

REMEDIES EXAM PROFESSOR COCHRAN

May 5, 2006

TIME
• 3 hour exam: 8:30 AM to 11 :30 AM
5 essays [suggested time 30 minutes each]
17 multiple choice [suggested time is 30 minutes to complete all 17 questions]

FORMAT:

Format is similar to bar exam essay questions and bar exam multiple choice questions. There are no limits on how much the student can write or type on any given question. A suggested amount of time is indicated at the start of each question.

Students writing out the exam answers should write on the front, but not the back of the blue book pages. This method allows you to insert something you forgot on the opposite blank page and allows me to write points and other notes if needed on the opposite blank page.

CLOSED BOOK:

Bring to the exam: 2 hands, one head, pen, pencil; laptop.

USE THE MAJORITY CASEBOOK APPROACH:

The exam questions require that rules of law be stated and analyzed. These rules of law will come from the materials in the casebook and at times, the question itself will provide additional rules of law, such as a statute. Use the casebook materials' majority rules of law.

Essay questions may be set factually in Utah, Ohio, Illinois or other states to be able to provide a detailed factual setting, NOT to require you to recite the law of that jurisdiction. It is simply a way of providing factual detail and to avoid the use of the terms Anytown, Any State.

For example, if an essay question is set in Utah - the exact rule for laches in Utah is not provided in our casebook- but we will use the general definition-- it is an equitable defense created by unreasonable delay and prejudice.

QUESTION ONE

Lloyd Cooper decided to tour southeast Utah at the height of the mountain, desert and high plain wildflower season. Cooper collected oil paintings and enjoyed, in particular, early American painters of the Southwest who depicted high desert and mountain landscapes.

Cooper stopped for dinner at the Moab Trading Post, a tavern and restaurant in the style of Western pioneer times. While enjoying his dinner in the nearly empty dining room, Cooper noticed that hanging on the wall of the tavern was an oil painting that he recognized as an original painting by Joe Eaton, a famous early Southwestern or "cowboy-style" painter.

Cooper believed the Eaton painting to be worth about \$50,000. He asked his waitress, her name badge said, "Sal," if he could speak to the tavern owner, John Winter. When Sal introduced Winter to Cooper, Cooper told them both he was very interested in the painting because of its beautiful colors. Cooper did not mention his belief that Joe Eaton had created the painting. Cooper offered to buy the painting for \$500. Winter, who was self-educated business person, thought this sounded like a pretty good deal for a picture he found in an old hay barn. And, as he commented to Winter, the seasonal nature of tourism made tavern finances tight. Cooper agreed to the sale and the two men signed a simple written agreement that called for Cooper to pay cash within thirty days and to pick up the painting when he paid.

Ten days later, Cooper returned to the Moab Trading Post to pay the \$500 and then pick up the painting. While having his dinner at the Trading Post, he mentioned to Sal, who once again was his waitress, that he had returned to pay for the painting and that he'd be in the next evening for dinner and to pay for and pick up the painting.

Sal, who was not fond of Winter, confided in Cooper that after Cooper and Winter reached their agreement, a noted art collector from San Francisco, Susan Arden, had been in the Trading Post and she had informed Winter that the painting was in fact by Joe Eaton. She also told Winter that it was the only painting of the local landscape surrounding Moab that Eaton ever painted. Because of its unique depiction, the painting was worth \$350,000. Arden offered to buy the painting from Winter for that price and Winter agreed. Sal said Arden would be in town in two days with \$350,000 in cash.

Cooper arrived at our law firm asking for help to get him the Eaton painting at his agreed upon price of \$500. Analyze what steps to take on Cooper's behalf and predict their success. Analyze the procedures, claim[s] and remed[ies], as well as Winter's likely responses and defenses....

QUESTION TWO

Ohio Revised Code § 71.01 Cause of Action

(a) An action for damages arising from an injury that causes an individual's death may be brought if liability is established.

(b) A person is liable for damages arising from an injury that causes an individual's death if injury was caused by the person or his agent's wrongful act, neglect, or carelessness.

Ohio Revised Code § 71.02 Who May Benefit From Bringing Action

An action to recover damages, as provided in § 71.01, is for the exclusive benefit of the surviving spouse, child, or parent of the deceased.

Ohio Revised Code § 81.01 Survival of Cause of Action

(a) A cause of action for personal injury to the health, reputation or person of an injured person does not abate because of the death of the injured person or the death of the person liable for the injury.

(b) A personal injury cause of action survives in favor of the heirs, legal representatives, or estate of the injured person.

James Guthrie, 53, lived in Dayton, OH. The son of a college professor, he lived in "university towns" all his life. Guthrie had a PhD. in 19th century American literature; worked for 25 years at Wright State University; and had published two scholarly books.

In January 2006, Guthrie decided to realize a life-long dream to open a coffee house, "Coffee & Culture," where intellectuals would drink coffee and discuss books. That month he signed a one year lease for the Arby's building on Brown Street, now open after Arby's left. His colleagues donated books; he bought coffee making equipment, furniture, and mugs. In mid-March, while walking on the sidewalk on Brown St. carrying supplies for the grand opening scheduled for the next week, a car driven by Ed Smith jumped the curb slamming into Guthrie. Smith died instantly. Smith had turned the wheel and jumped the curb because he was getting his sunglasses out of the glove compartment.

Guthrie had severe internal injuries; he was conscious for a few hours. Then he was hospitalized in a coma until his death three weeks later. His employer's insurance covered his medical bills and provided life insurance. Guthrie was a widower, living with his 19 year old son. His son, Tyler, however, rarely spoke to his father during the last year because of his ongoing dislike for and conflict with him. Tyler attended Wright State, lived in the basement, and ate his meals at home.

Advise Tyler Guthrie of the likely success of his claims, remedies, and the measure of the remedies against Smith. Include possible defenses and the success of these defenses that might be raised against Tyler.

QUESTION THREE

Andy Lorenzi is a graduate student in Environmental Studies and also an environmental activist. Lorenzi went to Arizona Gravel Co.'s [AGCO] parking lot every evening in early April when the second shift got out and handed out leaflets to employees about AGCO's poor environmental practices and the resulting pollution. Lorenzi was pushy enough with the AGCO employees that some of them complained to the company. On April 4, Lorenzi blocked the CEO of AGCO's car in the parking lot and did not let her leave until she read through his leaflet.

After the incident, AGCO went to court, alleged trespass against Lorenzi. On **April 6*** the court issued an injunctive order prohibiting Lorenzi from further trespass on the AGCO's company parking lot.

Lorenzi ignored the April 6 order and returned to distribute his new and improved leaflets in the AGCO parking lot on April 10. After a hearing, on April 12, the judge found him in contempt and fined him \$100.

He returned again to the AGCO parking lot on April 17 to distribute leaflets. After this visit to the parking lot, he was back in court. On April 20, the court found him in contempt and fined him \$200. At this April 20 hearing, the judge told Lorenzi that if he defied the court order again, he would be fined \$500 and he would be put in jail for 30 days.

Lorenzi left the courthouse and on April 21, promptly returned to the AGCO parking lot and violated the April 20 order. On April 24, he was brought into court and the judge imposed the fine and the jail term.

At the **April 24** court appearance, after this sentence was announced, Lorenzi looked straight in the judge's eyes and repeatedly cursed him in open court. For this behavior, the judge summarily sentenced Lorenzi to six months in jail for contempt of the court.

During these events, we have advised our client, Lorenzi, to obey the court orders issued against him, but he has ignored our advice. Lorenzi has consistently told us that he wants a jury to hear his case because he feels a jury would be sympathetic to environmental concerns. There have been several complaints within the community about AGCO's failure to respond to citizen concerns about dust and noise coming from AGCO's plant. We think a jury would have been desirable. We think Lorenzi may have a First Amendment speech defense because the AGCO employee parking lot is used in part by the public.

To help us understand what appeal issues might be available to Lorenzi, analyze: the type of contempts Lorenzi committed, any right Lorenzi had to a jury trial, and any issue raised by the validity of the underlying trespass order.

* dates are in bold simply to make it easier to track the events

QUESTION FOUR

Beth May was a newly licensed lawyer with large student loan debt and a desire to live a life style that too often was beyond her means. She was bright and hard working and thus was able to attract and retain a number of elderly clients she provided with excellent trust and estate planning advice.

In January of 2006, May set up a trust account for a new client, an elderly gentlemen, Clarence Petersen. Petersen was confined to a wheelchair, but his mind was alert. Soon after setting up the trust account, May found herself needing money for her own purposes and embezzled \$20,000 from Clarence Petersen's trust account.

She took half of the embezzled money, \$10,000, and deposited it in her existing bank account at Old Second Bank. This account already held some funds of her own in it. During the next four months, she used this Old Second bank account for her usual living expenses- mortgage payments on her new home, her food, haircuts, attendance at movies, and purchasing professional style clothing and shoes she felt she needed.

With the other \$10,000 of the embezzled money, she purchased an ATV [all terrain vehicle] to go trail riding on week ends. She thought this sounded like a good way to meet potential clients and gain referrals. However, after a single weekend outing, she strongly disliked trail riding and the accompanying bumps and bruises of the sport. She decided to sell the A TV to a classmate from law school, Lance Cunningham, who gladly purchased it from her and promptly paid her asking price. Cunningham treasures the ATV and keeps it in excellent running order.

With some of the purchase money Cunningham gave her for the A TV, May hired a contract worker to complete some repairs on her house. She paid the contractor for the repair of loose shingles on her worn out and moldy roof and to replace a kitchen window that was leaking.

With the rest of the A TV purchase money from Cunningham, May bought ten shares of EXXON stock as a birthday present for her twin sister, Amy, who had always wanted to own stock. Amy was quite pleased because in the weeks and months that followed, the EXXON stock performed quite well.

In May 2006, Clarence Petersen discovered May's embezzlement from his trust account. Unfortunately, by the time Petersen made the discovery, May was, and today remains, insolvent.

We represent Clarence Petersen.

Analyze the potential claims and remedies that are available to Petersen.

Evaluate the remedies and how they may be measured and enforced against May and any other persons.

QUESTION FIVE

Ohio Revised Code §4123.90

No employer shall discharge, demote, reassign, or take any punitive action against any employee because the employee filed a claim or instituted, pursued or testified in any proceedings under the workers' compensation act for an injury or occupational disease which occurred in the course of and arising out of his employment with that employer.

Any such employee may file an action in the common pleas court of the county of such employment in which the relief which may be granted shall be limited to reinstatement with back pay, if the action is based upon discharge, or an award for wages lost if based upon demotion, reassignment, or punitive action taken, offset by earnings after discharge, demotion, reassignment, or punitive action taken, plus reasonable attorney fees.

Claire McDowell worked as a hostess at the Friendly's Restaurant [Friendly's] in Kettering, Ohio. Last month, one of the waitresses at Friendly's dropped a tray of glasses of Coca Cola. Under Friendly's policies, the mess on the floor was supposed to be cleaned up immediately, but an hour passed before anyone even threw a towel over the sticky fluid. McDowell did not notice anything on the floor, but as she seated a party of patrons, she slipped on the wet towel covering the spot left by the spilled drinks. She sprained her back and chipped her collar bone as a result of her fall.

Claire filed a workers compensation claim with the Ohio Bureau of Workers' Compensation based on her injury in the workplace. When she returned to work, her supervisor berated her because she walked too slowly and ridiculed her for wearing her neck and back braces to work. He called her Quasimodo in front of other workers and patrons of the restaurant. He told her not to seat parties of patrons with young children among them because she frightened the children. Three weeks after her return to work, her supervisor told her that she was terminated.

We have represent Claire and have drafted a complaint with two claims: Count 1- under § 4123.90 seeking reinstatement to her position, back pay and reasonable attorney's fees; Count II- a common law claim for intentional infliction of emotional distress seeking compensatory and punitive damages. Before we file, however, we need to resolve a few questions.

[1] Analyze how the trial will be conducted based on the Complaint's allegations. To analyze this question, indicate how and why a count or issue will be heard by a judge and/or jury.

[2] Describe what we will we have to submit to the court to recover our attorney fees for Count 1.

[3] Analyze our ability to recover punitive damages for Count II.

MULTIPLE CHOICE QUESTIONS [17 questions in 30 minutes]

1. In Coach v. Notre Dame University, Coach sued the University because his professional papers, play diagrams and notes and files from his entire career as a college football coach were negligently lost when the University moved his office across campus to another location. The court denied recovery to the Coach in his claim for the negligent loss of his materials.

Which is the **least** likely basis for the court's decision?

[A] The Coach's property lacked any ascertainable market value.

[B] The Coach's property could not feasibly be replaced.

[C] The Coach's property was lost negligently without any intent on the part of the University.

[D] The Coach's expert witnesses gave testimony about the papers' value that was unduly speculative.

2. In Palmer v. Feed Co., the plaintiff, an established hog farmer, purchased hog feed from Feed Co. The feed purchased turned out to be defective and as a result many hogs were either injured or killed. Palmer sued under the U.C.C. and was able to recover his lost profits for the diminished value of his herd and business. The court:

[A] properly allowed this recovery because Palmer showed he had mitigat~d his damages by replacing his hogs as was within his financial ability to do so. .

[B] properly allowed this recovery because Palmer had an established practice and pattern of purchasing hog feed from Feed Co..

[C] properly allowed this recovery because Palmer had acted within the covenant of good faith and fair dealing implied in the contract.

[D] properly allowed this recovery because Feed Co. was liable in tort products liability.

3. One equitable defense available to a defendant is the defense of "unclean hands." This defense is best explained by which maxim of equity?

[A] Delay defeats equity.

[B] He who seeks equity must first do equity.

[C] Equity will not suffer a wrong without a remedy.

[D] Equity regards as done that which ought to be done.

4. In Paulsen Power Co. v. Aetna Insurance, Paulsen Power sought a declaratory judgment *to* declare the rights and interests it in an insurance policy Aetna had issued *to* it. The controversy involves land Paulsen Power owns that has been declared a toxic waste site. Paulsen *Power* was assessed clean up costs by the EP A and tried *to* recover such costs under its insurance policy with Aetna. Aetna denied that the policy covered such environmental clean up costs and refused *to* pay.

A court would most likely respond to Paulsen Power's request for a declaratory judgment:

[A] by dismissing the proceeding because the action was *more* properly one *for* nominal damages.

[B] by dismissing the proceeding because Paulsen Power has an adequate remedy at law.

[C] by permitting the proceeding, but striking Paulsen Power's request *for* a jury trial.

[D] by permitting the proceeding.

5. The term "substantive equity" refers *to* those claims which:

[A] were first fostered and developed in the Courts *of* Chancery.

[B] were available pre-merger *to* members *of* the clergy exclusively.

[C] were available when the remedy at law was inadequate.

[D] were claims at law, but were remedied by restitution as the result of a defendant's unjust enrichment.

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6. In Parker v. Builder, Parker operated a piano manufacturing business. Parker hired Builder to construct a new facility to serve as Parker's manufacturing site for pianos. The two parties entered into a valid written agreement; under its terms, Builder would construct the facility according to Parker's specifications. The total price of the building- \$350,000- would be paid in full upon completion. Builder completed the facility and Parker paid the price in full, but Palmer later learned that the facility was not built to all the specifications and thus could not serve to manufacture the pianos as planned. The facility had the same value as if it were constructed in conformity with the specifications, but it would cost Palmer an additional \$25,000 to make the facility conform to the agreed upon specifications. To construct an entirely new facility to conform to the agreed upon specifications would now cost \$450,000 because of the increase in building materials following Hurricane Katrina.

Parker brings a claim for breach of contract against Builder. A court would most likely permit Parker to recover:

[A] the contract price of \$350,000

[B] the \$100,000 difference between the contract price and the price to have a new facility built to conform with the agreed upon specifications.

[C] the \$25,000 needed to make the facility conform with the original specifications

[D] nothing, the value of the facility built to specifications and the value of the facility not built to specifications was the same.

7. In Palmer v. Dutton, Palmer and Dutton entered into a contract in writing for Palmer to lease a 100-acre farm, for five years, at \$2,000 per year, with the option of purchasing five acres of the farm for \$10,000 in cash at the end of the lease's five year term. Palmer took possession of the farm and paid rent for five years and paid the rent for those five years. During the fifth year, he decided he would exercise that option on the five acres and so he planted an apple orchard and built a cider mill on the property. At the end of the lease's term, Palmer tendered Dutton the \$10,000 in cash and demanded the five acres, but Dutton repudiated the option agreement and took back possession of the entire farm.

Palmer brings a claim against Dutton for breach of the option contract and seeks specific performance of the option contract. Dutton's best defense is:

[A] unclean hands renders the agreement unenforceable..

[B] the agreement's lack of a definite description of the property to be sold.

[C] the agreement's lack of consideration.

[D] the agreement's lack of mutuality of remedies.

8. Same facts as in Question 7. Assume that Dutton has been found not liable to Palmer in Palmer's suit for breach of contract.

Now Palmer seeks to recover from Dutton for the reasonable value of the improvements that Palmer added to the farm land. Which theory below will best support Palmer's claim?

[A] quasi contract because the improvements were unofficiously and non-gratuitously conferred upon Dutton by Palmer.

[B] tort because Dutton committed conversion by re-taking possession of the improvements on the land.

[C] breach of trust because Dutton became the trustee of the improvements through a resulting trust.

[D] implied in fact contract based on Dutton's past conduct.

9. In Cherokee Tribe v. Dawson, the plaintiff Native American Tribe got into a dispute with Dawson, arguing that Dawson did not have the right to build his house on property adjoining the Cherokee Tribe Reservation in upstate New York. Dawson argued that he had the right to build on the property because he had purchased it from a member of the Cherokee Tribe. The Tribe argued that the parcel of land sold to Dawson actually encroached on the Reservation land.

Dawson maintained that he had the right to build on the parcel and went forward with construction. He cut through trees and underbrush, laid the foundation for the house, and installed an extensive septic system. When the Tribe saw this work had been completed on the property, the Cherokee Tribe filed for a preliminary injunction to have further work on the house stopped. The trial court judge:

[A] properly denied the preliminary injunction because the Tribe could not make a sufficient showing of irreparable harm.

[B] properly denied the preliminary injunction because the Tribe had failed to seek a temporary restraining order first.

[C] improperly denied the preliminary injunction because the Tribe's interests were closely related to the public interest and outweighed Dawson's interest.

[D] improperly denied the preliminary injunction because the removal of the structure would not be difficult to supervise.

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10. In Parson v. Driver, Parson sued Driver. Driver was driving over the speed limit when he swerved into and injured Parson while Parson was riding his bicycle in the bike lane of the roadway. Parson brought a personal injury claim against Driver. Which recovery listed below will the court be least likely to permit Parson to recover?

- [A] punitive damages
- [B] loss of consortium
- [C] pain and suffering
- [D] medical expenses

11. In Petrie v. Denton Construction, Petrie contracted to have a building to house her latest children's clothing store, the first one in her chain to be located in Ohio, completed by September 1. She had been in this business 20 years and she wanted to make sure that she could have the store open for the usually heavy sales of children's clothing during the Thanksgiving and Christmas holidays. Just to ensure the opening date would be met, the parties put a clause into their contract stating that Denton would pay a sum in the amount of \$200 a day for every day that the completion of the building was delayed past September 1. The parties also put in a clause that if the building were finished by August 15, then Petrie would pay Denton a bonus payment of \$1,000. A court would find:

- [A] the clause requiring Denton to pay \$200 each day the completion was delayed beyond September 1 was a penalty, not a valid liquidated damages clause.
- [B] the clause requiring Denton to pay \$200 each day the completion was delayed beyond September 1 was overreaching and void as against public policy.
- [C] the clause requiring Denton to pay \$200 each day the completion was delayed beyond September 1 was improper because damages caused by the delay in opening were too speculative.
- [D] the clause requiring Denton to pay \$200 each day the completion was delayed beyond September 1 was valid because the loss of business Petrie would sustain from a delay in opening a new store in a new location would likely be difficult to estimate.

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12. In Parson v. Delaney, Parson and Delaney were adjoining landowners. Delaney built a new garage recently because his old one had been blown down in a fierce windstorm. Parson often observed the construction and spoke to Delaney in their back yards. When the garage was completed, Parson said to Delaney that the new garage is actually built on Parson's property. A survey shows that the new garage does indeed encroach on Parson's yard. Parson brings suit to have the garage removed *from* his property. Delaney strongest defense will likely be:

[A] Statute of Frauds

[B] unconscionability

[C] laches

[D] equitable estoppel

13. The equitable remedy of specific performance was traditionally associated with certain circumstances. Which of the following set of contract circumstances was viewed as unlikely to result in the remedy of specific performance?

[A] when the contract was an output contract.

[B] when the rights of a third party would be adversely affected.

[C] when the subject of the contract was unique or extremely rare.

[D] when the subject of the contract was performance of personal services.

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14. In Barret v. Stanlon, Stanlon and Barret are old friends. Stanlon owned a rare, old motorbike designed by the Wright Brothers while they were experimenting with bicycles and small engines. Barret had offered to buy the motorbike from Stanlon on several occasions, but Stanlon had never been willing to part with it. The day Barret graduated from medical school, Stanlon and Barret went out for dinner. During their conversation, Stanlon said, "Barret, as a graduation present, I'm going to sell you my motorbike for five hundred dollars. To make sure I don't change my mind later, I'll put it in writing." Stanlon wrote on a paper napkin, "We agree to the sale of my motorbike to Barret for five-hundred dollars, COD." Barret also signed the napkin and put it in her pocket. The next day, Barret tendered five hundred dollars in cash to Stallion, but Stallion refused to sell her the motorbike. If Barret succeeds in her action for breach of contract, a court is most likely to:

[A] issue an order directing Stanlon to sell Barret the motorbike for five hundred dollars.

[B] award damages equivalent to the reasonable market value of Stanlon's motorbike.

[C] issue an order directing Stanlon to sell her motorbike for five hundred dollars and award damages equivalent to the reasonable market value of Stanlon's motorbike less five hundred dollars.

[D] award damages consisting of five hundred dollars.

15. In Petersen v. Darren, Petersen, on behalf of himself and other shareholders, brought a shareholder derivative suit against the corporate director, Darren in state court. The plaintiffs' demand for a jury trial was stricken. On appeal, the state appellate court should:

[A] Reverse, because a shareholder's derivative action was traditionally one at law, where juries were used.

[B] Reverse, because the Constitution guarantees all citizens a jury trial.

[C] Reverse, because the remedy sought is a legal remedy.

[D] Affirm, because the claim, a shareholder's derivative suit, is an equitable one, despite a request for relief that may be phrased like a legal remedy.

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16. In Burton v. Anderson, Anderson and Burton were adjoining landowners. Anderson began to operate a large composting operation in his backyard. The operation produces a terrible and putrid smell that travels over to the Burton yard. Burton and his family find the odor is sickening and unbearable. As a result, the Burton's property value diminished by 20%. There is no zoning ordinance or regulation that addresses composting.

Burton asserts a nuisance action against Anderson alleging nuisance. The action seeks recover for money damages and injunction relief to stop the operation of the composting operation. The court should:

[A] award damages, but not grant injunctive relief

[B] grant injunctive relief, but not award damages

[C] grant injunctive relief and award damages

[D] neither award damages nor grant injunctive relief because no ordinance has been violated

17. The term "injunction damages" refers to:

[A] damages caused to an enjoined party when the court fails to notify that party of the hearing for the preliminary injunction

[B] damages caused to an enjoined party, paid from an injunction bond, when an injunction is wrongfully issued

[C] damages caused to a restrained party, paid from a bond, when a temporary restraining order is wrongfully issued

[D] damages caused to a restrained party when a permanent injunction issues.

