

**ISSUE OUTLINE OF SAMPLE ANSWER  
ELS REMEDIES 2012 MIDTERM EXAM QUESTION NO. ONE**

(Text in brackets “[ ]” are extra credit, not necessary to discuss for full credit)

1. Pete's remedies against Della concerning his employment:

Pete will claim that he and Della made a contract for his employment by Della as her dental hygienist for 6 years, at an annual salary of \$40,000 plus receiving ownership of Greenacre, a parcel of land currently worth \$50,000 owned by Della, if Pete worked for her for an initial 3 consecutive years.

[Contract was formed by Della's offer and Pete's counteroffer accepted by Della.]

Pete will argue that his employment termination by Della's was a willful breach of the contract: she had always been satisfied with Pete's work; but she fired him on the eve of his length of employment qualification to obtain ownership of Della's parcel, which she had agreed to sell to Ted for \$60,000, in order to avoid having to transfer title to Greenacre instead to Pete.

Pete will further claim that Della has defamed him and also interfered with his prospective economic advantage (new employment) by misrepresenting his work abilities to a prospective new employer; and, threatens to repeat the false claims to other possible employers, unless enjoined.

[Della may claim that the alleged oral contract is unenforceable under (a typical) Statute of Frauds: (a) because it concerns employment for more than one (1) year, and (b) the transfer of title to real property. Pete will respond that the Statute is not applicable to their agreement because (a) he detrimentally relied on the existence of the agreement in turning down a job offer from another dentist at a greater salary (and even though Della was unaware of the job offer), and/or (b) the contract with Della was partially performed, with her participation, thus sufficiently establishing its existence.]

Pete will seek compensatory, direct damages from Della based on her breach of the employment contract, designed to put Pete as the injured party in a position as if the contract had been fully performed:

\$130,000 in additional salary for the remaining 3 years and 3 months of the contract's 6-year term, plus the market value of Della's parcel at the time of breach – arguably at least \$60,000, based on Ted's contemporaneous offer – if Pete elects damages *in lieu* of obtaining title to Greenacre.

In addition to possible equitable relief (below), Pete would also seek damages for Della's slander and interference with his prospective economic advantage (new employment), according to proof. Modernly a plaintiff can recover both damages and injunctive relief, in the same action.

Assuming an enforceable contract and proof of breach by Della, she will assert that any monetary recovery for Pete is subject to reduction (the amount determined by expert testimony) under the doctrine of avoidable circumstances: that is, Pete must seek mitigation of his "lost future salary" damages, by seeking a replacement job as a dental hygienist.

[If Pete counters that Della is estopped to make that argument by her claim that he is (allegedly) incompetent as a dental hygienist, Della can argue that Pete should have mitigated such damages by some type of alternative employment.]

If Pete elects to seek damages for being denied the promised ownership of Della's parcel, *in lieu* of obtaining fee title to it, then he could recover expectancy damages, based on the prospective recovery from a future sale, or development, of Greenacre as its (hypothetical) owner, through expert testimony.

To enjoin Della's threatened continued defamatory statements about his qualities as a dental hygienist, Pete could also seek the entry of a permanent injunction against Della, prohibiting such further conduct by her.

Defamatory statements as distinct from business competition derision are not accorded First Amendment "free speech" immunity.

Requiring Pete to bring successive defamation cases for Della's continued defamation would be an undue burden on Pete and contrary to public policy favoring protecting work reputations and fair employment opportunities. Thus Pete's "legal remedy" of successive defamation actions is inadequate.

Della would suffer no "hardship" from being constrained from repeating defamatory statements about Pete's work performance, while he could encounter substantial hardship from her unrestrained defamations, from a resulting inability to find work.

## 2. Pete's rights in ownership of Greenacre:

Land is recognizably unique in the law; unlawful loss of its ownership cannot be fully compensated by monetary damages. Therefore Pete will argue that he should be awarded ownership of Greenacre through an equitable decree.

He will claim that her fraudulent breach of their contract under the terms of which he was to receive such title, excuses his “failure” to complete the initial 3 years of continual employment as a condition precedent to the transfer of title to Greenacre.

As Ned was unaware of the Della-Pete contract and Pete’s equitable claim to title to Greenacre thereunder, Ned could qualify as a *bona fide* purchaser for value and without notice, if his purchase agreement with Della for a price of \$60,000 is consummated out of their pending escrow.

Therefore, Pete will seek injunctive relief against Della and Ned, asserting that a legal remedy (damages) is inadequate, as noted before.

The balancing of relative hardships favors Pete: his employment at a reduced salary in consideration of the promise of ownership of the parcel after 3 years, is equivalent to payment to Della of a partial purchase price.

Pete would seek a (a) prohibitory decree preventing the execution of the Della-Ned sale escrow, avoiding the loss thereby of title to Greenacre, in which he has an equitable interest, to Ned as a BFP; and, (b) also a mandatory decree requiring Della to convey fee title to Greenacre to him.

[It is not uncommon in family law cases for a party to be required, by a court decree, to prepare, execute, and deposit in court an instrument conveying title to realty to another party in the case.]

No undue burden of “judicial supervision” would be implicated by either injunctive decree.

[Pete would assert that Della’s own wrongdoing (unjustified breach of the employment contract as a means of depriving Pete of the balance of his promised compensation, i.e., title to Greenacre), excuses Pete’s “failure” (i.e., inability) to meet a condition precedent to obtaining title: 3 years of continual employment. Pete’s actual employment was 3 months short, but the shortage was due to Della’s wrongdoing, and acting in equity, a court would likely deem the condition satisfied by Pete’s preceding 2 years and 9 months of work, whether or not the same is termed “equitable contract reformation.”]

**ISSUE OUTLINE OF SAMPLE ANSWER  
ELS REMEDIES 2012 MIDTERM EXAM QUESTION NO. TWO**

*(Text in brackets "[ ]" are extra credit, not necessary to discuss for full credit)*

NOTE: based in large part of the "Issues Statement" written in 2004 by Professor Joseph C. Tinney (Ret.), author of the original version of the question.

1. The rights and remedies of Liz:

What is the usual measure of damages for breach of a construction contract, i.e., an expectation interest of the property owner. The costs of the repairs to the negligently-installed family room wiring? The costs of correcting the incorrect bolt dimension installation problem?

An alternate measure of Liz's damages derived from Carr's negligent repair work should be employed, if the costs of necessary correcting repairs is unreasonably high under the circumstances.

Measure of alternative theory of damages: different in value of the property with proper bolts installed, vs. weaker bolts actually used by Carr.

Arguably, incidental and consequential damages were in the contemplation of the parties (Liz and Carr) when the repair agreement was initially made: if the media wiring of the family room was so negligently installed by Carr so as to result in sudden unexpected loud noises, then it would be reasonably anticipated that, as a result, Liz would incur expenses (a) for alternative living facilities (motel room and restaurant bills), and (b) medical expenses.

Is Liz required to mitigate her special damages incurred by the results of the defective wiring?

Can Liz recover damages for her mental distress incurred from the media wiring defect noise, even though she has no physical manifestations? How are such damages measured?

Can Liz recover damages for the tortious negligent infliction of mental distress (i.e., Carr's carelessness resulting in the defective media wiring which upset Liz as an expected resident of the affected premises); and, if so, how would such damages be measured. Does Liz have any duty to try to mitigate her damages?

2. The rights and remedies of Carr:

Carr will seek to enjoin Liz's continued employment of the signboard next to the busy highway with a defamatory text designed to and likely resulting in injury to his business. He will successfully argue that such false defamatory publication by Liz only designed to "get even" is not immunized by the First Amendment. His request for such a prohibitory injunction will have the necessary supporting elements: (a) inadequate legal remedy due to ongoing business injury difficult to quantify in money damages; (b) significant hardship to him if the defamation continues, none to Liz if it is prohibited, since what her sign says about Carr's business is false; (c) public policy favors prohibiting false reports about private businesses.

[Liz can be liable for defamation damages in the same action in which Carr obtains injunctive relief prohibiting further defamation.]

If Carr sues Liz for damages for defamation for the roadside sign, what would be his measure of damages? By contrast, Carr could not recover damages for the contents of the leaflets Liz prepared or enjoin their distribution, because those contents have some basis in actual fact regarding Carr's defective work.

Given her experience with Carr, Liz would not be required to permit Carr to do any of the restorative or corrective work, as a means of "mitigating the damages" due from Carr.

[Carr's negligence is not mitigated by the fact that he was distracted by the serious injuries contemporaneously suffered by his only son in an automobile accident: he should have delayed the project until his emotions were stabilized.]