

TOTAL 95

1) Q1 Model Answer Q1 98 Q2 92

Both Questions are labeled Question 1 This is Helen Homemaker Response.

Remedies are the means by which rights are enforced or violations of rights are prevented, redressed or compensated. It is important to ask, is the person entitled to the relief? if so, What is the relief?

Helen's Remedies

Excellent, thorough answer

Helen likely has actions for both breach of contract (BOK) and a tort for fraud/ Intentional or negligent misrepresentation against Carl. usually, under contract law, a plaintiff may not recover punitive damages for a claim, unless a tort action is brought concurrently therewith, and the behavior rises to the level of willful, wanton, malicious and/or reckless behavior.

Breach of Construction Contract

When the builder (Carl = CC) breaches on a Construction contract, in substantial performance, Owner (Helen = HH) gets the costs of restoration unless the court finds that it would be economic waste, then HH gets the difference of diminution of value between what was contracted and what was built.

good ✓

In Contracts, compensatory damages are for the expectation interest bargained for at the time of the contract. Here HH bargained paying CC \$500k to build her a home according to specs from her architect. Damages must be causal/foreseeable, certain and unavoidable.

✓

Pipes:

A prior case held that although a house was built with type A pipes when type B pipes were supposed to be installed (although in that case it was in error, not in an attempt to defraud the owner of the house by using something cheaper and easier to obtain) and type B pipes were substantially similar in cost and quality, that it would be economic waste to force D to pay to tear down the house and rebuild it with the type A pipes, and that the difference in the pipe brand didn't change the value of the home.

Here, CC knew that the pipes were cheaper, and more readily available then the copper ones that were to spec. CC did not tell HH of the substitution when building the house, but rather installed the plastic pipes figuring no one would know the difference. (this goes to the fraud / intentional misrepresentation, but also to the fact that he likely overcharge her for the materials.) The facts are silent as to if this material breach caused a diminution in value to the property as built.

Beta the contractor hired to inspect, found that the plastic pipes would function just as well, so it is unlikely the court would order for CC to pay to have the entire house refit with the

pipes in the original plans. (economic waste) however, HH should be compensated the difference of costs of the pipes. I.e. if Copper were \$20/length and the Plastic were \$10/length. and CC charged her for the Copper, then the total amount of Copper pipes charged (less) the cost of the plastic pipes should be returned to HH. If the house had less resale value due to the plastic v. copper pipes, then HH should receive the diminution in value in addition to the repayment of the materials cost.

HH would not receive consequential damages (hotel charges) for the months it could take to complete, because it would be economically wasteful to remove the plastic at this point in time, and the court is not likely to order replacement as a remedy.

Electrical issues:

Here CC again attempted to cut corners in his costs for the project, and in doing so breached his contract. The use of Stu who is unlicensed likely goes more to the issue of the tort for intentional misrepresentation (and will be discussed supra)

The court is likely to order CC to pay the costs for the new contractor to redo the wiring. Additionally, HH would likely receive consequential damages (hotel charges) for the week to complete the rewiring, as well as the damages for the amount of time she was already staying in a hotel upto the point of repairs.

MISC:

Issue with Carl offering to fix the work. In part besides Helen rejecting the offer it is unlikely that the court would order Specific Performance of Carl to do the repairs himself, as it's generally difficult for a Court to oversee that type of injunction in a Breach of Construction Contract case. For a court to order Specific Performance under a Contract, it would have to prove that the Contract was valid (likely) that Plaintiff Performed (also likely) that Legal Remedies were inadequate (here Money is an adequate compensation for HH, as she can have a licensed contractor go back in and fix the work done by CC and Stu.) and Feasibility of enforcement. Given the likely animosity between the parties by resolution, further potential problems could spring from it, and the court doesn't need the burden of enforcing when HH can receive money damages to repair.

Also, there does not appear to be a Liquid Damages Clause (LDC) in the contract between the parties. A LDC would limit the amount recoverable under breach by one of the parties. It would be upheld as valid if at the time of contracting, if the actual damages were given or if difficult to ascertain a dollar amount was stipulated to by the parties, and that amount was a reasonable forecast of the harm stemming from the breach. if the amount was excessive, it may be considered a penalty and thus unenforcable. As such, because it does not appear to have been included in the K, it need not be further addressed.

Tort Issues

CC 1) Hiding the fact that the pipes were spec to the plans of the architect, likely pocketing the money for the more costly copper and installing plastic, and using an unlicensed person to perform the electrical work rather than a licensed electrician to cut corners and save himself labor costs likely meets the pleading requirements for Fraud and/or intentional misrepresentation (Both intentional torts) As such, the court may be able to order CC to pay HH punitive damages as incentive to detour and punish this type of future behavior. ✓

Punitive Damages are generally ordered when the behavior rises to the level of willful, wanton, malicious, and/or reckless misconduct. Public Policy tends to limit the Punitive Damages to 10 x's the recover, anything more maybe considered unjust and an attempt to bankrupt Defendant. ✓

Helen may be able to also recover Prejudgment interest if there was a liquidated damages clause in the contract and Post Judgment interest if she prevails, and possibly attorney's fees if they were a part of the contract with CC, and/or by statute in the jurisdiction where this matter will be heard.

Carl's Remedies

Tools: Because of Carl's missing fingers and the tools accommodate his disability (in addition to the fact that they are expensive because custom) the tools may be considered 'unique.' He is likely to want to seek an injunction ordering HH to give back his tools. ✓

Since he cannot work without them, getting the tools back timely would be in both parties best interests (If HH is found to be wrongly withholding them, she could be liable for consequential damages of lost wages.) HH's keeping property not belonging to her would fall under a tort action for conversion or Trespass to Chattel.

Carl may be able to get a TRO to have the tools returned to him. A TRO is a stop-gap measure, to preserve the status quo until a preliminary hearing (and possible issuing of a preliminary injunction) may be heard. A TRO requires little to no notice to the opposing party initially (if it can be proved by plaintiff that notice would frustrate the purpose of the TRO) A TRO without explicit start /stop dates or wording stating that it can morph into a Preliminary Injunction, would likely only be effective for 10 days (state) or 14 days (fed). A preliminary injunction would then (likely) be granted with notice to the opposing party, and remain in effect until a trial on the merits could be heard. Often the courts will require a plaintiff to post a bond in an amount to offset any harm done to defendant. That may not be necessary here.

Here if Carl requested an injunction, it would like be a coercive injunction (court orders someone to do/not to do something specific.) ordering HH to return his tools. Carl could try to seek money damages, however, the time to try the case, would likely put him out of a substantial amount of work, which if he is successful on the merits might be able to be compensated by HH, however, a Plaintiff has a duty to mitigate their damages, and as such, the issue of whether or not her could truly work without his tools would need to also be

addressed by the court.

In deciding whether or not to order an injunction, the court looks at four things 1) Inadequacy of a Legal Remedy. 2) Irreparable Harm to Plaintiff 3) Balance of Hardship, 4) Public Interest and/or what does the court need to do to supervise it? ✓

In looking at Carl's tool problem:

1) there is a legal remedy, he could sue for the costs of his tools back, however, if time is of the essence, as he's unable to work without them, it could be a solid argument that a Legal Remedy is inadequate. CC wants these exact tools back, as such replevin would likely be the best way to satisfy the problem.

2) In this case at bar, #2 ties in with #1. CC could suffer irreparable harm if he has other jobs lined up and is unable to do the work. This is of course different than tearing down a historical building that you can't get back, but based on the facts it's hard to know how serious the harm is at this time. Plaintiff would bear the burden to prove at trial.

3) CC has considerably more hardship to bear in this instance if he is unable to work without his custom tools due to his injuries. Yes, HH is out a substantial amount of money, but this hardship sends CC's business to a screeching halt.

4) No real public interest, and the court would not have to supervise much if they ordered HH to return the tools promptly. If she didn't then, the injunction could be enforced by contempt proceedings of either a fine or jail time.

Additionally, in the first phases, the court also looks at whether the plaintiff would prevail on the merits. Here it looks like CC may have a good chance, and it would be likely that the court would order either a TRO or a Preliminary injunction restoring the tools to CC.

If Carl brings his claim for the tools as a cross complaint to HH's lawsuit, and he is seeking an equitable remedy such as an injunction ordering HH to return his tools, the issues at bar to be satisfied by legal remedy (\$ damages) will be heard first if in front of a jury and then the injunction matters will be handled by a judge subsequently. ✓

2)

FLORA (F) V. PETE (P)

EQUITABLE RELIEF

Q2 - Excellent!
understood Diff betw inj type
good use of facts

Equitable relief is when a court enjoins a party from certain conduct or orders affirmative conduct from a party when there is no adequate legal remedy. There are four main categories for determining when a legal remedy would be inadequate: (1) when a party would have to bring multiple or sequential suits to obtain relief, (2) when damages are not measurable and would be too speculative, (3) when damages, although calculable, would not provide adequate compensation for the loss, and (4) when a defendant's action are willful or malicious, so as to give plaintiff their remedy of choice. Equitable relief can come in the form of an injunction or specific performance. An injunction can be further categorized by conduct (either mandatory or prohibitory) and by time (either temporary or permanent).

F will be a candidate for equitable relief because money will not be adequate for her loss. F has millions of dollars from her start-up business. She is not concerned about the modest income she receives from her flowers. What F is most concerned about is the beauty she will be deprived of if her flowers were to be destroyed and the joy she would no longer receive from winning her biodynamic farming competitions. ✓

Temporary Restraining Order (TRO)

A TRO is a temporary form of injunction that is issued to forestall

imminent, irreparable harm. It is a stop-gap measure to preserve the last peaceable status quo pending a hearing for a preliminary injunction. Since P wants to rip out all the blackberry bushes "right away" - F's injury is imminent. It is also irreparable because as soon as the blackberry bushes are ripped out, the incidental pollination F receives from them will be gone. A TRO can be issued ex parte - meaning without notice and a hearing given to P. If a TRO is issued ex parte, it typically lasts for about 10 days. If it is issued with notice, and there is no expiration date given, the restrained party should seek a modification from the court to give a clear expiration date. If not, the duration of the TRO is ambiguous. In Sampson, the court said that a TRO "morphed" into a preliminary injunction after 10 days. In Granny Goose, however, a TRO was issued to prohibit protesting and the court found that the TRO had expired after several months when the protesting had started up again.

It would actually be to F's benefit if the TRO were unclear as to duration because if F violated it, he would be found in contempt of court. The court could jail him, fine him, or issue other coercive orders to make him comply with the TRO. This would at least give F more time to protect her precious dahlia farm.

Preliminary Injunction

Separate P for each factor would make this easier to read. 35

A preliminary injunction (PLI) would be another course for F to pursue. A PLI is a judicial mandate to require or restrain a party from certain conduct pending a trial on the merits. The court must be convinced that the harm is likely to occur without judicial intervention. F could submit affidavits to the court based upon admissible evidence that the pesticides and chemicals P uses in his business are a public nuisance. The chemicals endanger the health and safety of those around him because they are dispersed in large clouds in the sky. The factors a court will consider in issuing a PLI are (1) likelihood of success on the merits, (2) likelihood of irreparable harm, (3) balancing of the hardships to the defendant, and (4) public policy. The court will likely conclude that F will succeed on the merits because pesticides are known as harmful agents and she will be able to present evidence as such. The harm F will suffer will be irreparable because money will not be able to bring her flower farm back after it is destroyed. It would probably take years to bring it back to its glory, if it is even possible. However, the court will struggle with the last two factors. Here, P is not an adjudicated wrongdoer yet and the injunction would shut down a costly enterprise and cost him significant harm to his business and livelihood (he has \$2 million dollars on the line in mature apple trees he purchased). Also, the public interest, while harmed by the pesticides is benefitted from the economic growth and income it would provide to the county. The court could devise a modified decree where perhaps they prohibit P from ripping out the blackberry bushes and spraying pesticides in the air, but allowed him to spray the ground directly on his property with Round-Down.

The moving party does have to post an injunctive bond in the event they lose their motion and the non-moving party suffers any damages. ⁵

As with a TRO, a violator of a PLI is subject to the court's contempt power. *(citing is wrong when issued...)*

Permanent Injunction

F could also seek a permanent injunction (PMI). A PMI is a final judgment on the merits. Unless modified or vacated on appeal, it is res judicata - both claim preclusive and issue preclusive. The Supreme Court set forth a four part test in *Ebay v. Mercexchange L.L.C.* to determine if a PMI is appropriate: (1) legal damages are inadequate, (2) the likelihood of irreparable harm, (3) balancing of the hardships, and (4) public policy. The first two prongs go hand-in-hand: an injury is irreparable because there is no adequate remedy at law. The value to F of her flower farm is not measurable. Furthermore, if it were destroyed, money damages would not suffice. At the PMI stage, P either would or not be an adjudicated wrongdoer. Depending on how the court rules, the facts that his business would be significantly harmed would play a big factor in this role. Also, with regard to PMI's, the court's time to monitor compliance comes into factor when deciding what is in the public interest. Is it in the best of the court to monitor spraying of chemicals - probably so. ✓

As with a TRO and PLI, a violator of a PMI is subject to the court's contempt power.

Declaratory Judgment

Finally, while the above-mentioned equitable remedies are pursued, F should also seek a declaratory judgment (DJ). A DJ is a form of preventative, legally-binding adjudication by a court whereby they declare the rights, remedies and obligations of parties in a civil dispute. This is not an advisory opinion, it must relate to a real case and controversy. A DJ is a statutory remedy, not an equitable remedy, although there are similarities between the two (i.e., requiring imminent, irreparable harm). If a party does not tailor their conduct to the DJ, the party offended can sue or seek an injunction. F should seek a DJ to determine her rights with respect to the property line, blackberry bushes and chemicals to be used.

TIME

END OF EXAM