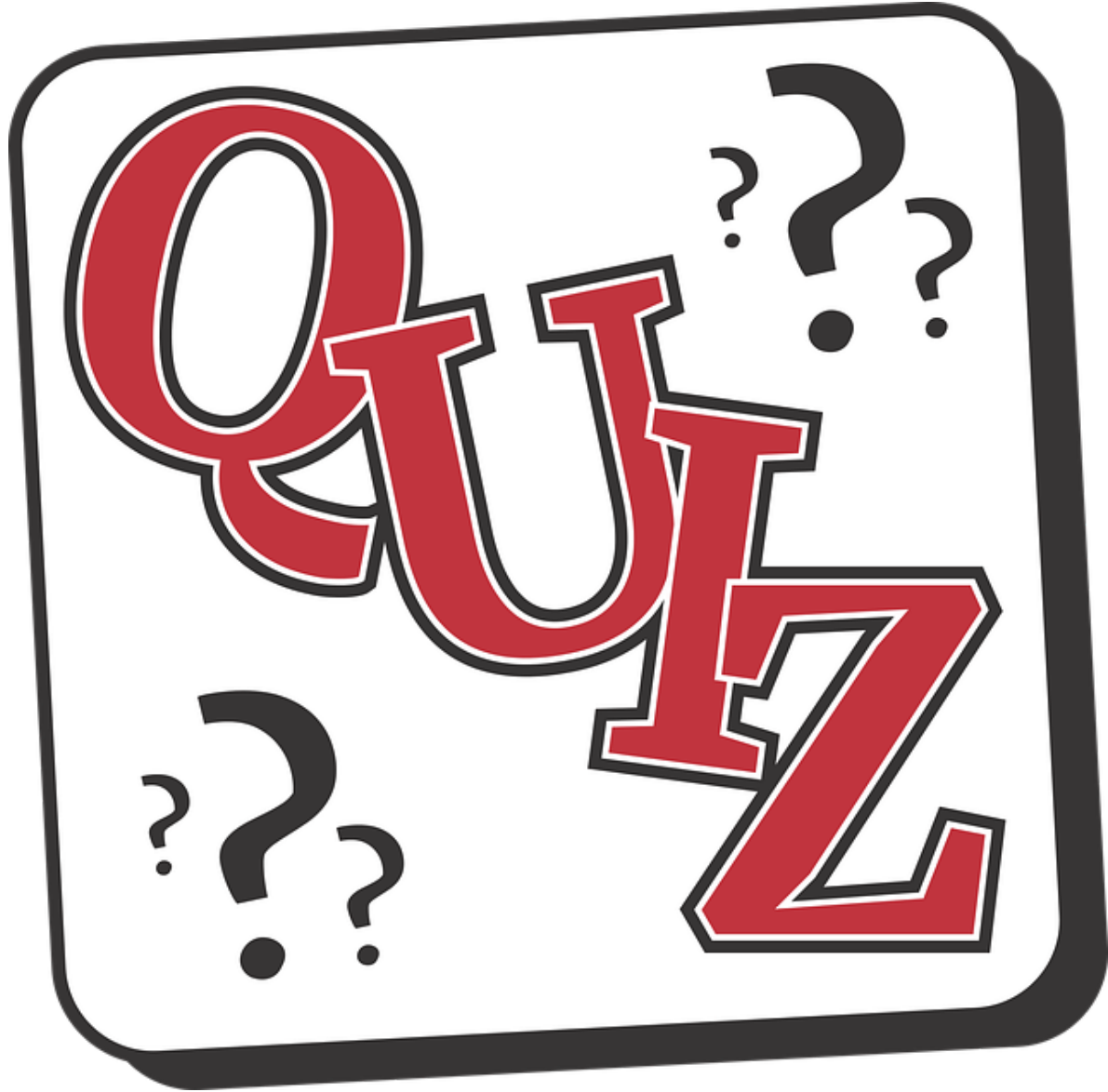


# 5. What are the Damages?



The standard measure of damages in an action for breach of contract is that amount of money necessary to restore the non-breaching party to the position s/he would have occupied in the event there had been no breach.

Be on the lookout for the plaintiff's duty to mitigate damages.



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# Questions?

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