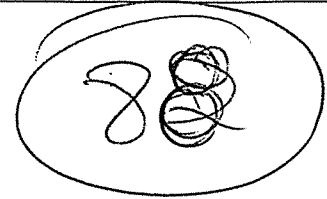


1)

===== Start of Answer #1 (1227 words) =====

Ms. Darling v. Pub

Tort Damages



Sample
Answers
Q1 & Q2

Ms. Darling may bring a tort action against the pub for nuisance. To prevail she would be required to show that she has been deprived the peaceful enjoyment of her home due to the noise and traffic emanating from the pub. Further she would be required to show that the Pub's use of the land was unreasonable under the circumstances. As the pub has been in the location for 20 years it is likely that a court will find that the use is unreasonable. The court will also look to see if the pub complies with local zoning ordinances and if it does this would also weigh in the pub's favor in regard to reasonable use of the land. Under the facts provided, it seems unlikely that the court would find a nuisance.

If, however, Ms. Darling were to prevail in her nuisance action, she may be entitled to compensatory

damages. If Ms. Darling owned the property, these damages would be the amount of diminution of her property due to the pub's maintenance of a nuisance, or in other words the difference between what she could have sold her land before the nuisance and what she could now sell her land for. As for the period of time that she has already been affected, she would be able to recover a proportionate amount of lost rental value of her property.

Injunction

____ Ms. Darling would likely also seek an injunction against the pub. An injunction is a court order, enforceable by sanctions for contempt, requiring a party to do or refrain from doing a specific act. Here, Ms. Darling would seek an injunction prohibiting the pub from allowing patrons to make noise. She may first seek a preliminary injunction or a TRO. These temporary injunctions are designed to maintain the status quo until a full evidentiary hearing can be held to decide the issue on the merits. These are an emergency measure and a court will not issue a preliminary injunction unless specific criteria are met, as

Why?
TRO
Phase

the enjoined party is compelled to act without a full hearing. The party seeking the injunction must show that there is high likelihood that they will prevail on the merits, that there is an imminent irreparable harm, that the balance of hardships favors granting the injunction and that public policy does not disfavor the injunction. Here, there is not a high likelihood that Ms. Darling will prevail on the merits, so the court will likely not issue a temporary injunction before a hearing on the merits.

Why not?

At the full hearing, Ms. Darling will seek a permanent injunction. To obtain a permanent injunction she must show 1) that she has been irreparably harmed, 2) that there is no adequate remedy at law, 3) that the balance of hardships favors granting the injunction, and 4) that public policy does not disfavor granting the injunction.

She will argue that she has no adequate remedy at law. A finding of no adequate remedy will be found where monetary damages are not likely to suffice for the injury and where the defendant's tortious act is likely to be repeated, requiring a multiplicity of suits. In the case of a

good
good!

continuous nuisance, as is found here, the court will almost always find that there is no adequate remedy at law. Ms. Darling must then show that she has been irreperably harmed and that without an injunction she will continue to be harmed. Here, Ms. Darling has been harmed in that she has been deprived of peaceful enjoyment of her land, and if the pub is allowed to continue its operations as is, she will continue to suffer the same harm. Next she must show that balance of hardships favors granting the injunction. This would be a more difficult burden as the pub has existed at its location for over 20 years and thus perhaps has a right to continue its operation there as long as it complies with local zoning laws and noise ordinances. However, the facts indicate that the noise levels from the pub have recently increased drastically. Finally the court will consider public policy. Public policy favors appropriate land use. Without more information of the zoning and laws in the area and the surrounding neighborhood it is difficult to assess the public policy implications.

Why are legal remedies inadequate

Pub v. Darling

The pub may bring an action against Ms. Darling for both nuisance or unlawfully interfering with their business (for the berating of customers and staff) and defamation (for telling neighbors that the pub has had numerous health code violations and promotes prostitution.) The pub may seek damages for the loss of business incurred in the three month period that Ms. Darling carried out her campaign. To obtain damages the pub would have to show that the loss of business was attributable to Ms. Darling's actions, which could be difficult. Perhaps the pub was just experiencing a temporary upswing in popularity and the law students decided to move to another bar for completely unrelated reasons. If causation could be proven, the pub would then have to prove the damages with a degree of certainty. Again it may be difficult to attribute the amount of the decrease Ms. Darling was responsible for, but the congruence of the timing would be relevant.

In addition to damages, the pub also sought an

injunction to enjoin Ms. Darling's conduct moving forward. (see requirements for TRO's, preliminary injunctions and permanent injunctions, supra.) The facts indicate that the pub was successful in obtaining a TRO, thus the court found that it was likely to prevail on the merits. However, a TRO only lasts for 10 days in California, or 14 days federally. The facts indicate that the hearing was not set until several months after the hearing on the TRO. Thus, when Ms. Darling resumed her activities 3 weeks after the TRO was issued, the TRO was not valid and she could not be held in contempt.

But TRO possibly morphed into prelim inj?

good ✓

Another issue to consider in both the issuance of the TRO and a permanent injunction are the 1st Amendment implications. The injunctions here may be considered prior restraints on speech and therefore unconstitutional. The Supreme Court has held that a TRO should never be issued when speech is enjoined without notice to the enjoined party. Here the party was notified prior to the TRO hearing. ✓

Even when notice is given, injunctions are rarely

granted when free speech is implicated. However, defamatory speech is not protected by the first amendment. If the court finds that Ms. D's speech is defamatory and that she is likely to continue the conduct it may enjoin that conduct. At issue here are some statements that are likely to be considered opinion, and thus not defamatory (like the food sucks) and some which are defamatory (hot bed of prostitution, health violations.) The court may enjoin the defamatory speech but not the opinions.

✓
good

The pub would also raise the issue that it would be unlikely to recover money damages for further defamatory speech (thus necessitating the injunction) because Ms. D would be insolvent and unable to pay. Some courts have found that the ineffectiveness of remedy of damages due to an insolvent defendant is sufficient grounds to issue an injunction while others have found, especially in cases involving enjoining speech, that the defendant's ability to pay is not relevant.

✓
good

balance of hardships?
Public Policy?

#1 got main points and did provide analysis but a bit rambling & muddled. Some organizations ie. by headings would have been very helpful to clarify discussion & issues

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===== End of Answer #1 =====

2)

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===== Start of Answer #2 (876 words) =====

Contract Remedies

good use of headings

Chopper can bring an action for breach of contract for Wiley's failure to deliver the parts meeting the specifications that had been contracted for. However, the facts indicate that Wiley is the only manufacturer of the parts required, so Chopper was not able to seek cover from other suppliers. In addition to any costs to procure cover parts, Chopper can recover any costs incurred that were incidental, that is directly attributable to the Wiley's

breach, such as time spent by employees attempting to procure cover, or in this case, time spent tracking down all of the parts delivered during the time that Wiley was delivering non-conforming products, a cost of \$500K. In addition, while Chopper was not able to obtain cover from another party, it was forced to buy replacement parts at a cost of \$1M from Chopper. Both of these costs would be fully recoverable by Chopper in a breach of contract action. ✓

Chopper could also seek consequential damages under the breach of contract claim. In contract such damages would do not flow directly from the breach but are a consequence of the breach nonetheless can be awarded if the defendant should have known that their breach would expose the plaintiff to those losses. The forced recall of the 900 clutches would certainly have been foreseeable to Wiley, as it was aware of the regulatory requirements. *this is the 500k*

Chopper and its CEO may also claim that his mental

suffering and medical expenses are consequential damages stemming from the breach. However, these damages would be deemed not foreseeable or contemplated by the parties when forming the contract and would not be rewarded. Further, the CEO was not a personal party to the contract and would be unable to recover in a breach of K action.

Alternatively, Chopper could seek restitutionary damages from Wiley, for the \$1M that Wiley was unjustly enriched by the sale of the replacement clutches.

Tort Remedies

✓ Punitive damages are available when the defendant acts willfully, wantonly and with a disregard for the consequence of his actions. The aim of punitive damages is to punish the defendant for the conduct and deter future conduct by the defendant and others. As punitive damages are not available under contract law, Chopper

would be wise to sue for tort damages. When a defendant fraudulently and intentionally breaches a contract or induces a party to enter a contract through fraud or misrepresentation, the plaintiff may recover in tort as well in contract. Here, the facts indicate that Wiley delivered clutches for a six month period that did not conform to contract or regulatory standards. It did so knowingly and concealed the fact by providing certificates that the clutches were in conformance. It then refused to provide serial numbers to aide in determining which clutches needed to be recalled

very good!

In deciding the availability and measure of punitive damages juries may look to the reprehensibility of the conduct, the duration of the conduct and attempts to conceal, the harm caused and potential for harm, the defendant's financial position and the defendant's motivation in its actions. Here, the conduct was highly reprehensible as it not only caused Chopper to incur great financial losses, but also could have resulted in many deaths and serious injury. Thus, the potential for harm was

✓

very great. The motivation for the conduct was monetary gain as the inspector testified that the change was made to speed up manufacturing, allowing more product to be produced. Wiley did not disclose the change for several months despite Choppers letters informing them of complaints. However, Wiley did return to its original manufacturing process after receiving complaints. Under these circumstances, a large punitive award would likely be justified. A punitive award will only be effective as a deterrent if it is large enough that the offending company will feel it. ✓

While a large award may be justified, there are limitations. In *BMW*, SCOTUS held that the reasonableness of punitive damages should be based on the 1) the reprehensibility of the conduct, 2) the actual harm and risk of harm as compared to the punitive award, and 3) the punitive award in comparison to statutory fines for the same conduct, as well as other punitive awards in different jurisdictions. Additionally, in *Exxon*, SCOTUS held that punitive damages should not intend to bankrupt the defendant. Part of the rationale against excessive

punitive damages is that the defendant is denied Due Process because they did not have notice that they could be punished so harshly.

Various jurisdictions have imposed limitations on punitive damage awards, most capping punitives at a specified ratio above the compensatory damages. Generally, punitives that do not exceed 10X the compensatory damages are considered reasonable. ✓

Here, the compensatory damages stemming from the fraud are the out-of-pocket expenses to buy new clutches and to find the ones needing to be replaced, These damages total \$1.5 million so punitive damages in the \$15M range are most likely reasonable. ✓

Again, the CEO or Chopper may attempt to recover for his emotional distress and medical expenses. As with contract law, the damages are required to be foreseeable. Here they would likely be too speculative and would not be recoverable.

Emotional Distress can be recovered w/ intentional tort when documented physical manifestations - ie: PTSD jury would decide worth like they do

Prejudgment interest could also be recovered by
Chopper for expenses incurred after the breach. ✓

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===== End of Answer #2 =====
END OF EXAM