

MONTEREY COLLEGE OF LAW

REMEDIES

Final Examination

Spring 2020

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INSTRUCTIONS: There are three (3) questions in this examination. You will be given four (4) hours to complete the examination.

Question 1

On January 3, 2020 “Amy Designs” a producer of fine and unique dresses, orally agreed to make and sell to Barbara a “one of a kind” dress with a “special fabric from China” for \$1000. A few days later, a viral infection struck the province in China where the special fabric was produced, and production was suspended. A similar special fabric was available from Thailand but was twice the cost.

On January 20, 2020 Amy emailed Barbara the following:

Barbara,

Due to unforeseen circumstances I will be unable to sell you the dress for \$1,000 but I can sell it to you for \$1,600.

Amy

Barbara immediately responded by email:

Amy,

We made a deal and I expect you to honor it.

Barbara

On February 2, Amy purchased the special fabric from Thailand and made the dress. Amy had another customer, Claire, who saw the dress and agreed to purchase it for \$1,600.

Barbara learned of this when she called Amy on February 3 to inquire about the delivery of the dress. Amy told her, “I am selling the dress to someone else as my lawyer told me that because our agreement was oral, I don’t have to honor it.”

Barbara consults you later that day. Amy still has the dress. Advise her of all available remedies and explain fully.

Question 2

Andrea owns several thoroughbred horses. Bill, one of the trainers of her horses, arranged the theft of one of the horses Golden Jewell by having his accomplices enter her property at night without her consent.

Golden Jewell had a deflated value of \$20,000 because she was sired by two other champion horses that Andrea owned and had not yet raced. Bill sold Golden Jewell to Slimy Jim, the jockey, for \$50,000. Jim was aware of how Bill obtained Golden Jewell so he immediately changed her name and identifying features and took her to a neighboring state where he could race her under the name of Silver Bullet.

Andrea was not aware of Bill's involvement in Golden Jewell's disappearance. She shared an illegal insider stock tip with him at her stable a few weeks later. Bill took the \$50,000 he was paid by Jim and invested in the stock tip by Andrea and quickly doubled the money to \$100,000.

Bill also bought lottery tickets with \$10.00 out of the money from Jim and won \$20,000 with one of the tickets.

Jim jockeyed Silver Bullet in the Happy State Derby, came in 1st and was awarded \$300,000. He took the \$300,000 prize money and purchased property the Silver Bullet Ranch adding \$100,000 of his own money for a total purchase price of \$400,000.

A month later, an investigator hired by Andrea uncovered this whole scheme and tracked down Golden Jewell to Jim and Bill's involvement.

Andrea consults you. Advise her as to all her potential remedies vs. Bill and Jim and any defenses they may raise. Explain fully.

Question 3

Penny owns a 75-acre lot in the country. Danny owns a smaller unimproved lot to the north. A stream runs through Penny's lot near the boundary line with Danny's lot. Penny has a guest house at the south end of her lot and uses it for visitors. She plans to build a larger house in the future to use as a short-term rental hoping to receive up to \$500 each month in net rent proceeds.

Danny began to clear his land to build a house. To do so, he had to fell trees and haul them to a nearby lumber mill. He asked Penny if he could take a short cut across Penny's lot to the mill and Penny agreed.

On his first trip, Danny dumped the trees on Penny's lot near the stream. The trees were dumped in an area that Penny didn't see and was unlikely to see or use. Several of the trees rolled into the stream, blocking its natural flow.

Penny left on a book tour for six months. During this time, as a result of normal rainfall during that time of the year, the stream overflowed, causing water to rush down to Penny's house at south end of her lot flooding her guest house and damaging her mint condition 1970 Mustang.

Penny returned from her book tour and learned what happened. It will cost \$20,000 to remove the trees. The trees' presence on the lot has depressed its market value from \$750,000 to \$500,000. It will cost \$20,000 to repair the mustang and \$15,000 to buy a new one.

What intentional tort claims can Penny reasonably bring against Danny and what remedies can she reasonably seek? Discuss.

Remedies-spring 2020-

Question 1 Answer:

Specific performance – unique items

Injunction to prohibit sale and delivery to Claire

Law Damages – Cover K difference or difference in contract price and market price

Q2 Answer Outline

v. Jim: Replevin horse, Restitutionary Damages. Trace the \$300,000 prize to Silver Bullet Ranch – Equitable Lien. No BFP defense.

v. Bill: Tort conversion. FM value at the time of taking \$20,000. Waive Tort and get restitutionary damages of \$50,000 benefit to Bill. Trace lottery tickets and winnings \$20,000. Constructive trust and restitutionary damages.

Trace \$, invested in stock, constructive trust on \$100,000. BUT Unclean hands on stock \$.

Q3 Answer Outline:

Intentional Torts:

- License
- **Trespass to Land**
 - Defenses: Consent
- **Trespass to Chattel**
 - Motorcycle
- **Conversion**
- IIED
- Battery

Remedies:

- Legal Remedies
- Restitutionary Remedies
- Injunction

Punitive Damages

Nominal Damages

Special Damages

Restitution

Ejectment

Injunction

Remedies Final Exam

Question 1

A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some recognizes a duty. A contract may be oral or written and consists of an accepted offer and is supported by adequate consideration.

Did “Amy Designs” breach the contract with Barbara when she was not able to fulfill the terms of the contract due to an unforeseen viral outbreak in China? Can Barbara see legal and or equitable damages from Amy Designs for this breach?

Here, “Amy Designs” (“AD”) a producer of fine and unique dresses, orally agreed to make and sell to Barbara (“B”) a “one of a kind” dress with “a special fabric from China” for \$1,000. AD and B had a valid oral contract. However, when there is a breach of a contract through the failure of one of the parties from fulfilling their end of bargain (duty), the harmed party may seek damages.

Damages may be through legal or equitable remedies. Legal remedies consist of financial damages (money), such as expectancy, reliance, incidental, consequential, liquidated or punitive damages and are normally decided by a jury. Equitable remedies do not consist of financial damages, are usually decided by a judge and include specific performance, rescission or reformation of the contracts, temporary, preliminary or permanent injunctions. Damages would have to be foreseeable, unavoidable and certain along with causation.

Here, it was not foreseeable that a virus would strike China and the material would not longer be available, it was not unavoidable, again due to the virus, AD would not have known that this fabric was only available in China. The damages are certain (\$1,000 for this exact dress) but while AD is the actual cause of the breach, she is not the proximate cause. The virus is, therefore I would go through all the possible legal damages that B could receive under this breach of contract. And I would advise on the equitable damages. AD breached the contract when she stated that, "she is unable to sell the dress for \$1,000 but...can sell t to you for \$1,600." This is known as anticipatory repudiation.

Expectation Damages (AKA the benefit of the bargain) flow from the wrong and are designed to make the victim of the breach whole as if the promise had been performed and the amount of the damages is not speculative.

Here, the dress is unique as AD is a producer of fine and unique dresses made with a special fabric from China. The likelihood of B finding this same unique dress for the same price with this unique fabric from a country that has shut down due to a virus is unlikely. She has not at this point paid AD for the dress and she is not likely to find an exact match, therefore expectancy damages are not an adequate remedy for B to pursue.

Reliance damages

These damages are intended to put B in the same economic position as if the contract never exists. It would be money she had spent due to her reliance on the contract. Here, there are not facts to indicate B expended any funds, unless she lined up photographers, paid deposits, planned a wedding around the acquisition of this special dress and if so, she would be entitled to both reliance and incidental damages – money she would have spent looking for a replacement dress or any other out of pocket expenses. Nothing in the fact pattern indicates that she is entitled to either of these damages, but if there were it would be justified under this breach of contract.

Liquidated damages, there is no written contract, so this is not applicable as these are typically written into a contract in the event of a breach. Punitive damages are not appropriate in this situation as AD could not have foresee that a virus would strike China and that she would not be able to fulfill the terms of the contract.

Sale of Goods

If the Seller breaches and the seller keeps the goods, then the buyer is entitled to recover market price at the time the discovery of the breach. Here, B and AD had an oral agreement for the purchase of the dress for \$1,000. Three weeks later AD informed B through email that she was unable to make the dress for the price and needed to charge \$1,600 because she had found a similar special fabric in Thailand. B was aware of the breach on January 20, 2020.

Because AD is still in possession of the dress and B could try to find another source for the dress and if she has to pay more for it then AD would have to pay B the difference between the ^{cover}market price and the contract price. If she is unable to find a replacement, then AD would owe B the ^{Market}cover price minus the contract price. B will either be able to collect expectancy damages or cover damages, but not both. This is a better option for B, however B has her heart set on the exact special dress that she asked AD to make and that is why she said in her email, "I expect you to honor it." It is unlikely that B will find legal remedies are adequate for this unique item. ✓

When legal remedies are not sufficient, then equitable remedies can be sought by the harmed party. In this case because the dress is so unique, it would fall under "specific performance."

Specific Performance ("SP")

SP is an extraordinary remedy, permitted when there would be an inadequate remedy at law. Here, the dress is very unique and can only be sourced from China or a very near substitute with material from Thailand that is more expensive. B has her heart set on this dress, she has an oral contract and AD has the ability to make the dress as close as possible to the one she wants. AD did not tell B that she did not intend to sell the dress to anyone else, in fact AD did not reply to B's email when B stated that she expected AD to fulfill the contract. If she had, B may have started looking elsewhere for the dress or perhaps come back to the table to negotiate the contract. In order to prevail in SP, B must 1) show that there is a valid contract (see above, the contract is valid 2) there is an inadequate legal remedy (this is true, see above) 3) Mutuality of remedy – both parties have to be ready, willing, and able to perform. Here, AD has made the dress and yet it's not at the price that B agreed to and she may not want the substitute material from Thailand. But AD is an expert in high end dresses and it is likely the dress is a solid match. She had made the dress and appears that she could be ready, willing and able to perform, however, she has not lowered her price and she has now sold the dress to a third party. 4) Feasibility of enforcement – the court must be willing to supervise this performance. Here, the dress is already made, therefore the court is likely to agree that SP is possible as there is minimal supervision required to honor it.

Injunction

Along with specific performance, I would advise B that a temporary restraining order (“TRO”) should be sought. A TRO would ensure that 1) immediate irreparable injury could occur before the trial. Here, when B inquired about the dress on February 3, B discovered that AD had made the dress and had agreed to sell it to Claire (“C”). Furthermore, AD stated that she is selling the dress to someone else because her lawyer told her that because the agreement was oral she does not have to honor it. I would advise B that because she has legal counsel who is giving her poor legal advice, AD is very likely to sell the dress to C and the TRO will ensure that AD cannot sell it to C so that B can ensure their contract is honored. 2) balancing the hardships – it is likely that getting another unique dress will take another three weeks not to mention she probably has to find another designer due to this disagreement and there is some reason B needs this special dress, so B is likely to be harmed more than AD, who is in the business of making dresses and can easily satisfy C with a different dress. 3) AD does not need notice because if she gets it, she may just sell the dress to C 4) limited duration, it is unlikely that this is a complicated issue that will take months to get to court, it can be handled in small claims. The court will award the TRO.

Other remedies include rescission – to cancel the contract. But if B sues AD first, then she can’t rescind the contract. Reasons to rescine include mistake, misrepresentation, illegality, incapacity, consent, unconscionability....but AD will likely argue for impossibility as a defense to rescinding the contract. As she cannot

possibly make the exact dress at the exact price that B wants due to the virus. I would advise B that revising the contract to account for the impossibility of making this dress for \$1,000 due to the virus and to pay AD the extra cost.

Reformation is another option – to reform the contract to the original parties' understanding. However, that is typically for mistakes or misrepresentations, so I would not advise this as an option.

Limitations on recovery must be causal, certain, foreseeable and definite. Because the virus was not foreseeable at the time of contract formation, damages are not recoverable.

I would advise B that AD does not have any defenses to rescission of the contract as B has not engaged in laches (undue delay), she does not have unclean hands and there was nothing unconscionable about the contract.

Therefore, I would advise B to get a TRO to prevent the sale of the dress and demand specific performance. For service contracts, the courts do not compel service, however in this case the dress has been completed and is ready to be sold, so this may prevail. However, due to the unforeseeability of the virus, I would recommend rescinding the contract and form a new one that is for a contracted price of \$1,600 for the dress. Each party will also have to pay their own attorney's fees.

2)

Question 2:

Andrea v. Bill

Tort of Conversion:

In order to determine the rights of the parties, the area of substantive law must be determined first. Also, the court must make sure that the plaintiff has a case and that relief is needed. Here, the facts state that Andrea (A) owns several thoroughbred horses, and that Bill (B) one of the horse trainers, arranged the theft of one of the horses by the name of Golden Jewel. The facts state that B's accomplices entered the property at night without A's consent. A can potentially sue either under trespass to chattels or conversion. Trespass to chattels is an intentional interference with a chattel affecting a marketable interest. On the other hand, conversion is an intentional act that interferes with P's right of possession, so serious that it warrants full payment for the chattel. Here, the interference seems to be pretty serious because they intentionally entered A's property (trespass to property) to take her horse. Thus, A would likely sue B for conversion.

Legal Remedies (\$\$) - Compensatory Damages:

The purpose of compensatory damages is to put the injured party in the position he/she would have been in but for the defendant's wrongful act. In order to obtain compensatory damages the damages must be foreseeable, unavoidable, and certain. The P must also demonstrate causation. Compensatory damages for tort include: (1) specific damages (monetary damages), (2) general damages (non-monetary damages); (3) nominal damages and punitive damages.

Special Damages:

If the tort deals with the destruction or conversion of personal property then the plaintiff is entitled to the fair market value (FMV) of the chattel - computed at the time and place of the conversion. Here, the facts state that when B took Golden Jewel the horse she had a deflated value of \$20K. Andrea will claim that but for B taking her horse she would have still been able to enjoy her property (causation). Andrea will also claim that the injury was foreseeable because B knew that if he took Golden Jewel, A would be deprived of her property. Andrea will claim that the injury was unavoidable as B was the trainer and she trusted him. Lastly A will claim that the damages are certain and not speculative as a professional individual that knows about horses can confirm that the horse had a \$20K value. B will claim that A breached her duty to mitigate because she did not keep Golden Jewel inside a safe location as evidence by the fact that he was able to enter her property and take the horse. The court will likely find in favor of A because A trusted B and the horse was in A's property. Thus, A would be entitled to 20K because B stole her personal property (her horse).

Loss of Use Damages:

Under the traditional rule, recovery for loss of use is only available when property is damaged NOT destroyed. Further it is limited to the FMV of the damaged property. However, under the Modern Rule, recovery for loss of use is available when property is destroyed OR damaged. Andrea would probably not be able to recover for loss of use because the facts do not indicate that B ever found a temporary substitute for her horse or that she lost profits or rental value.

General Damages:

Intentional Infliction of emotional distress would fall under general damages. Andrea does not need to meet either the Norfolk Test or the McDougal test all she would have to demonstrate in order to prevail would be that B's conduct was intentional, extreme and

outrageous. As a result, she suffered severe emotional distress. However, nothing in the facts indicate that A suffered any emotional distress so the court would not award general damages.

Nominal Damages:

Nominal damages are granted where there is a clearly established substantive right, but no available remedy except declaration of that right. A negligent tort requires proof of actual injury while for an intentional tort the injury can be nominal or may not even be an element. Here, A would probably be able to recover nominal damages because the tort seems to be intentional.

Punitive Damages:

Punitive damages are awarded to punish a defendant for egregious conduct and deter him/her and others from future offenses. The plaintiff is awarded a sum of money to punish the defendant for willful, wanton, or malicious conduct. Punitive damages that are grossly excessive are invalid under the DP of the 5th and 14th Amend.

Here, the facts fully indicate that B acted with malice because he knew that A trusted him and he did not care. Instead, he made a plan and had his accomplices enter A's property to take A's horse. The court would probably find that the facts indicate that B acted with the intent to eliminate A's property interest. As a result, the court would grant punitive damages.

Legal Restitution:

Legal restitutionary damages are damages that are calculated by the value of the benefit that was received by the Defendant. The goal is to prevent unjust enrichment by the Defendant. While plaintiff has an option to choose between legal damages and legal

restitutionary damages, you cannot claim both. The Plaintiff must choose the cause of action that will garner the biggest award. There are two types of legal restitution available: (1) replevin and (2) ejectment. Here we will only focus on replevin because we are not dealing with real property. In an action for replevin, the plaintiff may recover possession of specific personal property. Here, B does not have the horse anymore because he sold it to Slimy Jim (SJ) for 50K. Thus, the court would find that replevin does not apply in the suit between A and B.

Equitable Restitution:

Equitable restitution is also when the defendant has been unjustly enriched, the court may award damages based on the benefit to the defendant. The amount is calculated based on the benefit to the defendant. There are two forms of equitable restitution: constructive trust and an equitable lien.

Constructive Trust:

Equitable remedy imposed by the courts when the retention of property by defendant (wrongdoer) would result in unjust enrichment. Defendant serves as a "trustee" and must return the property to P. In order to obtain a constructive trust the following must be met: (1) inadequate legal remedies (e.g. the defendant is insolvent, damages are speculative, there would be multiplicity of suits, or item is unique); and (2) tracing - plaintiff must be able to follow the property to whatever form it takes, as long as the trust can be identified. The plaintiff will not prevail over a bona fide purchaser but will prevail ✓ over unsecured creditors.

Here the facts indicate that B sold Golden Jewel to Slimy Jim (SJ) for \$50K. Andrea was not aware of Bill's involvement in Golden Jewell's disappearance. Thus, she shared an illegal insider stock tip with B at her stable a few weeks later. Bill took the \$50K and

invested it in the stock tip by Andrea, the stock tip quickly doubled to \$100K. Andrea will want to claim that the horse is unique property because Golden Jewel was sired by two other champion horses, as a result the legal damages are inadequate and would not fully compensate her. Andrea will also argue that she is able to trace the property as B used the \$50K in stock. To conclude, Andrea will want a constructive trust on B's stock. B will claim that the court should not allow this because A will be unjustly enriched as she would be receiving \$100K when A's horse is worth \$20K. The court will likely place a constructive trust on the stocks and A would be entitled to the \$100K, because that was the value of the benefit to B.

The facts also state that B also bought lottery tickets with \$10 out of the money from SJ and won \$20K with one of the tickets. If A was able to track that money, then she would also obtain a constructive trust on the \$20K. In the end A would likely obtain \$120K from Bill and she would not be able to obtain the \$20K in compensatory damages.

Equitable Defenses:

Unclean Hands:

The party seeking equitable remedy is guilty of some wrong, the taint must relate to the matter before the court.

Here, the facts indicate that A shared an ILLEGAL insider stock tip with B. B will claim that because the tip was illegal she should not be able to obtain a constructive trust on his stock. However, B will likely not prevail because the illegal insider "tip" had nothing to do with the conversion of her horse. The tip was given in complete confidence. The court will likely find in favor of A and will find that the unclean hands defense does not apply.

unclean on stock profits

Andrea v. Slimy Jim

In order to determine the rights of the parties, the area of substantive law must be determined first. Also, the court must make sure that the plaintiff has a case and that relief is needed. Here, the facts state that B sold Golden Jewel to SJ, for \$50K. Jim was aware of how Bill obtained the horse so he should also be liable under the tort of conversion.

Legal Remedies (\$\$) - Compensatory Damages:

The purpose of compensatory damages is to put the injured party in the position he/she would have been in but for the defendant's wrongful act. In order to obtain compensatory damages the damages must be foreseeable, unavoidable, and certain. The plaintiff must also demonstrate causation. Compensatory damages for tort include: (1) specific damages (monetary damages), (2) general damages (non-monetary damages); (3) nominal damages and punitive damages.

Here, A will argue that but for SJ purchasing Golden Jewel she was not able to enjoy/ride her personal property. Andrea will also argue that the damage was foreseeable as SJ knew that by purchasing the horse, A would be further deprived of her property. Andrea will also argue that she did not breach her duty to mitigate because she hired an investigator, as for the damage being certain, A will claim that because SJ is a Jockey he is well aware of the value of the horse. SJ will claim that Andrea breached her duty to mitigate because she did not hire an investigator until one month later. The court will likely find that A did not breach her duty to mitigate.

Special Damages, General Damages, Nominal Damages & Punitive Damages:

(see rule statements above)

It is likely that A will rather sue under legal and equitable restitution instead of compensatory damages because that seems to provide the best results.

Legal Restitution:

Replevin:

In an action for replevin the P may recover possession of specific personal property. P must show: (1) that P has a right to possession, and (2) there is wrongful withholding of property by D. Here, can ask for replevin because SJ is still in possession of the horse. Andrea would prevail because she is the rightful owner of the horse and SJ is took the horse by buying it from B who actually stole it. As a result, the court would grant replevin.

Equitable Restitution:

An Equitable lien is a form of equitable restitution. An equitable lien is where the D has improperly acquired title to a property, and equitable lien allows the court to order an immediate sale of the property and the monies received go to the P. P must show: (1) that D misappropriated P's property creating a debt or obligation to pay; (2) P's property can be traced to property held by D, and (3) retention would cost unjust enrichment.

Here, the facts state that SJ was awarded \$300K after the horse came in 1st place. He took the money and purchased the Silver Bullet Ranch adding \$100K of his own money for a total purchase price of \$400K. Because Andrea would be able to trace the money and because the money was commingled, Andrea would be entitled to an equitable lien over the property. If SJ does not want to sell the property he can always pay Andrea the \$300K to avoid unjust enrichment.

Limitations on Restitutionary Damages:

Bona fide purchaser:

A bona fide purchaser must take the property without notice of facts that give rise to equitable restitutionary interests. Here, SJ will claim that he is a bona fide purchaser and should not be required to return the property (replevin) or have an equitable lien over his property. However, he will not prevail as a bona fide purchaser because the facts clearly state that he purchased the horse knowing it was stolen property. A bona fide purchaser is (strictly liable for conversion if the chattel was stolen from the true owner. The basic principle/doctrine is the following: a thief cannot deliver title to a stolen item/property.

3)

Penny v. Danny

Easements and Intentional Tort Claims:

Litigation of disputes regarding easements can be challenging. This is so because litigation of easement disputes presents a mixture of legal theories and precedents. When starting an action to resolve a dispute over an easement, express, implied or prescriptive, several tort causes of action are often pled in easement disputes, including trespass, nuisance and negligence. An easement is a nonpossessory right to use and/or enter the real property of another without possessing it.

Here, the facts indicate that Penny (P) owns a 75 acre lot in the country. Danny owns a smaller unimproved lot to the north. Danny began to clear his land to build a house. He asked Penny if he could take a short cut across Penny's lot to the mill to haul some trees and Penny agreed. Thus, Danny had an nonpossessory right to Penny's property because he was not the rightful owner of such property and he was only allowed to enter such property for purposes of hauling trees. As a result the court would have no problem finding that there was an easement in place.

Trespass to Land:

Trespass to land occurs when a person intentionally enters someone else's property without permission. The only intent required for this claim, is the intent to enter the property. A trespass can also occur if someone causes a physical item, like a golf ball to enter your property.

Here, Penny can sue under trespass to land because Danny had permission to use the short cut to haul away trees. However, Danny DID NOT have permission to dump the

trees on Penny's lot near the stream. Penny can claim that the trees were physical objects that entered her property. Danny will claim that the property is not ONLY her property as the stream runs near the boundary line with Danny's lot. Further, Danny will claim he had permission to enter Penny's land. The court will likely find in favor of Penny because the facts do specifically state that the stream runs through Penny's lot, therefore that portion would be considered her property. Further, Danny exceeded his permission when he dumped the trees on her property.

Nuisance:

To prevail under nuisance, P must establish that D's conduct was a substantial and unreasonable interference by weighing the gravity of the harm against the utility of the conduct. Here, the facts state that several of the trees rolled onto the stream, blocking its natural flow. The stream overflowed causing water to rush down to Penny's house, flooding her guest house and damaging her Mustang. The facts indicate that the gravity of the harm was substantial. Further the facts indicate that Danny's conduct had no utility whatsoever. For all these reasons, Penny would be able to sue under nuisance.

Legal (compensatory) Damages:

The purpose of tort damages is to put the injured party in the position he/she would have been in but for the D's wrongful conduct. In order to prevail, the P must demonstrate that the damages are foreseeable, unavoidable, certain. P must also show causation. There are four types of legal damages available under tort law: (1) specific (monetary) damages, (2) general (non-monetary) damages, (3) nominal, and (4) punitive damages.

Special Damages:

Penny will argue that she should be entitled to the difference between the market value of the property before and after the injury. Thus, she should be entitled to \$250 K because

the trees presence on the lot has depressed its market value from \$750K to \$500K. Penny will also argue that she should be entitled to \$20K because that is the value to repair the mustang. Additionally, Penny will want the \$20K to remove the trees. Penny will state that causation is present, but for Danny putting his trees close to the stream her real and personal property would not have been damaged. Further, Penny will argue that the damage was foreseeable, putting trees next to a a stream would cause a blockage as these would roll. Penny will also argue that the damage was unavoidable because she had left on a book tour for six months, thus she was not aware of the presence of the trees in the stream. As for the damages being certain she will claim that she came up with the market value of the property with the help of a realtor. Penny will also claim she got an estimate form a tree removal service. As for the mustang, Penny will claim that she took it to several auto shops and they all agreed on the price. Danny on the other hand will argue that Penny should not be entitled to the \$20K because she could buy a new mustang for \$15K (she should not be entitled to anything above fair market price). Danny will also argue that Penny failed in her duty to mitigate because she did not leave someone in charge of monitoring her property when she was gone. The court will likely find that Penny is entitled to the \$250K (difference in value of her property) + the \$20K to remove the trees (because that would put her in the same position she was before Danny put the trees in the stream) + \$15K (she might want to argue that she does not want to buy a new car because her car has sentimental value, but the court really does not take that into consideration. In the end she would be entitled to approx. \$285K.

Loss of Use:

Under the traditional rule, recovery for loss of use is only available when property is damaged NOT destroyed. Further it is limited to the FMV of the damaged property. However, under the Modern Rule, recovery for loss of use is available when property is

destroyed OR damaged. Here, Penny can probably also recover the \$500 of rent she received for renting out the guest house (lost rental value).

General Damages:

Here, Penny might be able to recover damages for intentional infliction of emotional distress. The facts state that Danny knowingly dumped the trees into the stream. Penny will argue that Danny's conduct was extreme and outrageous because who in their right mind dumps trees into a stream instead of taking them to the mill. Penny will state that she suffered severe emotional distress after she saw all the damage Danny's conduct caused to her property. It is likely that the court will grant general damages (such damages do not have to be certain) because Danny's conduct lead to substantial damage.

Nominal Damages:

Nominal damages are granted where there is a clearly established substantive right, but no available remedy except declaration of that right. A negligent tort requires proof of actual injury while for an intentional tort the injury can be nominal or may not even be an element. Here, Penny would probably be able to recover nominal damages because Danny committed two torts: (1) trespass to land and (2) nuisance. Both torts are intentional so Penny should be able to recover some amount.

Punitive Damages:

Punitive damages are awarded to punish a defendant for egregious conduct and deter him/her and others from future offenses. The plaintiff is awarded a sum of money to punish the defendant for willful, wanton, or malicious conduct. Punitive damages that are grossly excessive are invalid under the DP of the 5th and 14th Amend.

Here, the facts state that on his first trip, Danny dumped the trees next to the stream. Danny will argue that it was never his intention for the trees to roll down and fall into the stream. Penny will argue that Danny's conduct was willful and malicious, according to her, any individual with common sense would have known that the trees could fall into the stream and cause blockage. Further, and more importantly, Penny will argue that he acted maliciously because Danny knew he could only use Penny's property as a short cut, instead he abused of her trust and extended the permission Penny had granted him. The court will likely find that Danny acted maliciously and award Penny punitive damages.

Legal Restitution:

Legal restitutionary damages are damages that are calculated by the value of the benefit that was received by the Defendant. The goal is to prevent unjust enrichment by the Defendant. While plaintiff has an option to choose between legal damages and legal restitutionary damages, you cannot claim both. The Plaintiff must choose the cause of action that will garner the biggest award. There are two types of legal restitution available: (1) replevin and (2) ejectment. Here, we will only focus on ejectment.

Ejectment:

In an action for ejectment, the P may recover possession of specific real property. The P must show (1) P has a right to possession, and (2) there is a wrongful withholding by D. Ejectment is only available against defendant who has possession or the property. Usually coupled with damages for loss use of the benefit during the wrongful withholding.

Here, Penny can ask for ejectment if Danny continues to use the easement. Penny will likely prevail because she is the rightful owner of the stream and there is a wrongful withholding by D (D wrongfully withheld the property the moment the trees fell in the stream because Penny was not able to use her stream as she wanted to). Danny will

continue to claim he had full permission (both he and Penny had an agreement), thus it is not a wrongful withholding by D. The court will likely find that there is wrongful withholding by Danny because he exceeded his permission, thus Penny would be able to eject Danny from her property.

Injunctive Relief:

An injunction is a court order to do (affirmative/mandatory), some act or Stop (negative) doing some act. There are three types of injunctions: temporary restraining order (TRO), preliminary injunction and a permanent injunction. A temporary restraining order is issued before a hearing, while a preliminary injunction is issued after a hearing but before a trial. Both a TRO and a preliminary injunction are known as interlocutory injunctions that serve to maintain the "status quo."

TRO:

In order to obtain a TRO, P must satisfy the following elements: (1) irreparable harm; (2) likelihood of success on the merits; (3) balancing of hardships in her favor, (4) notice/service, and (5) P must post a bond. A TRO can be obtained via Ex-Parte as long as a good faith effort was used to give proper notice to D. This is a short order that lasts 14 days until a preliminary injunction.

Here, P will claim that if the court does not order an mandatory injunction NOW her property will continue to suffer irreparable harm because it might continue to rain and her property can get further damaged. According to Penny, the court needs to order Danny to remove his trees ASAP. Penny will also argue that the likelihood of success on the merits of her case are high as Danny did not commit one intentional tort but two (trespass to land and nuisance). Further, Penny will argue that the balance of hardships is in her favor because she is the one that will continue to suffer damages if the trees are not

removed. Given all these facts it is highly likely that the court would order a TRO. In the alternative, the court can always order a preliminary injunction if P proves that there is an inadequate legal remedy. Penny can always claim that there is a chance that Danny repeats the same torts in the future leading to continued trespasses.

To conclude, Penny can decide whether to obtain the compensatory damages or opt for equitable relief. However, Penny will not be able to obtain both.

END OF EXAM