

MONTEREY COLLEGE OF LAW
REMEDIES FINAL EXAM
SPRING, 2021
PROFESSORS PATTERSON & MARTIN

Instructions: There are three (3) questions in this examination. You will be given four (4) hours to complete the examination. Questions 1 and 2 refer to the same fact pattern.

QUESTIONS ONE & TWO

PAM and DAN are young adults who live together in an unmarried, but romantic relationship. Both attend acting school and have hopes for wealth and fame from film careers. In 2019, PAM is hired as an actress in a popular television show and she soon receives positive reviews and national notoriety. She is re-hired for the same show in 2020, in a starring role and at a greatly increased salary.

During those times, DAN's acting career never begins and his only income is from a part-time job at a coffee shop. PAM and DAN begin to argue often and, for several reasons, they part during 2021. DAN moves into his own apartment and unpacks the items he moved with.

DAN discovers he has one of PAM's electronic devices, correctly guesses the password, and finds private pictures of PAM stored there. The pictures of PAM include her in various stages of undress, including some nude photos. In all the photos, it is clear that the subject is PAM. DAN contacts DIRT MAGAZINE, a periodical that specializes in provocative stories and shocking photos, and he offers PAM's photos for sale. DIRT, knowing that DAN is PAM's ex-boyfriend and that the photos are stolen, offers the sum of \$100,000. DAN accepts in April, 2021, and some of the photos and the entire \$100,000 are quickly exchanged.

DAN receives the \$100,000 and he puts \$50,000 into a bank account. The other \$50,000, DAN uses to make a down payment on a house costing \$200,000. DAN's investment in the house is smart because, within days, he is offered \$240,000 for the property.

Within days, PAM realizes that DAN has her electronic device which contains nude photos of her. When she calls DAN, she finds out about the \$100,000 payment and that DIRT has plans to feature her nude photos in their May, 2021, issue. PAM has concerns about possible damage to her acting career and also wonders, if she decided to publish such photos, what value she could ask for them. She comes to your office for legal advice about those events and issues.

1. What legal rights and remedies might PAM assert in a civil suit against DAN and how should those claims and any defenses be resolved? Discuss.
2. What legal rights and remedies might PAM assert in a civil suit against DIRT and how should those claims and any defenses be resolved? Discuss.

* * * * *

QUESTION THREE

ALICE planned to build a large shopping center in a suburb of New City. BOB agreed in writing to sell ALICE his 100-acre orchard in the center of the proposed development. The agreement contained the following clause:

"If either party intentionally and without cause cancels this agreement, the other party shall be entitled to \$30,000 in liquidated damages as damages may be difficult to determine"

Relying on BOB's agreement, ALICE purchased the surrounding 300 acres from the other landowners. She paid them the same price she had contracted to pay BOB-- \$1000 per acre, the market price in that area.

CATHY, hoping to build her own shopping center, offered BOB \$1,500 per acre for his 100 acres. BOB then falsely told ALICE that he could not complete the sale because of a defect in the title. ALICE reluctantly accepted the return of her deposit and offered the 300 other acres for sale, which caused the market price of land in that area to drop to \$700 per acre.

ALICE recently learned of BOB's false story and CATHY's offer. No one has yet purchased ALICE's 300 other acres.

1. What legal and equitable CONTRACT remedies might ALICE have against BOB and how should those claims and any defenses be resolved? Discuss.

* * * * *

1. 90

2. 90

1)

Question 1 and 2

Prof. Martin and Patterson

Pam v. Dan

In order to determine the rights of the parties, the area of substantive law must be determined.

Conversion

When Dan took one of Pam's electronic devices, identified that there were nude photos of Pam and then sold the photos to Dirt he may be liable for Conversion.

Conversion is the intentional exercise of dominion or control over chattels which so seriously interferes with the owner's control that the defendant may be required to pay for the chattel's full value.

Here, Dan had a duty to return the electronic device and its contents back to Pam when he discovered he had it. He breached that Duty when he decided to contact Dirt and sell the photos to the magazine causing harm to Pam due to the loss of her property. But for Dan's actions, Pam would still have possession of her device and photos.

Intrusion into Seclusion

HOW ABOUT APPROPRIATION OF LIKENESS (PRIVACY)?
(SHE'S AN ACTRESS = PROPERTY RIGHT)

One who intentionally intrudes upon the seclusion of another or his private affairs, may be liable for invasion of privacy, if the intrusion would be highly offensive to a reasonable

(JUST SAW) → PAGE 13

person. Intrusion into Seclusion (Invasion of Privacy tort) is presumed once it takes place. Here, Dan is liable of intrusion once he recognized he had Pam's device and guessed the correct password to open it finding the private pictures of Pam. Again, he had a duty to respect Pam's privacy, but he violated that duty when he breached the electronic device and accessed her photos causing harm in the form of intrusion to Pam's seclusion.

Legal Remedies

Compensatory Damages are intended to compensate for actual injury or economic loss. In order to obtain compensatory damages, there must be 1) causality (but for); and the damages must be 1) foreseeable; 2) unavoidable (did the plaintiff breach duty to mitigate?); 3) certain.

Here, but for Dan's actions there would be no conversion of Pam's photos or an Intrusion into her Seclusion. It was foreseeable that once Dan opened the password protected device, he would find sensitive and private information about Pam. They were both young adults who lived together in an unmarried, but romantic relationship. Both were attending acting school and were likely free spirited and it was likely to be know to Dan that Pam would have nude photos of herself due to her hopes for wealth and fame in the film industry as well as her free spirit nature of possibly taking photos in the nude. It was unavoidable that Dan would find these photos without the opportunity for Pam to mitigate his actions or finding of the photos because Dan moved out of her apartment and took the device unbeknownst to Pam. Pam was not in control of her personal property at that time. It was certain that once he found the nude photos of Pam in various stages of undress, and decided to sell the photos to Dirt, Dan was dealing with stolen property and was wrongfully converting her property without her consent.

Special Damages

↓ FOCUS ON CERTAINTY OF VALUE.
(CAN WE SAY, WITH CERTAINTY, WHAT THE PHOTOS ARE WORTH?)

Special Damages compensate the claimant for quantifiable monetary losses. If the tort involves Conversion (as it does here) of personal property, the plaintiff is entitled to the Fair Market Value (FMV) at the time and place of conversion. The problem is the valuation of the photos. We know that Dirt offers the sum of \$100,000 for the photos and Dan accepted in April of 2021 and the some of the photos and the entire \$100,000 was quickly exchanged. While this appears to be evidence of FMV for the photos, Pam would say otherwise because she wonders if she were to publish such photos, what value she could ask for them. Presumably, she would take longer and consider all her options when offering her photos for sale and consider terms such as reuse and royalties - something Dan did not consider in his rush to make a quick buck.

JERRY KNOWS WHAT THE PHOTOS ARE WORTH

→ LEGAL DAMAGES ARE SPECULATIVE!

General Damages

General Damages are damages that can't easily be assigned a monetary value, such as pain and suffering, loss of consortium, emotional trauma (IIED), and hedonic damages. Pam could claim that she has hedonic damages (loss of enjoyment in life) once she found out about the sale of her photos. She has concerns about possible damage to her acting career and this possibly upsetting to her. Pam could also claim that she is entitled to royalties and reuse of her photos by Dirt (which would be hard to monetize at this time possibly). Alice will have to overcome this uncertainty if she attempt to sue for General Damages against Dan.

Nominal Damages

→ THESE WON'T HELP PAM

Nominal Damages are minimal damages to show that the plaintiff was correct, but where there are not substantial injuries. These types of damages to not restore the harm done to Pam and she has better options legally under the Special Damages (and General Damages if she can show certain values to the court).

Punitive Damages

THE PROBLEM WOULD BE TO NAME AN AMOUNT OF PUNITIVE DAMAGES THAT IS APPROPRIATE FOR UNCERTAIN COMPENSATORY DAMAGES

Punitive Damages are awarded to punish a defendant's willful and wanton conduct and deter future offenses. Grossly excessive damages are invalid under the Due Process of the 5th and 14th Amendments. Here, Pam has a good case for Punitive Damages for the theft of her device and photos if she were to take a legal damages approach.

Problems With Money Damages

good!

If legal remedies (money are inadequate and there is a taking that leads to a Benefit or Unjust Enrichment, the plaintiff may waive the tort and seek restitution (sue in assumpsit) or seek an injunction. Certain circumstance lead a plaintiff to Restitutionary Remedies. Pam is in a good position to seek restitution based on the uncertain value of her photos and the fact that Dan used the \$100,000 to invest in a house and gain interest in his savings account.

Unique Items

A Unique Item creates a situation where replacement or repair is impossible or extravagantly expensive. It may be hard to determine a Fair Market Value which creates uncertain damages. Here, Pam may have difficulty in determining the fair market value of her photos, as discussed above. The unique in the photos, in part, are related to her potential career and fame from the film industry. While, Dan was able to get \$100,000 for the photos from Dirt on quick notice, Pam could have shopped around a variety of media venues as well as made a potential profit as her stardom expands in the future. Now that the photos are on the street, it will be hard to do this and this fact makes the real and potential value for Pam uncertain. ★

Pure Economic Loss on a Tort

There is no recovery for a pure economic loss on a tort. The plaintiff requires physical Harm to property or bodily injury. The Economic Harm is said to be a "Parasitic Loss". Here, Pam's photos could be returned. However, there is no economic value associated with these items and no associated physical harm to her property or bodily injury - additionally, she would not be able to claim Intentional Infliction of Emotional Distress under the Majority Rule that requires physical contact. So, Legal Remedies are limited under value uncertainty and pure economic loss of the property alone. She could possibly get FMV based on Dirt's purchase, but a greater value is still an unknown from Pam's perspective.

Restitutory Remedies (Need a Taking)

Restitutory Remedies are based on the Benefit to the Defendant and to prevent the Defendant's Unjust Enrichment. While the Plaintiff may choose between legal remedies and restitutory remedies, she can't claim both. She should choose the option with greatest award. Pam appears to have options under restitutory remedies (see below).

There are three forms of Legal Restitution: 1) Replevin; 2) Ejectment; 3) Quasi-Contract, and two forms of Equitable Restitution: 1) Constructive Trust; 2) Equitable Lien.

Since Ejectment deals with Real Property, we will not consider this as an option for Pam because her photos amount to Personal Property (Chattels). However, Replevin, Constructive Trusts, and Equitable Liens' are possibilities for Pam.

Replevin

In an action for Replevin, the Plaintiff may recover Possession of Specific Personal Property. The Plaintiff must show: 1) Right to Possession, 2) and, Wrongful Withholding by the Defendant. Here, Pam has a right to possession of her electronic device and the photos it contains. Dan has wrongfully converted her property and sold it to Dirt. Timing

is important. As long as a Defendant is still in possession, the plaintiff can recover the Chattel before Trial. The plaintiff must post bond. The defendant may post re-delivery bond, allowing him to keep the chattel until after the trial. Here, Dan has already given the photos to Dirt. It is unclear if he retained the electronic device and copies of the photos. If he still has the device, the court could order him to return the device and the photos it contains back to Pam. However, Pam will most likely not be satisfied with this option because Dirt is still in possession of the photos and Dan made \$100,000 from the sale and invested the money he gained.

Constructive Trust

Constructive Trust is an equitable remedy imposed by the courts when the retention of property by the defendant would result in Unjust Enrichment. The Defendant serves as the "trustee" and must return the property to the Plaintiff.

Legal Remedies must be Inadequate (Defendant is Insolvent or the Property is Unique). Here, Pam is in a good position to show that her photos are unique and that she is now disadvantaged because Dirt has them and has the potential to make a substantial amount of money now and in the future as her film career blossoms. The conversion was against her will and she did not have an opportunity to control her photos. This has limited her ability to consider options like monetizing the photos herself, as well as protecting her privacy.

Tracing. The plaintiff must be able to follow the property to whatever form it takes. Here, Pam will have to show that Dan took the \$100,000 that he gained from selling her stolen property and put \$50,000 in his bank account. In the modern age, it should be fairly easy to show a transaction as large as \$100,000 going from Dirt to Dan and then a portion of that (\$50,000) going into his bank account. Pam will also have to trace the remaining \$50,000 that Dan used to make a down payment on a house costing \$200,000.

Good!

Again, this should be fairly easy to trace electronically. Additionally, real estate transactions are closely monitored and title companies and finance institutions want to be able to trace monies during a purchase to ensure that there are no liens or securities against them.

Bona Fide Purchasers. Bona Fide Purchasers are individuals who purchase property for valuable consideration without notice of prior claims in the property or defects in the seller's title. The situation with a Bona Fide Purchaser is not relevant with regard to the monies (\$100,000) that Dan received from Dirt because that was the consideration Dan agreed to in his agreement with Dirt in exchange for the photos. However, if Pam was trying to gain an interest in a property right of the device and photos that Dirt has, then she would have to show that Dirt was not a Bona Fide Purchaser of the photos in that regard. Here, Dirt could not claim themselves as a Bona Fide Purchaser because they know that Dan is Pam's ex-boyfriend and that the photos are stolen when they made the offer to purchase the photos. However, the mortgage company has an interest in the house because Dan made a down payment with \$50,000 of the money he gained from the photo sale. Presumably, the bank has an interest in the property and holds interest the title because they have loaned the remaining \$150,000 for the purchase of Dan's home. Therefore, a Constructive Trust claim for the monies used to purchase Dan's home will not be appropriate because those funds have been commingled with the bank's interest. See Equitable Lien discussion below.

Unsecured Creditors do not prevail over the Plaintiff in a Constructive Trust situation. There does not appear to be unsecured or secured creditors with regard to the money in Dan's bank account.

✓ Under Constructive Trust, Pam could claim that she has a valid claim to the whole property interest situated in Dan's bank account where he placed the first \$50,000 of the \$100,000 he gained from Dirt. She may also be able to trace interests gains in that

account. As long as Dan has not commingled the account, Pam could claim a right to the entire amount under a Constructive Trust claim to stop the unjust enrichment of Dan based on his actions.

Equitable Lien

An Equitable Lien allows the court to order an Immediate Sale of the Property where the Defendant has commingled funds from a tort such as conversion with other funds and gained an unjust enrichment by doing so. The monies received from the immediate sale of property in this situation go to the Plaintiff.

The Plaintiff must show:

1. The Defendant Misappropriated the Plaintiff's Property, creating a debt or obligation to pay. Here, Pam will claim that Dan converted her photos and sold them to Dirt for a profit and then misappropriated those funds by making a down payment on a new home.
2. The Plaintiff's property can be traced to the Property held by the Defendant. This was shown to be possible in the discussion above.
3. Retention would Create an Unjust Enrichment. Here, Pam will claim that Dan not only used the ill-gotten gains from the sale of her photos to make a \$50,000 down payment on a new home, he also was able to unjustly benefit from that investment now that someone is offering him \$240,000 for the property within days of the purchase.
4. Legal Damages are Inadequate. As discussed above, Pam will have difficulty showing with certainty that her photos are worth more than \$100,000 that Dirt paid for them. While that purchase price could provide a baseline for a FMV, it is uncertain as to whether Pam could have received more now and in the future for unique photos of her as she rises in the film career industry. This uncertainty will allow Pam to claim that the legal

damages considered above are inadequate. Furthermore, it is difficult to put a price on Intrusion to Seclusion that occurred Dan gained access to her personal and private photos.

Deficiency Judgement

If the proceeds in an Equitable Lien action from the sale of the property are less than FMV when taken, the court can order a deficiency judgment against the defendant to make up the difference. Since Dan is getting an offer for \$240,000, that does not appear to be an issue currently. However, if the Equitable Lien action is imposed by the court and the FMV situation changes at that time a Deficiency Judgment may be warranted.

Property Improvements

Where misappropriated money is used to improve property, an Equitable Lien is available. Pam should be aware that if Dan was to use any of the \$50,000 that he has in his bank account gained from the Dirt sale to improve his new home, Pam could have access to the monies of such improvement through an Equitable Lien action.

Limitations to Restitution

As mentioned above, tracing and bona fide purchasers are limitations to a Restitutionary action.

Injunction

An injunction is an extraordinary remedy and should only be issued where the party seeking it is threatened with irreparable harm without adequate remedy at law.

Inadequate Legal Remedies. Here, Pam will claim inadequate legal remedies as stated above. Dan could profit off the sale of her home and use the money in his bank account if not stopped.

Irreparable Harm Will Occur. As stated previously, Dan is in a position to continue to profit with the \$100,000 he gained from the sale.

Property Right Exists. Pam has a property interest in her photos that was traceable from the sale to Dan's bank account and home purchase.

Feasibility of Enforcement. The court will be able to trace the funds and examine the assets controlled by Dan.

Balancing the Hardships. The irreparable harm that Pam faces favors an injunction on her behalf.

Public Interest. Pam will claim that there is a public interest in protecting the privacy and personal property of individuals and that others should not be allowed be unjustly enriched.

Temporary Restraining Order

A temporary restraining order (TRO) is an immediate, stop-gap measure designed to preserve the status quo that prohibits a party from acting until request for injunctive relief is adjudicated. Here, Pam will request a TRO to prevent Dan from selling his new home or removing funds from his bank account until a Equitable Lien and a Constructive Trust (respectively) can be adjudicated by a court.

Preliminary Injunction

A Preliminary Injunction gives the plaintiff temporary relief on the merits issued prior to or during trial to prevent irreparable injury from occurring before the case is decided. A plaintiff is entitled to a preliminary injunction upon showing that there are serious questions going to the merits of the dispute. Her Pam will be able to show serious merits of the dispute as described above. The court will find that a balancing of the hardships leans sharply in Pam's favor due to Dan's actions and unjust enrichment. An injunction is in the public's best interest (similar to what is described above), and irreparable harm is likely to occur if Dan can continue to profit off of the sale of the photos. Pam must post bond to indemnify Dan if the injunction was found to be warrantless. However, that seems unlikely to occur here based on the merits of the case.

Permanent Injunction

A permanent Injunction is a court's final order (after trial on the merits) requiring a person to refrain from activities permanently or take certain actions. Here, the court would prefer to resolve the issue on the merits using an equitable lien and constructive trust. Doing so would resolve the dispute for Pam in a more adequate way than a legal remedy and there would be no continued action that the court would have to monitor going forward once Pam was made as whole as possible under those remedies.

Equitable Defenses

Laches

→ PAM ACTED QUICKLY

Laches is a defense in equity under which a party claims that the opposing party has failed to assert its rights within a timely manner and that the rights thus cannot be enforced. Here Dan may claim that Pam should have come forward and requested her photos and device back before Dan had a chance to sell them. However, this argument will not be persuasive to the court because intrusion to seclusion occurs once Dan took action to

view the photos and Pam was unaware of his actions as Dan breached his duty to Pam (as described above).

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Pam v. Dirt

Appropriation of Name and Likeness

One who appropriates (a taking) to his own use of benefit the name or likeness of another is subject to liability to the other for invasion of his privacy. Here, Dirt may be liable to Pam for Appropriation of Name and Likeness when they breached a duty of not using Pam's personal photos when they knew they were stolen, causing harm to Pam against her private and monetary interests.

Defamation

~~Defamation is the publication of defamatory material to a third party who perceives the material as defamatory and understands that it applies to the plaintiff, causing damages that constitute libel (written - damages presumed) or Slander (less permanent - special damages. Here, Dirt may be liable to Pam for Defamation if the put Pam in a bad public light when they publish her photos. This is possible if it goes against her film career interests and would cause damages to her image but for the actions of Dirt.~~

Legal Remedies

Compensatory Damages (Supra). Here, Dirt has the potential to profit off of Pam's likeness and photos. But for Dirt's actions, Pam would not have this harm. It was foreseeable that Dirt would cause this harm because they knew the photos were stole. It was unavoidable because Pam was unaware of the sale transaction before it was too late. And damages were certain to occur once Dirt took possession and started to consider publication .

Special Damages (Supra). Pam will claim a personal property right in the photos and that she is entitled to any fair market value that the photos provide in the publication opportunities.

General Damages (Supra). Pam will claim she could suffer emotional trauma or hedonic damages as she considered above for Dan. However, these have not presented themselves against Dirt.

Nominal (Supra). Pam has a right to the photos, but that FMV has not been determined. Furthermore, these would offer little to remedy the harm to Pam.

Punitive (Supra). Pam could make a cause of action for the court to adjudicate punitive damages for misappropriating stolen goods.

Problems with Money Damages

Supra. These are similar to those described against Dan. Here, Pam could claim a fundamental right to privacy that was violated by Dirt. However, this is a constitutional action that would not work appropriately in this case against Dirt

Restitutionary Damages

Replevin

(Supra). Pam has a good case to request the return of her photos from Dirt. While there is no recovery with replevin for a sale to a Bona Fide Purchaser, Dirt is not a BFP (as described above). The court would likely grant replevin to Pam to recovery her photos and her device so that Dirt could not profit on them.

Constructive Trust

(Supra). If Dirt has already started profiting from the use of Pam's photos and those profits can be traced to accounts, Pam could recover those funds through a constructive trust.

Equitable Lien

(Supra). If Dirt has already started profiting from the photos and used those funds to increase the capital elsewhere in their business, Pam may be able to recover the portion of those funds from the immediate sale of such property. As described above, Pam would have to show misappropriated property (Dirt knew the photos were stolen), the funds can be traced to property held by Dirt, the retention would create an unjust enrichment, and legal damages are inadequate. For the same reasons that Pam used against Dan, Pam could argue here against Dirt for an Equitable Lien.

Limitations to Restitution

(Supra). Again, Pam would have to show tracing of funds that Dirt gained from profits from the use of her photos. She would also have to prove that there were know Bona Fide Purchasers that transacted with Dirt in regard to continued use of her photos. This might present a problem if there are third parties that are unaware of the nature of the stolen photos of Pam.

Injunction



(Supra) For the same reasons that Pam used for Dan, Pam has a good cause of action for requesting an injunction against Dirt. Pam faces irreparable harm from the continued use of her photos, the full damage is unknown because of the nature of the photos the potential commercial use of the photos that are available to Dirt and Pam (as well). Of course, Pam has a property right to her likeness that exists in the photos. The court will also find feasibility in a negative injunction that restrains Dirt from using the photos. The

hardships are balanced in favor of Pam and there is public interest (as described in the case for Dan) in protecting one's privacy and preventing the conversion and misappropriation of stolen property. She faces irreparable harm if she can't control her private photos and others (such as Dirt) are allowed to profit off of them. The damage is also due to the uncertainty of the true value of her photos. Additionally, if her photos are allowed to be in the control of Dirt, a situation arises that a multiplicity of suits could transpire as her photos are used without her consent.

TRO

(Supra). Pam should request a TRO against Dirt to prevent further use of the photos until injunctive relief is adjudicated.

Preliminary Injunction

(Supra). For the same reasons and constraints provided in the case against Dan, Pam could request a preliminary injunction against Dirt from using her photos. Note that Pam may be able to make less showing of the merits (some but not strong) to receive a preliminary injunction against Dirt if she faces substantial harm and the Defendant is not substantially harmed by the injunction. Here Dirt may claim they paid \$100,000 for the photos and now they will not be able to profit if an injunction is enforced. However, Dirt knew of the stolen aspect of the photos and that court will not be persuaded by their argument.

Defenses

Laches

(Supra). Dirt may claim that Pam waited too long to bring a suit against them. They may claim that (if a timely suit is not filed) that Pam's rights cannot be enforced because they are disadvantaged due to the fact that they have expended not only \$100,000 but other

resources to make use of the photos in provocative stories and shocking photos. However, the court may not find this persuasive because the idea of a provocative story or shocking photos depends, in part, by the quick action of the publisher in close proximity to the connection of the subject in the photo. If they claim it took too long for Pam to act and yet have not used the photos at that time, that defeats their defense.

First Amendment



Dirt may claim that they have a first amendment right for freedom of the press and speech. However, as a journalist, Dirt has no special rights greater than the general public. They may also claim that the use of Pam's photos amounts to commercial speech and that the first amendment protects speech to engage in a commercial transaction, with reference to a specific product (Pam's photos), based on an economic motivation for promulgating the speech. However, the court will use a Central Hudson test and will likely fail Dirt's argument on the first prong of the test being that Dirt's proposed communication is unlawful because they misappropriated the subject matter of the speech (stolen property).

Crimes and Criminal Prosecution

Courts will not enjoin crimes criminal prosecutions. It is in Pam's best interest to act as soon as possible to ensure that she can gain an equitable remedy before Dirt is potentially brought to some criminal action for the misappropriation of her stolen property.

2)

Question 3

Prof. Martin and Patterson

REDACTED

Breach of Contract

In order to determine the rights of the parties, we must first determine if a valid, enforceable contract has been formed. A valid enforceable contract consists of an offer which is open for acceptance (not revoked or terminated), and acceptance supported by adequate consideration.

Here, Alice planned to build a large shopping center in a suburb of New City. Bob agreed in writing to sell Alice his 100-acre orchard in the center of the proposed development. Alice agreed to a contracted price of \$1,000 per acre, the market price in that area. There appears to be a valid, enforceable, written contract meeting the statute of frauds for the sale of Bobs 100-acre orchard in exchange for \$100,000 from Alice. Alice relied on this contract as she purchased surrounding property (discussed below).

When there is a breach of a contract through failure of one of the parties to perform, the harmed party may seek damages. Here, when Cathy offers Bob \$1,500 per acre for his 100 acres after he already contracted with Alice for the same property, he decides to falsely tell Alice that he could not complete the sale because of a defect in the title. Alice reluctantly accepted the return of her deposit. This appears to be a Anticipatory Breach of the contract by Bob (Repudiation). While Bob Repudiated the contract with false intentions, Alice did not know of the agreement between Bob and Cathy. She tried to mitigate her own damages when Bob told her that he was canceling the sale, which was would be

required by Alice if she hoped to seek compensation for damages in the future. Alice had previously purchased surrounding 300 acres from the other landowners. But when she learned of Bob's desire to cancel the sale, she also offered the 300 other acres for sale. This could also be seen as an attempt to mitigate damages on Alice's behalf in the future.

Goal of Damages

The goal of contract damages is to compensate the aggrieved party so that they are in the same economic position that would have been attained if the contract had been fully performed.

The aggrieved party is entitled to the benefit of the bargain, receiving gains prevented (expectancy, e.g., profits) and losses sustained (reliance, e.g., partial performance). Contract damages must be Foreseeable, Unavoidable, and Certain.

Foreseeable - General and Consequential Damages

Contract damages cannot be recovered unless they were foreseeable (known to the parties or reasonable contemplation of the parties) at the time of contracting.

Here, both Alice and Bob had a contract to sell Alice Bob's land. It was foreseeable that if one of them failed to perform on the contract, the other would not gain the benefit of their bargain. When Bob canceled the sale, it is reasonable to believe that Bob foresaw that Alice could lose out on profits from a future sale because he had already seen the land was worth more through his dealing with Cathy. Although Cathy approached Bob later, this type of profit gain from a property sale is the natural flow of acquiring property during real estate transactions. Bob would likely counter this argument by saying only a short time transpired from his contract with Alice to the agreement he made with Cathy and that no profits could be had in such a short time. He will also claim that it was unforeseeable that Alice had plans to develop the surrounding land. However, Alice could

easily counter this because she had planned to build a large shopping center in the area.

While we do not have specific facts that Bob knew this, it is reasonable to believe that this could have come up in their discussions as the surveyed the property and prepared for the sale. If so, Bob could be liable for special and consequential damages in addition to general damages.

General Damages are those foreseeable to a reasonable persons similarly situated. These damages flow from the contract (Expectancy and reliance damages). The canceling of the contract created a situation where Alice was losing out on the agreed upon value and future possibility of gains within the property.

Special or Consequential Damages are those that are foreseeable because, at the time of contracting, the breaching party knows that no substitute performance will be available. Here, Bob's land is unique to Alice's situation because she intends to build a large shopping center and it is likely that this endeavor would require a large expanse of land. Furthermore, it is reasonable to believe that Bob knew of Alice's desire to buy up the 300 surrounding acres because she relied on Bob's agreement and it is possible that due to her reliance she shared this information with Bob during contracting. If so, Bob could be liable for damages arising out of the 300-acre property sale.

Unavoidable

Under the Doctrine of Avoidable Consequences, the plaintiff has a duty to mitigate damages. Failure to mitigate damages may reduce damages, or if failure causes greater damage, the defendant may not be liable for this additional damage. Mitigation costs may be recovered. Here, Alice attempted to mitigate damages upon hearing of Bob's desire to cancel the sale. She returned her deposit and offered up the 300 other acres for sale, which caused the market price of land in the area to drop to \$700 per acre. We are not told whether Alice was actually able to sell the 300 acres. If she still has the property, or

she sold it for \$700, she has a loss associated with that mitigation of \$300 per acre that Bob could be liable for. Bob would have the burden to prove Alice failed to mitigate. In this case, it appears she took valid mitigation steps and the court would recognize that action.

Certainty

Damages must be reasonably certain to occur and not based on speculation. Here, Alice and Bob's agreement had a certain terms and price. He was selling his 100 acres to Alice for \$1,000. Additionally, we know that Alice purchased the 300 acres for \$1,000 and that the price dropped \$700 per acre after she offered the 300 acres back up for sale.

Types of Damages

Damages consist of Legal and Equitable Damages. Legal Remedies consist of money damages, such as expectancy, reliance, consequential, incidental, punitive, or liquidated and are normally decided by a jury. Equitable Remedies are usually decided by a judge and include specific performance, injunctions, restitution, rescission, or reformation of contracts.

Legal Remedies

Expectancy Damages flow from the breach of contract (are not speculative) and seek to put the plaintiff in the position she would have been in if the contract had been performed. Here, Alice expected to have Bob's 100 acres worth a total of \$100,000. After Bob canceled the contract, she was out the land. Furthermore, the property values decreased to \$700 dollars in the area. Alice will claim she want the property and that Bob should provide property at the lower value of \$700 per acre. Bob would disagree and say he already has a contract with Cathy for \$1,500. The court would likely disagree with Bob

and side with Alice that she should have the benefit of her bargain which is the 100-acres that she agreed upon.

Reliance Damages are awarded for breach that seek to put the plaintiff to the position she would be in had she not relied on the promises of the breaching party. Here, if Alice knew that Bob was not going to sell her the 100-acres, she would not have purchased the 300-acres in the surrounding area. Bob will claim that he was unaware of her intentions. However Alice will want to claim Consequential damages.

Consequential damages for a contract breach that arise from special circumstances peculiar to the injured party. The breaching party must have had reason to know of special circumstances. Here, it is uncertain if Bob knew of Alice's intention to purchase the 300 acres. However, it is reasonable to believe that he did (see above). If the court determines that he had knowledge of Alice's intention, then she may be awarded damages with regard to the 300-acre that she purchased for \$1,000 per acre.

Incidental Damages are reasonable losses in addition to actual damages caused by a defendant (e.g., preparation expenses, fees). If Alice paid additional money for the sale transactions of the properties, she would be entitled to those costs as well. Any additional costs for the 300-acres would be based on Bob's knowledge of Alice's intent (see above).

Punitive Damages are above just compensation to punish willful and wanton conduct. Here, Bob falsely told Alice that he could not complete the sale because of a defect in the title. Alice may have a potential suit with regard to falsifying information on a real estate transaction. If so, the court may impose punitive damages on Bob for his actions.

Liquidated Damages are damages expressly provided for by the contract that 1) are difficult to ascertain 2) represent the parties' reasonable estimation of damages in the event of a breach. If the clause is unconscionable, against public policy, the breaching

party may still be liable for actual damages. Here, the contract has a liquidation clause that state if either party intentionally and without cause cancels this agreement, the other party shall be entitled to \$30,000 liquidated damages as damages may be difficult to determine. Here, Alice lost \$300 per acre on the 300 acres (\$90,000). Furthermore she lost the potential for other incidental losses. Bob knew that he could make \$500 more per acre from Cathy and make an additional \$50,000. He stood to profit \$20,000 even with the liquidation clause. The court will not view Bob's actions favorable and find that keeping the clause would be against public policy to enforce valid contracts.

Real Estate Contract

Seller (Vendor) Total Breach

Under the English Rule, the Vendee may recover only the down payment plus reasonable expenses of a survey and examination of title unless the vendor was aware of title defect or refuses to convey. Under this rule, Alice has already recovered her down payment. However, Bob refused to convey. There are better options for recovery for Alice.

Under the American Rule, no matter what the reason for the breach, the vendor is liable for the difference between the Market Value and the Contract Price. Here, Alice will argue that the Fair Market Value is \$1,500 per acre because Cathy was willing to pay that amount to Bob. Bob will argue that the property values have decreased to \$700 and therefore doesn't owe her any difference. The courts will likely side with Alice and find that under the American rule, Bob will owe Cathy the land and \$500 more per acre. This may factor into the consequential damages, if awarded to Alice, for the 300-acres provided she is able to add those damages to her suit.

Equitable Remedies

An aggrieved party may elect one of the two types of damages: Money Damages or Restitution. Here, Alice will want to consider if the compensatory damages (money) are inadequate.

When Legal Remedies are not sufficient, then Equitable Remedies can be sought by the harmed party (e.g., unique property, unjust enrichment, replacement is impossible. Here, Alice will claim that the 100-acre property is unique because of its size and location and that she intended to build a large shopping center in the suburbs. She will also claim that the 300 acres surrounding the area make the entire location unique and that a replacement is not possible. Alice may consider Specific Performance.

Specific Performance

Specific Performance is an equitable remedy that requires specific action when monetary damages are inappropriate or too difficult to ascertain. Courts will consider the following.

Courts will Balance the Hardships between the parties. Here Bob still has the 100 acres and it would not be hard for him to continue with the sale to Alice. Alice on the other hand has 300 acres that she is attempting to sale (no one has purchased them yet) and she has intentions to continue with the shopping center development. The court will clearly see that the contract has been breached and that the terms were certain and definite (above). Importantly, Alice is in a good position to show that there are inadequate legal remedies because of the uniqueness of the land. The courts will view a specific performance order feasible to enforce because the court can supervise the land transaction. Mutuality in the parties' ability to perform also exists because Bob has the property and Alice was willing to buy it.

Injunction

Injunction is a form of equitable relief in which a party is ordered to perform or refrain from performing a certain act. As discussed, Alice is in a good position to show Inadequate Legal Remedies, Feasibility of Enforcement, Parties have been identified, and balancing of hardships. Furthermore, Alice is in a good position to show that irreparable harm will come to her because she still has the 300 acres that she purchased based on her reliance of Bob's agreement and now the price per acre has decreased by \$300 and she will be out a unique property to build the shopping center.

Temporary Restraining Order

A temporary Restraining Order (TRO) is an immediate, stop gap measure designed to preserve the status quo that prohibits a party from acting until request for injunctive relief is adjudicated. Alice will want to request the court issue a TRO so that Bob will be enjoined from selling the property to Cathy or others until she can have a preliminary hearing on the merits.

Preliminary Injunction

A preliminary injunction gives the plaintiff temporary relief on the merits issued prior to or during trial to prevent irreparable injury from occurring before the case is decided. A plaintiff is entitled to a preliminary injunction upon showing that there are serious questions going to the merits of the dispute. Alice will be able to show a clear contract breach by Bob and the issues presented above. She will likely be able convince the court that balance of the hardships leans sharply in her favor due to any incidental expenses and that she retains the 300 acres that are decreasing in value. Furthermore, Alice will be able to show that an injunction is in the public's interest of faith in contracting and that irreparable harm is likely to occur without relief (above).

Permanent Injunction is a court's final order (After trial on the merits) requiring a person to refrain from activities permanently or take certain actions. If Alice gains a Specific Performance against Bob, here case will be satisfied. It does not appear that a permanent injunction would be needed in this case. She either regains the property or does not.

Reactionary Remedies

Restitutionary Remedies are based on the Benefit to the Defendant and to prevent the Defendant's unjust enrichment. While the plaintiff may choose between legal remedies and restitutionary remedies, she can't claim both. She should choose the option with greatest award. There are three forms of Legal Restitution: 1) Replevin; 2) Ejectment; 3) Quasi-Contract, and two forms of Equitable Restitution: 1) Constructive Trust; 2) Equitable Lien.

Replevin (Personal Property)

IN an action for replevin, plaintiff may recover possession of specific personal property. Plaintiff must show 1) right to possession, 2) there is wrongful withholding by defendant. As long as the defendant is still in possession, the plaintiff can recover chattel before trial. the plaintiff must post bond The defendant may post re-delivery bond, allowing him to keep the chattel until after the trial. Here, Alice can show that Bob has the property. However, she did receive her down payment back under false pretenses. Alice is in a good position to have the court return the property to her based on her benefit of the bargain.

Ejectment (Specific Real Property)

IN an action for Ejectment, the plaintiff may recover possession of Specific Real Property. The plaintiff must show a right to possession, and a wrongful withholding by the defendant. Usually, this is coupled with damages for loss of use of benefit during wrongful withholding. Alice will likely show that Bob wrongfully withheld the property

from Alice when he canceled the agreement so that he could make more money from Cathy. Alice is in a good position based on the facts (above) to get a court order ejectment.

Rescission is a judicial order declaring a contract a nullity and returning all parties to the same positions they were in before entering into the contract. Reasons include mistake, illegality, impossibility. This is not an equitable option for Alice because she still has the 300-acres at a reduced price and cannot continue to build her shopping center without Bob's 100 acres.

Unconscionable Contract or Clause. If a clause is unconscionable, the court can refuse to enforce the whole contract or the clause at issue or interpret the clause narrowly to avoid an unconscionable result. Here, the court would likely strike the liquidation clause and retain the remaining portion of the contract and then either enforce specific performance on the contract with awarding additional consequential and incidental damages.

Defenses

Laches

Laches is a defense in equity under which a party claims that the opposing party has failed to assert its right within a timely manner and that the rights thus cannot be enforced. Here, Bob may claim that Alice should not have agreed to accept the return of her deposit and instead should have requested for him to continue the sale. However, it is likely he would not have done so. He will claim that he now faces additional damages because of her actions of waiting until later. However, Alice will claim that she was relying on Bob's information and tried to mitigate damages and she should not be punished for her mitigation attempts. The court will likely find in Alice's favor and not grant laches because of Alice's good faith mitigation and Bob's dishonest dealings.

Unclean hands does not appear appropriate for a defense because there is no evidence of Alice committing any wrong doing.

Bob may claim estoppel as a defense due to Alice's mitigation attempt as described above for Laches. However, for the same reason the court will likely not grant an estoppel.

END OF EXAM

QUESTIONS ONE & TWO --MODEL ANSWER

IDENTIFICATION OF UNDERLYING TORTS GIVING ACCESS TO REMEDIES

1. Conversion

When DAN sold PAM's photos to DIRT, he did an intentional act that represented a taking -- an exercise of dominion and ownership of a chattel over the real owner's right of possession. No present facts indicate consent or a privilege.

2. Invasion of Privacy

A. Intrusion Into Seclusion

When DAN entered Pam's electronic device, without consent, he intentionally intruded into an area of seclusion and those acts would be highly offensive to a reasonable person because of the nature of the seclusion and the type of information therein, as well as the manner in which DAN entered. PAM's peace of mind was harmed, shown by her being described as "concerned" and "angry".

B. Public Disclosure of Embarrassing Private Facts

When DAN provided PAM's private nude photos to DIRT, he gave publicity to the photos. That act would be highly offensive to community notions of decency. While DAN would defend with the privilege of "public interest", there must be legitimate public concern to support that defense. No present facts indicate consent.

C. Commercial Appropriation of Likeness

If DIRT uses the stolen nude photos of PAM without her consent, it will have appropriated PAM's likeness for an advantage, namely DIRT's sales and publicity. PAM's celebrity image, which presumably represents a property right owned by PAM, will have been diluted. No present facts indicate consent or a privilege.

DAMAGES

PAM can be told that due to the torts identified above, she may ask for the legal remedy of Damages, that is, an amount of money that equals the Fair Market Value of the chattel (her photos) at the time of taking. Both Conversion and the Appropriation tort would support those damages.

PAM will have a problem, however, with measuring the amount of damages because, unlike cars or jewels, there is no "market" for nude photos. Such photos are not an accepted commodity but are a personal memento held for personal use. Without a measure of damages, any request for an amount greater than a nominal sum would be criticized for being uncertain. Damages require certainty and cannot be based on speculation or conjecture.

PAM could be awarded Nominal Damages but such an amount (likely, \$1.00) would be unsatisfactory for PAM.

PAM could also request Punitive Damages, meant to punish and deter, but there must be some proportionality between actual/nominal damages and any punitive award. With only a nominal award, punitive damages would also be unsatisfactory for PAM

It can be concluded that legal damages for stealing and selling PAM's nude photos would be inadequate.

RESTITUTION

PAM can also be told that she may ask for the \$100,000 received by DAN, under the doctrine of Restitution. That theory would seek to recover benefits unjustly retained by DAN and the unjust nature of DAN's acquisition would be shown by the above-referenced torts that were source of DAN's benefits.

1. Legal Restitution

A. Assumpsit/Money

Under this remedy, PAM can ask for the reasonable value to the benefit unjustly obtained, which is easily ascertained to be \$100,000. Using Assumpsit, DAN would be required to turn that sum over to PAM.

B. Replevin

(1) DAN

If DAN still has any of the photos (the facts say "some" of the photos are sold) and still has possession of PAM's electronic device, PAM could ask for recovery of those specific chattels that were wrongfully taken. Replevin could not traditionally be used to recover money, unless the exact same bills and coins could be identified. Therefore, PAM could not use Replevin to recover money from DAN as DAN did not take money from PAM.

(2) DIRT

PAM could use Replevin to obtain the photos that DIRT has possession of. It is stated that DIRT knows the photos are stolen, so it cannot claim ownership as a BFP.

2. Equitable Restitution

A. Constructive Trust

The traditional requirements for a Constructive Trust are present in the facts:

1. There must be the existence of property (res) and that is present in the \$100,000 that DAN received from DIRT.
2. Plaintiff must claim a right to that property and that is present in PAM's claim that the photos were her private property within her private electronic device.
3. There must be the wrongful acquisition of that property by another and that is present in DAN's tortious behaviors (Invasion, Conversion, etc.), then his sale of the photos to DIRT without consent or privilege.

(1) Bank Account

DAN's bank account was funded with \$50,000 from the money he received from DIRT. As the elements of a CT are present, and as the remedy at law is inadequate, a CT would allow PAM to receive that asset as well as any enhanced value from interest.

(2) House

DAN used some of the unjust benefits to acquire title to real property. Because DAN's retention of the house would therefore be unjust enrichment, and because of the inadequacy of a legal remedy, PAM would also seek an order to convey the house to her.

DAN, however, either contributed money or obtained a mortgage of \$150,000 to buy the house. If DAN did contribute and there is a "mixing" of their monies, PAM might not be able to utilize a Constructive Trust.

B. Equitable Lien

An Equitable Lien is also a claim on property to prevent unjust enrichment, such as DAN's ownership of the house. Using an EL, PAM would receive the unjust benefit (\$50,000) plus any enhanced value in proportion to her contribution. Because DAN received an offer of \$240,000 the Fair Market Value went up by \$40,000. As PAM's contribution was 1/4 of the purchase price of \$200,000 she should receive the \$50,000 plus 1/4 of the enhanced value (\$10,000).

Both remedies of CT and EL would require the tracing of the unjust benefit money used to acquire the real property (\$50,000) and the bank account (\$50,000). From the facts that hint DAN has no other property or wealth, the tracing should be accomplished easily.

Because both remedies are equitable, DAN could raise equitable defenses but none are apparent in the facts.

INJUNCTION

The equitable remedy of an Injunction could be used by PAM to order a Defendant, such as DIRT, to refrain from doing something (a negative injunction). PAM would try to prohibit the publishing of the nude photos of her in DIRT's upcoming issue.

A. Inadequacy of Law

PAM would first have to contend that her remedies at law would be inadequate as they would be speculative, or too small to compensate fully for her actual injuries. While she may recover some money under the torts and remedies discussed above, that money could not fully account for damage to her career, or damage to her peace of mind, if the photos were published. Therefore, PAM would say that legal remedies are inadequate and an Injunction is needed.

B. Irreparable Injury

PAM would also have to contend that, once the photos are published, her career would never be the same and the photos could never be "unpublished".

C. Property Right

PAM would also contend that she had a property right in her appropriated photos, proved by her career as an actress with growing notoriety.

D. Feasibility of Enforcement

PAM would also contend that the exercise of equity would be a negative injunction and not need supervision or maintenance by the court. DIRT merely would be forbidden to publish her photos.

E. Balancing of Hardships

PAM would also contend that a balancing of the "equities" would be in her favor, with DIRT losing very little in income or circulation if they did not publish her photos, while PAM's career would suffer greatly if DIRT was allowed to publish.

INJUNCTIVE PROCEDURE

1. Temporary Restraining Order

The TRO is an order at the first stage of Plaintiff's request for injunctive relief. Asking to maintain the status quo, PAM could seek an order on an ex parte basis, to stop the imminent publication of her photos. The TRO would have a short and strict time limit to keep from doing unjust harm.

2. Preliminary Injunction

After an adversary hearing where both sides had notice and could present evidence, the Preliminary Injunction would continue the status quo, pending a trial. The above two steps would allow a period of protection for a longer period of time, during which PAM could organize a trial and anticipate receiving a Permanent Injunction.

EQUITABLE DEFENSES

1. Unclean Hands

It might be anticipated that DIRT would allege PAM's own behavior (posing nude) was an antisocial act that is related to the transaction in the suit and/or it was Implied Consent. With PAM portrayed as having unclean hands, DIRT would argue that she should be denied equitable relief. It is doubtful that posing nude would be considered antisocial in modern times.

2. Freedom of Speech

DIRT may also state that an injunction would be a prior restraint of a media defendant and interfere with First Amendment rights. PAM would reply that the underlying torts protect her significant property rights-- rights that should not be taken by an exercise of First Amendment rights.

QUESTION THREE-- MODEL ANSWER

I. Legal Remedies

A. Damages

1. Purpose-- to give the non-breaching party the Benefit of the Bargain, subject to being Foreseeable, Unavoidable, and Certain.
2. Analysis: In this case, BOB intentionally breached the contract with ALICE, thereby entitling ALICE to Damages.
 - A. It was foreseeable to BOB that his breach would cause ALICE damages in obtaining another parcel and, because he had special knowledge of the purpose of the contract, it was foreseeable that ALICE would lose the profits of a completed shopping center.
 - B. The damages available to ALICE, however, are uncertain.
 - C. There was a liquidated damages clause which is valid if (1) damages are difficult to ascertain at contract formation, and (2) this is a reasonable estimate of the damages. The liquidated damages clause appears to be valid and not punitive.
 - D. Conclusion: The legal remedy of Damages may be available but may not be the preferred remedy for ALICE.

II. Equitable Remedies

B. Specific Performance

1. Purpose -- to prohibit breach by enforcing an existing contract, if certain requirements by Equity are met. The facts indicate a writing and ALICE's reliance on BOB's promise within the writing.
2. Analysis of Equitable Requirements:
 - A. Inadequate Legal Remedy. Here, damages are uncertain as to lost profits of a completed shopping center. Additionally, the liquidated damages clause also may not adequately compensate for lost profits. Additionally, land is traditionally unique and ALICE may want the land more than money damages.
 - B. Certain and Definite. Here, the terms are very certain and definite as the court would know the subject of the contract (the exact land), as well as the price.
 - C. Feasible. Here, the orchard has not yet been resold and is still available. The court's order could be easily complied with and the court's ongoing supervision would not be necessary.
 - D. Mutuality. Here, the Claimant, ALICE, is ready, willing, and able to perform by tendering the purchase price.
 - E. Conclusion: ALICE may prefer the Equitable Remedy of Specific Performance.