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Question 1:

Cooper could bring a cause of action based on breach of contract pursuant to the written agreement that Cooper and Winter had entered into. Cooper would first attempt to go after specific performance of the contract in order to get the painting for the \$500. In order to justify a remedy for specific performance eight specific things must be met. First there must be a valid contract with offer, acceptance, and consideration, all of which were present in this case. Second, the terms of the contract must be specific enough for it to be specifically performed as it was in this case, the specific painting in exchange for \$500. Third, the plaintiff must be ready and willing to complete his end of the bargain, which Cooper was willing to do as he had returned with \$500 to pay for the painting. Fourth, the defendant must be able to specifically perform, because Winter still had the picture he was clearly able to still perform. Fifth, there must be an inadequate remedy at law, which poses a bit of a problem for Cooper, legal damages in the form of expectancy or reliance damages may be possible to remedy the problem. However, Cooper could successfully argue that because this is a unique painting that will appreciate in value over time, legal damages are an inadequate remedy because they would not be able to determine how much appreciation would take place and would be very attenuated. Sixth, there must be irreparable harm, which Cooper is likely to meet seeing as there are no other paintings like this one because it is the only one. In fact, UCC 2-716 states that specific performance on sale of goods requires that they be either "unique, or other proper circumstances." This is clearly a unique item in this case because it is an original painting and only one of them exist. A unique item is one that is one of a kind, which this original painting clearly is. Seventh, the court must consider a balancing test as to the harm to each of the parties in granting the equitable relief in the form of specific relief. In this case, this could pose to be a problem because Cooper stands to get a great benefit of \$349,500 for only \$500 paid to Winter. Finally, the court must consider any public interests that may be involved in this case but it really does not come into play. Although Cooper will most likely be able to establish all of these elements for specific performance, it is unlikely that he will win on the case because of the many defenses that Winter can raise.

Cooper could also pursue a legal remedy in the form of damages. The general rule of damages is expectancy measure of damages, which puts the non-breaching party in as good of a position as he would have been in had the contract been performed. In this case, had the contract been performed Cooper would have maintained a painting that was worth \$350,000 and most likely going to appreciate over time. Therefore expectancy damages would have to project the future appreciation of the painting. Although it is likely that he can maintain a cause of action for breach of contract, it is unlikely that Cooper will win because of the multiple defenses that can be raised.

Winter can raise a number of equitable defenses to rebut Cooper's claim seeking the equitable remedy of specific performance, particularly unclean hands and unconscionability. Winter can first raise the defense of unclean hands. The equitable defense of unclean hands is based on the equitable maxim that "one seeking equity must do equity." Therefore, one that comes to court seeking equity cannot have performed an act in bad faith in order to bring about the cause of action seeking the

equitable remedy. This unconscionable/bad faith act had to have taken place before the cause of action was brought, it must be substantial in nature, and it must be intimately related to the cause of action at hand. In this case Cooper clearly came to court with unconscionable hands by withholding the fact that he knew what the painting was potentially worth, he cannot under this defense seek equitable relief in the form of specific performance because of his bad faith action.

Winter can also raise the defense that this was not a valid contract due to unconscionability. Unconscionability is a defense that only pertains to contracts but it can be applied to both equitable and legal claims. Therefore, this defense can rebut both of the remedies that Cooper is seeking. Unconscionability can raise in either of 2 ways: (1) where there are substantially unequal bargaining powers between the parties, or (2) where there are substantially unequal terms of the contract. This case falls more into the latter of the two. Given the gross difference between the \$500 offered by Cooper for the painting and its worth of \$350,000 the contract terms are clearly unconscionable. Furthermore, it can also be argued that there were unequal bargaining powers given the fact that Cooper had a great knowledge of art whereas Winter clearly did not.

2)

Question 2:

2 types of personal injury actions arise upon the death of an individual that result in legal damages. The first, which is provided for by Ohio Revised Code 81.01 is a survival action, the other, provided for by Ohio Revised sections 71.01 and 71.02 is a wrongful death action.

Survival actions are an action brought by the estate of the decedent for the injuries and damages that the decedent suffered between the accident/event and his ultimate death. In other words, this is an existing action on behalf of the decedent, not a new cause of action, which according to the statute as well as the majority of common law will pass to the heirs of his estate as determined either by his will or by the intestacy statute. Tyler Guthrie is an heir of the decedent, James Guthrie, therefore, according to the statute he may bring a cause of action on behalf of the estate for the damages that James Guthrie suffered between the accident and his ultimate demise three weeks later. These damages include general damages such as pain and suffering, as well as special damages such as medical bills and lost wages. However, it has been determined that lost wages must be something that is determinable based on past history of the business. Because this is a new business, it will be difficult to determine any of the wages that would have been ascertained as a result of it. However, if James Guthrie did maintain his job at Wright State, those wages for the three weeks that he was unable to work can be collected.

The defense may be raised that because James Guthrie was in a coma for those three weeks he did not suffer any pain because he was unconscious and not aware of what was going on. Furthermore, the defense can be raised that the medical bills were paid by the insurance company therefore there were no such damages suffered.

Wrongful death actions on the other hand, are a separate cause of action which is brought by a surviving spouse, child, or parent of the decedent. This separate cause

of action is for the loss that the beneficiary sustained as a result of the death of the decedent. The damages sought under a wrongful death claim really include loss of consortium and pecuniary damages suffered as a result of the decedent's death. This claim of loss of consortium has been extended to not only spouses but to children as well. These loss of consortium damages include both tangible and intangible benefits that were lost. Tangible benefits include the loss of economic support that was supplied by the decedent. Particularly in this case, where Tyler lived at home and ate at home, he was clearly being supported by his father James and therefore suffered tangible losses in the form of consortium damages. These tangible losses will be calculated by the projected value of James Guthrie's future income that would have been contributed to James based on his position at Wright State. Although the argument can be made that it should also include profits as a result of the new store that James was opening, these would be far too attenuated based on the fact that the store had not even opened and it would be impossible to determine what profits if any would have been earned. Intangible losses include things such as loss of love or companionship. The courts have recognized that the value of a human life clearly has pecuniary value in this nature. In this case James lost the companionship and love of his father.

However, the common law defense can be raised that adult children cannot always collect under a wrongful death claim. The court must look to the closeness of the child with the parent. In this case, there is a strong indication that there was a complete lack of closeness between James Guthrie, the decedent, and his surviving son Tyler. In fact, they rarely spoke for the entire last year not to mention that he was no longer a minor.

Naturally, a defense that can be raised to both the survival and the wrongful death claim is that Smith was not even liable for the accident. Although the facts strongly indicate that Smith was in fact negligently operating his vehicle that resulted in the death of James Guthrie, Smith can still try to battle the liability issue. Liability must be established before the survival and wrongful death remedies may be maintained.

3)

Question 3:

Criminal contempt is an action brought by the state where one has defied a court order and therefore mocked the court. There are two different forms, direct and indirect. Direct criminal contempt occurs in "the presence of the court" and indirect takes place outside of the court. Civil contempt on the other hand is an action brought by the person that was injured or wronged as a result of the defiance of the court ordered injunction (in this case it would be AGCO). Civil contempt can be compensatory, which is an award granted to the plaintiff for past injuries suffered as a result of the defendant's defiance of the court order, or civil contempt can be coercive, which is to prevent future injuries to the plaintiff. No trial rights are afforded to civil contempt, nor are they afforded to direct criminal contempt. However, due process is afforded to indirect criminal contempt allegations. There is a fine line between indirect criminal contempt and coercive civil contempt which plays greatly into whether due process procedural rights are afforded or not. Indirect criminal contempt (and all criminal contempt for that matter:) is punitive in nature and therefore results in

unconditional fines or jail terms to punish the defendant for his/her violation of the court order (injunction). Coercive civil contempt on the other hand is remedial as opposed to punitive in nature. It is an attempt to coerce the defendant to comply with the injunctive court order as opposed to punishing him/her for their violation. In the case at bar, it will most likely be found that the contempt that was issued on April 12, April 20, and April 24 as a result of Andy Lorenzi's defiance of the injunction were indirect criminal in nature as opposed to coercive civil. The judge was clearly punishing Andy Lorenzi for his defiance of the court order. He was issued an unconditional fine of \$100 on April 12, and then another unconditional punitive fine on April 20 in the amount of \$200.

Although the judge did warn Lorenzi that another infraction would result in another fine of \$500 and 30 days of jail time this is still punitive in nature. Just like any crime that would result in punishment as a result of defiance this cannot be declared coercive simply because the court warned him that he could avail himself simply by complying with the order. Ultimately this fine of \$500 and 30 days of jail time were imposed.

As a result of this most likely be classified as indirect criminal contempt, Andy Lorenzi will be afforded due process rights. The form of due process rights afforded to one that is being charged for indirect criminal contempt depend on the severity of the punishment. Contempt that is punishable by more than 6 months, results in the defendant being afforded (1) notice, (2) right to counsel, and (3) right to a trial by jury. However, crimes that result in punishment for less than 6 months result in the (1) right to notice, (2) right to counsel, and (3) the right to a hearing as opposed to a jury trial. In this case Andy Lorenzi was given the \$500 fine and 30 days in jail for his defiance of the order, therefore he will not be afforded the right to jury trial, but instead only the right to a hearing. Although the judge also sentenced him to six months in jail, this was as a result of his direct criminal contempt in the presence of the court not for his indirect criminal contempt of violating the order.

The actions that occurred in court on April 24 were direct criminal contempt. Direct criminal contempt occurs where the defendant mocks the court "in the presence of the court." Although not all of it must happen directly in front of the judge, the judge must issue a written finding of what he/she witnessed in the court in order for a direct criminal contempt order to be valid. Courts have determined that "in the presence of the court" can extend as far as the halls of the court and some even say that it carries with the jurors. However, in this case we are not dealing with such a removed situation but rather a criminal contempt that happened right in front of the judge and was in fact directed at the judge. Direct criminal contempt is not entitled to a jury trial and can be sentenced and punished on a summary proceeding. Therefore, the 6 month jail term that was imposed for the direct criminal contempt will most likely stand despite the fact that no jury trial was afforded.

The validity of an underlying injunction for a trespass does not impact punishment in the form of criminal contempt. In other words, one may not entitle themselves to self help by defying an injunction order simply because they think it was unjustly issued. Criminal contempt will stand despite the fact that the underlying injunction is later overturned, because it is punishing the actual defiance of the court. Civil contempt on the other hand, will not survive if the underlying injunction is found to be invalid. The theory is that civil contempt is to remedy a wrong that was caused to the private plaintiff, but if the injunction was issued in error to begin with, the private plaintiff suffered no damages to base a claim of civil contempt on.

4)

Question 4:

The main remedy that Clarence Peterson can go after as a result of May's actoins is for restitution pursuant to May being unjustly enriched. Unjust enrichment/restitution can serves as its own substantive claim, usuually as a claim for quasi-contract/IMPLIED IN LAW CONTRACT, or it an float around and attach as a remedy to traditional legal or equitable claims. In this case it is likely that the claim to be brought will be the equitable claim for breach of a fidicuary duty. BEcause May was Clarence's attorney she owed a fidicuary duty to him, which she clearly breached upon embezzling. A legal claim may also be brought for embezzlement. Under either of these approaches, because May is insolvent, Clarence will want to pursue the remedy of unjust enrichment/restitution, as opposed to personal damages agaisnt May. Restitution/unjust enrichment can be awarded where the (1) defendant retained a benefit at the expense of the plaintiff and (2) it would be unjust or inequitable for that benefit to be retained by the defendant. In this case it is clear that these 2 eleements were met, where May unjustly retained 20,000 of Clarence's money.

However, there are limitations to being afforded a resetitutory remedy. First and foremost, the unjustly retained benefit must be able to be traced. This becomes a big problem in this given the many different changes that it took. The first 10,000 that was invested into the Old Second Bank account was co-mingled with other funds and the bank account was used extensively. However, three different presujmptoins have been created in order to deal with the tracing problem involved in co-mingled accounts. The first is the "first in first out" rule. Under this rule, whatever was first put into the account will be assumed to have come out first upon expeniture. Thereofre under this appraoch because the unjustly retained 10,000 was put in after May's personal funds, the court will presume that these personal funds came out first, leaving Clarence's 10,000 in tact in the account. Under this appraoch, an equitable lien would be the appropriate remedy to impose. An equitable lien is appropriate where we know the amount that is unjustly retained but not necessarily where all of it is. INI this case we do nto know how much she had in the account before hand or how much is in teh acocnt now, therefore an equitalbe lien would be appropriate becuse we do know that she unjustly retained 10,000. Under the second approach the "jessel's bag" appraoch the court presumes that whatever money comes out of the co-mingled account is from the personal assets of the defendant, leaving the 10,000 in tact in the account. Again, it would still be more appropriate to issue an equitalbe lien in this case because dont

necesasrily know how much was in the bank account before the 10,000 was put in or how much is now left in it. Finally, under the "Restatement" approach, the entire co-mingled account is considered to be entitled to the plaintiff on an unjust enrichment claim. This is very pro-plaintiff, and under this approach a constructive trust would be more appropriate. Because the plaintiff is entitled to the bank account in whole, the defendant becomes the trustee and holds the entire bank account in trust for the plaintiff who becomes the eneficiary. Ultimatlley, constructive trusts are appropriate where the asset is severable, and equitalbe liens are appropriate where the unjust enrichment is not severable.

Another limitation that arises is the bona fide purchaser. This comes up concerning the second 10,000, particularly the part that was used to purachse the A TV

that was then sold to Lance Cunningham. A remedy for unjust enrichment may be imposed on the defendant or any other 3rd party that purchases the asset or the property that was unjustly retained, unless that 3rd party is a bona fide purchaser ("BFP") for value. To become a BFP one must not have notice of the unjust nature by which the asset or money was retained and must have paid value for the property. Lance Cunningham was a BFP for value when he purchased the A TV because he paid the asking price and had no notice that May had purchased the A TV with unjustly retained funds. As a result, the A TV or the funds that were used to purchase it cannot be remedied or returned to Peterson. The other part of the second 10,000 which was used to purchase EXXON stocks that were given to May's twin sister as a gift may be remedied and regained by Peterson. Although May's twin sister will raise the defense that she was a BFP, this will fail because it was a gift which is not for value, therefore May's twin sister is not a BFP for value. As a result, the remedy of unjust enrichment may be imposed on the EXXON stocks that were gifted to May's twin sister via the unjustly retained money. A constructive trust will be the appropriate remedy in this case. Because the whole amount of the EXXON stocks was paid for with the unjustly retained money it can easily be traced and it is severable in its entire form. Furthermore, the improved value of the stocks will be part of the constructive trust because one of the benefits of the constructive trust is because it takes the entire asset in whole, the plaintiff is entitled to any income that may be ascertained by the unjustly retained money. This constructive trust will come before all other creditors. Peterson may also be able to impose an equitable lien on May's house for the money that was used to repair the loose shingles on her roof and replace the kitchen window. Because the amount is not severable from the house, the equitable lien is therefore the appropriate remedy which will be in the amount of the unjust funds that were used to do these repairs. As a result, Peterson will be able to force her to pay by a foreclosure action, and his equitable remedy will come before all unsecured creditors.

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Question 5:

[1] Where claims are purely legal they will be tried by a jury. Where claims are purely equitable they will be tried by the judge under "equitable jurisdiction." However, where there are mixed claims as there are in this case, the court can either imply the Equitable Cleanup Doctrine or the Federal Approach to determine how the issues will be resolved. Under the equitable clean up doctrine, which is implied by nearly all state courts (because the 7th amendment does not apply to the states under the 14th amendment) the judge must first determine the overall premise of the case to determine whether it is legal or equitable. If it is equitable the judge will be able to try the entire case without a jury and the incidental/tangential legal issues will be swept up by the equitable clean up doctrine and decided by the judge without a jury as well. In this case it is clear that the main claim for the case is that for reinstatement and backpay, both of which are equitable in nature. Despite the fact that she also wants legal damages for the intentional infliction of emotional distress ("IIED") the ultimate claim is under R.C. 4213.90, because she wants her job back. Therefore, this case will be tried by the judge without a jury because the equitable clean up doctrine will sweep up the legal claims for IIED allowing them to be tried by the judge alone. However, it should be

noted that a strong case can be made that the overall essence of the case resonates in legal damages for the emotional distress that she suffered and a chance to make her whole again, which would thus entitle her to a jury trial. On the other hand, Under the Federal Approach, the individual issues are parceled out and handled in their respective forms. In other words, first the legal claims will be tried by a jury and then the judge alone will rule on the equitable claims. Furthermore, any factual determinations that relate to both legal and equitable claims will be determined by the jury before the judge makes any equitable determinations, and the judge will be bound by those factual determinations of the jury. Therefore, under this case the legal questions concerning the emotional distress will be decided by the jury first. Once that decision has been made, the judge will then make a ruling on the equitable claims concerning reinstatement of Clarie's position and the claim for backpay.

[2] The general rule is that attorney's fees are not to be awarded, however they may be awarded by contract, common law, litigation for public interest, or by statute. In this case, the statute provides for attorney's fees, therefore we will be able to claim them. In order to make a claim for attorney's fees we will have to prove that we were (1) a prevailing party, and (2) the reasonable costs. To be a prevailing party, there must be a material alteration in the relationship between the parties based on the merits of the case. This does not necessarily have to be a win in court, it can also be based on a settlement decree. Therefore we will have to put forth evidence proving our win of some sort. Secondly, the reasonable costs are determined by the "lodestar" amount, which makes a presumption that the appropriate attorneys' fees are: the reasonable amount of hours to litigate the case multiplied by the reasonable price per hour to litigate the case. In order to establish the lodestar amount, we will want to submit to the court any records we have concerning the amount of time spent on the case, the cost per hour, the size of our firm, the length of discovery and pleadings that we performed, as well as evidence of the difficulty of litigating the claim that was brought. Finally, the court may in its discretion adjust the attorneys fee award based on the degree of the win in this case. Therefore, we will want to submit evidence to the court that the main claim in this case was to get Claire reinstated and her backpay. Therefore showing that upon winning on this claim we substantially achieved our goal and that a loss on Claim II is not a very significant factor in this case. By proving that Claim I was the main goal we will show to the court that we had a great degree of win and therefore potentially entitling us to the entire lodestar amount.

[3] Punitive damages are awarded for damages that result from an "evil mind" particularly where intentional conduct has taken place. That clear has occurred in this case because Clarie's employer was making intentional comments that resulted in the claim for liED. However, the ability to recover punitive damages in this case will depend on which theory of vicarious liability this state depends on in. This case will most likely be brought against the corporation of Friendly's as opposed to Claire's supervisor individually. The first theory (majority) holds that an employer can only be held vicariously liable for punitive damages if they either (1) took part in facilitating the egregious conduct, or (2) intentionally and knowingly hired or retained someone that was dangerous or likely to cause such egregious conduct. Under this theory it is unlikely that Friendly's will be held vicariously liable for the punitive damages based on the actions of Claire's supervisor.. Mere neglect is not enough to establish vicarious

liability under this theory. The second theory (minority) finds that mere negligence is enough to establish vicarious liability for punitive damages to an employer. Under this theory Friendly's will most likely be vicariously liable for the punitive damages. Furthermore, punitive damages may not be "grossly excessive." In determining if punitive damages are grossly excessive, the court is to look at: the duration of the bad conduct (in this case it went on for quite a long time, it was not just a one time occurrence), the relationship of the punitive award to the compensatory damages, the relationship of the parties (in this case given the fact that the defendant was Claire's employer in an authoritative position this justifies higher punitive damages), the degree of reprehensibility of the crime (given that it was an intentional embarrassment of Claire with extremely mean comments in front of customers the degree of reprehensibility is high, and the defendant's financial condition (in this case because it is a corporation they are likely to have great economic resources at their disposal). Moreover, the punitive damages will be found to be grossly excessive if it affects another state's laws. Because the defendant in this case will most likely be a corporation that is multi-state punitive damages much like the *BMW v. Gore* case will be grossly excessive and unconstitutional.

END OF EXAM