

REMEDIES
Final Examination
Spring 2001
Instructor: Craig Smith

Time Allotted - Three Hours

An answer should demonstrate your ability to analyze the facts presented by the question, to select the material from the immaterial facts, and to discern the points upon which the case turns. It should show your knowledge and understanding of the pertinent principles and theories of law, their relationship to each other, and their qualifications and limitations. It should evidence your ability to apply the law to the facts given, and to reason logically in a lawyer-like manner to a sound conclusion from the premises adopted. Try to demonstrate your proficiency in using and applying legal principles rather than a mere memory of them.

An answer containing only a statement of your conclusions will receive little credit. State fully the reasons that support them. All points should be thoroughly discussed. Although your answer should be complete, you should not volunteer information or discuss legal doctrines that are not necessary or pertinent to the solution of the problem.

Unless a question expressly asks for California law, it should be answered according to legal theories and principles of general application.

QUESTION 1

Curly's apartment building adjoins Moe's shopping center, Plaza Stooge. During the past two years Moe has held six rock music events to promote business at Plaza Stooge. The concerts have attracted between 4,000 and 7,000 people.

Curly has a number of complaints about the concerts: Moe's property is not large enough to accommodate crowds of 4,000 people; concertgoers use Curly's property damaging the grass and leaving a huge amount of trash behind. Some of the concerts have been very loud; and the concerts continue well past midnight on weeknights.

Curly's tenants have complained bitterly. Plaza Stooge has announced a full concert schedule for the summer, and the tenants fear that the concerts will involve noise, large crowds, and lots of trash. Some tenants have given notice of their intent to move.

Assume you have just been hired to represent Curly. Advise him as to what legal remedies he and/or his tenants may be entitled to.

QUESTION 2

Dale Earnhardt was recently killed in an auto racing accident. Photographs of Earnhardts body were taken during an autopsy. The Miami Herald, by means of a source it refuses to identify, has obtained copies of some of the photos and has announced its intention to publish them in its upcoming Sunday edition. Some of the photos have already surfaced on the internet at sites unrelated to the Herald. Florida law makes it a misdemeanor to publish autopsy photos without the permission of the deceaseds next of kin. Although Earnhardts widow has refused to grant permission, the Dade County District Attorney has announced that he will not prosecute the paper should it decide to publish the photos because of the great public interest in Earnhardt.

The mere thought that the pictures might be published by the Herald has caused Earnhardts widow much emotional distress. On the Wednesday preceding the Sunday of the planned publication, Earnhardts widow comes to you and wants to know if she can do anything to prevent the publication of the photos since the District Attorney wont.

Advise her as to her rights in this regard as well as any other remedies she may have.

QUESTION 3

Orville was a grain dealer. Wilbur was a farmer. Orville was in the business of merchandising grain. Wilbur was simply in the business of growing rather than merchandising grain. On April 16, 2000, Wilbur agreed to sell to Orville, for delivery in October and December of 2000, 40,000 bushels of corn. Half the quantity was to be delivered in October and the other half in December. The price was to be \$1.12 per bushel.

On June 3, 2000, Wilbur informed Orville that he was not going to plant corn because the season had been too wet. He told Orville to arrange elsewhere to obtain the corn if Orville had obligated himself to deliver to any third party. The price for a bushel of corn on June 3, 2000, for future delivery was \$1.16. In September of 2000, Orville asked Wilbur about delivery of the corn and Wilbur repeated that he would not be able to deliver. Orville however persisted. He mailed Wilbur confirmations of the April 16 agreement. Wilbur ignored these. Orville's attorney then requested that Wilbur perform. Wilbur ignored this request likewise.

The time for performance came and went and Wilbur did not deliver the corn. By the October delivery date, the price of corn had risen to \$1.22 per bushel and remained at that level through the end of December 2000.

Orville, who as a result of Wilbur's failure to deliver, did not have corn to deliver to third party buyers, has sued Wilbur for breach of contract. You are the judge, sitting without a jury, who must decide the case. Orville is arguing for the highest measure of damages available. Wilbur is arguing for the lowest measure.

Write a statement of decision explaining who you are giving judgment for, what the amount of recovery shall be and why.

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Sample Answer to Question 1

Curly is suffering physical injury to his property and is the victim of a nuisance.

The measure of damages for injury to real property is the lesser of the cost of restoring the property to its pre-injured state or the diminution in value. The cost of cleaning up the trash and replacing the grass can be compensated in monetary damages. For these injuries alone, Curly will not be entitled to injunctive relief because his legal remedies are adequate. The general rule is that equitable relief (of which injunctive relief is a type) is only available when one's legal remedies are inadequate.

The noise and the crowds are a different matter. They constitute a nuisance. A nuisance may be either public or private. It is public when it effects a large number of people. It is private when it effects only a single plaintiff. Traditionally only the government had standing to abate a public nuisance. A private citizen could only bring an action to abate a nuisance if he or she could show that they suffered some injury different in kind from the public in general. This may be a difficult test for Curly to meet as the injury affects not only him but his tenants as well. He may well lack standing to abate this public nuisance. However, many jurisdictions have relaxed this rule and allow private defendants to bring actions to either enjoin or abate public nuisances.

Assuming Curly has standing he could abate this nuisance by seeking an injunction. Monetary damages are ineffective to remedy the problems of noise and crowd control. Injunctions are effective tools to combat instances of disturbing the peace. Curly could seek a permanent injunction to halt the entire summer concert schedule. A permanent injunction is not "permanent" in the sense that it cannot be modified or changed but rather is one that is entered after a full trial on the merits. The lack of the immediacy of the threatened harm would seem to rule out the necessity of a temporary restraining order (TRO) which could be obtained ex parte (without a hearing but with notice to the opposing side) which is designed merely to maintain the status quo pending the full-blown hearing on a permanent injunction. TRO's are only granted in situations where failure to maintain the status quo would render the relief granted pursuant to a permanent injunction ineffective.

Curly could enjoin the nuisance. If for any reason the court declined to award an injunction he could still obtain monetary damages for the cost of the clean-up and the injury to his land.

Sample Answer to Question 2

The harm that is at issue here is emotional distress. Not all emotional distress is compensable. Many jurisdictions require that it be accompanied by some physical injury. Other jurisdictions, while not requiring physical injury require that the plaintiff at least be in the "zone of danger" i.e., in proximity to witnessing physical harm to a loved one. Ms. Earnhardt would not appear to qualify for compensation for emotional distress. Even if she could she would face the problem of having to prove her damages with certainty. A plaintiff cannot recover for damages which are remote, speculative or conjectural. Emotional damages are frequently difficult to quantify in monetary terms. As a result Ms. Earnhardt cannot recover legal damages.

Injunctive relief may be available to Ms. Earnhardt. The traditional rule was that equity will not enjoin a crime. The rationale is that the penal laws are standing injunctions. Hence, an adequate legal remedy was available. Here the publishing of such photos is a misdemeanor. However, the district attorney has indicated that he will not prosecute for this offense. This means as a factual matter Ms. Earnhardt is without an adequate legal remedy. Thus, in this situation the fact that the defendant's act is also a crime will not preclude injunctive relief.

Ms. Earnhardt's remedies are inadequate in that she cannot recover damages for her emotional distress and the criminal laws will not protect her. Publishing of the pictures would appear to result in "irreparable harm" because once the "cat is out of the bag" the damage is done. Her next hurdles are procedural. Time is short. It would appear there is insufficient time to give notice in order to have a hearing on the merits of an injunction. She would have to seek a TRO (Temporary Restraining Order) which would only last for 10 days (subject to a 10 day extension) to stop publication. The purpose of a TRO is to preserve the status quo until there is a hearing on the merits. Ms. Earnhardt would have to give notice to the opposition (unless she can show that giving notice would frustrate the purpose of the TRO) and post a bond if the TRO is granted. The bond is designed to protect the defendant in the event it is determined the TRO was wrongfully issued and sets a ceiling on the defendant's recovery.

Ms. Earnhardt is also up against the issue that courts are reluctant to issue injunctions where First Amendment (freedom of the press) rights are involved. Courts are very reluctant to enjoin publication of material before the fact because to do so constitutes a prior restraint which runs afoul of the First Amendment.

Although Ms. Earnhardt's legal remedies are inadequate it is doubtful that she would be successful in obtaining an injunction against the Herald.

Sample Answer to Question 3

This is a contract for the sale of goods. Goods are defined as those things that are movable at time of identification to the contract for sale. Corn meets this description. Hence, the contract and any remedies are governed by the UCC.

Wilbur is in breach having failed to deliver the corn as promised. The buyer's measure of damages when the seller breaches is the difference between the contract price and the price of cover, i.e., goods purchased in substitution. Specific performance is being ruled out as an appropriate remedy because it is only available when legal remedies are inadequate. In a sale of goods contract specific performance may be decreed when the goods are unique or in other proper circumstances. Corn is not unique. Although inability to cover may be a circumstance indicating that the goods are unique, Orville made no attempt to cover.

Although Orville did not cover he may still recover the difference between the contract price and the market price at the time he learned of the breach. Orville "learned of the breach" on June 3rd. At that time the difference between the contract price and the market price was 4¢ per bushel. Orville made no attempt to cover at this time or within a period that could be considered a "reasonable time after learning of the breach." The purpose of allowing this reasonable time is to give the seller an opportunity to retract his repudiation. Although, strictly speaking, a party is not under a "duty" to mitigate his damages (i.e., he cannot be penalized for failing to mitigate, he cannot recover for those damages which he could have reasonably avoided. By not seeking cover at the time of repudiation Orville allowed his damages to pile up. He cannot recover the difference between the contract price of \$1.12 and the market price of \$1.22. Rather he is limited to the difference between the contract price of \$1.12 and the market price of \$1.16 which was the price at the time he first learned of the breach.

Judgment for Orville in the amount of 4¢ per bushel for the 40,000 bushels of corn.