

SAMPLE ANSWER QUESTION NO. 1

- 10           As to the 100 acre parcel, each party owns a half interest in the parcel. When two parties own an interest in real property, either can sue to partition the property. This can either divide the property or the court can order a sale, but the preference is to divide it if that can be done. The problem is that a court only has jurisdiction to partition land within its borders, and even if the parties consent to a single action to resolve the problem, the court can't partition land outside its jurisdiction. Either party may file a partition action, but this must be done in two states.
- 10           One problem is that Judy put up all the down payment and more than one-half of the monthly payments. She is entitled to be reimbursed for at least her excess payments. Judy may also ask the court for declaratory relief to declare that she is an owner of more than a half interest in the property, since she paid most of the money. If they had taken title as Tenants In Common she would have a good chance to prevail, but since they are Joint Tenants the court will probably declare that they are each owners of an undivided one-half interest but that Judy must be reimbursed for the excess payments she has made. If Judy can convince the court that their intent was not an equal ownership she might prevail, if she convinces the court that the parties were ignorant of the true nature of joint tenancy.
- 5           Also in a partition action, if a party incurs attorneys' fees for the common benefit in pursuing the action, they can be awarded from the sales proceeds. However, if each party has their own counsel, each generally must get their own fees from his or her own share of the proceeds if sold, or else each must pay their own.
- 5           The court can appoint a referee to appraise and sell the property or see that it is divided and make the proper conveyances, if the parties refuse. If a party is recalcitrant, as Judy says that she will not give Punch a cent, the court has the power to order that the costs of having a referee sign for her be borne by her share of the proceeds.
- 15           On the smaller parcel, Punch will want to sue for specific performance of the contract. The action can be brought where the contract is made or where the defendant lives, and there do not have to be two suits as in a partition action. If Punch is ruled to be a one-half owner of the property, then he or Judy could also file a partition action as, in the 100 acre parcel, and the same rules apply on the smaller parcel as discussed above. This would be awkward, as the home is in one state and approximately half the land in another. Specific performance will prevail if the remedy at law is inadequate, and land is always a proper subject of specific performance, especially for the buyer, since land is unique. Judy has announced she will not perform the contract, so she has committed an anticipatory breach, and if Punch is successful the court can order specific performance and award consequential damages, if any. If the contract provides for attorneys' fees the prevailing party can get attorneys' fees.
- 10           However, when one induces another to enter into contract by fraud, this is a defense to specific performance, and Punch seems to have induced her to enter into the

contract by his implied promise that they would remain a romantic couple. Concealment is a form of fraud, so this may be a good defense for Judy. She will undoubtedly argue that she would not have entered into this arrangement if she had known of Punch's relationship with Deedee. She will probably prevail. However, the court could rule that Punch's relationship with Deedee had nothing to do with the contract.

10 Judy may also plead the defense of unclean hands, which holds that if someone is guilty of inequitable conduct in the very same transaction in which they seek relief, the court will refuse equitable relief. Punch seems to have acted inequitably here. However, the inequitable conduct must be within the very same transaction for which the plaintiff seeks relief, and the court might rule that Punch's relationship with Deedee was not the same transaction as the contract and decline to apply the doctrine.

10 However, even if these defenses fail, a court can refuse specific performance if the consideration is so inadequate it shocks the conscience of the court. Here, the consideration is \$50,000 for a one-half interest in property that apparently is worth \$250,000, so this consideration is grossly inadequate, and a court will probably refuse specific performance.

10 Judy can seek also rescission of the contract based on fraudulent concealment, arguing that Punch concealed his relationship with Deedee in order to obtain the half-interest in her land for inadequate consideration, and ask that the contract be rescinded. Assuming the parties can be restored to their original positions, with a refund of any money advanced, the court will probably rescind the contract in this situation. When rescission is sought of a contract that contains an attorneys' fee clause, this will allow the court to award attorneys' fees to the prevailing party, but only on the contractual portion of the action. Once again, if Punch is declared an owner of a portion of either parcel, and if Judy refuses to obey court orders regarding conveyances or partition, the court can enforce its orders by contempt, by fine, or, in an extreme case, imprisonment. (Imprisonment seems unlikely here.) The court can also order a conveyance to be made by a referee or receiver at the recalcitrant party's expense. However, the court is without power to make equitable decrees that are enforceable out of its own jurisdiction. Here, we will have an action in one state and the orders may have to be enforced in another. If the court in Flux makes orders against Punch, and if he is in the State of Woe, the Flux court cannot punish him or enforce this order out of the state.

5 A party seeking to enforce its equitable orders must take the order of one court to the other state and ask the second state to enforce the order. The second state may choose to do so or it may not. Although one state cannot partition land outside its own borders, because there are multiple actions between the same parties, each state will probably order as many actions as possible consolidated for partition and actions involving both parcels, to have as few different actions as possible.

10 points at the discretion of instructor.

## SAMPLE ANSWER QUESTION NO. 2

One who unlawfully causes the death of another is liable for the wrongful death. Generally, these actions are governed by statutes although some states depend on judicial decree.

The person liable is Wyatt, if he is found to have acted unlawfully either intentionally or negligently, and the City of Pain could be held liable as a principal. There is a question of whether Wyatt was an employee or agent for the City, but even though unpaid and a volunteer, he was acting in an official capacity, so Pain is a proper defendant.

- 10 The proper plaintiffs in a wrongful death action are generally the heirs at law, the wife and children. The general rule is that this does not include domestic partners. However, there is a growing trend to include them as proper party plaintiffs, and statutes have done so in some states. Lover might be a proper party if he can prove he was a domestic partner under the statute. Under these circumstances, he may be a plaintiff, but there is some doubt here. There has probably never been a situation where a domestic partner and a wife were allowed to sue at the same time. If Lover is not a proper party under the statute, Lover would not be able to recover.
- 15 In some states the personal representative of the estate is a proper party, especially if he is relying on a survival statute, which is sometimes combined with wrongful death statutes. In a survival action, the defendants may be liable for Ook's pain and suffering and medical bills. In most states, however, pain and suffering are not recoverable in a wrongful death action, even for the time the decedent lived. Wyatt will undoubtedly claim that he was acting in self defense and in the course and scope of his duties, and that as such he has immunity. Generally, such employees have limited immunity and are not liable if they are acting in good faith and in the course and scope of their duties. In the instant case, it seemed that he was acting out of bias in excess of his duties, so he is probably liable and not immune. Wyatt may also be liable as a defendant in a Bivens action, which states that a public employee may be held liable if he violates someone's constitutional rights by acting in bad faith in exercise of their duties. This is generally true for public employees, so this may allow the plaintiff to include Wyatt as a Bivens defendant in such an action.
- 10 A civil rights action which alleges that someone violated a plaintiff's civil rights may be brought in state court, and in this case, it seems that Ook's civil rights as a citizen were violated by Wyatt, since his actions were prompted not only by negligence and poor

judgment but by racial hatred. In a civil rights action, the successful plaintiff is entitled to attorneys' fees. If a civil rights action is filed, a plaintiff can get attorneys' fees but the defendant cannot recover them unless the case was brought frivolously or in bad faith. The amount of attorneys' fees is set by the court, based on the reasonable amount of time spent by the attorney at a reasonable hourly rate, considering the attorneys' skill and reputation and difficulty of the tasks performed.

25 Under the older rule in wrongful death, the plaintiff was limited to pecuniary losses, which included funeral bills and lost earnings, which will be discussed below. More recently, in the majority of jurisdictions the plaintiff can also recover for the loss of comfort, society and protection, so the plaintiff can recover for these. Generally, this does not include grief and sorrow. Most will not include punitive damages under wrongful death, but some states allow it. If punitive damages are recoverable, such damages may be allowable here, since Wyatt acted out of actual malice. If punitive damages are awarded, the financial condition of the defendant is relevant but not important today, as the constitutional requirements are there must be a reasonable relation to actual damages and generally may not exceed four times the actual damages. Punitive damages are generally not recoverable against a public agency. A principal is also not generally liable for punitive damages unless the tortfeasor was a manager, the principal was reckless in hiring him, or the defendant ratified the action. Here, Pain discharged Wyatt immediately, and he was not a manager, so punitive damages are probably not recoverable against the City of Pain. Most states do not allow a loss of consortium, although some do. The loss of comfort, society, protection generally mirrors this at any rate. Most do not allow for mental distress, but some states do.

5 The fact that Ook had a relationship with his wife and also with Lover may lessen the wife's recovery, but this is a question of fact. Some states also allow recovery for loss of inheritance, if plaintiff can prove he or she would have inherited property from the defendant. In some, this is too speculative, and this seems speculative here at any rate.

20 Plaintiffs may recover for lost earnings of Ook that would have benefited them. But for minors, this is generally cut off at the age of majority unless they can prove he would have supported them later, such as with college costs. For the wife, she can recover for the entire amount of the lost earnings. The court would take the earnings that decedent would have earned in his working life (let us assume 30 years) add fringe benefits such as vacation, retirement pay, and medical benefits, and Social Security. Deducted from this figure would be costs saved by not working. such as union dues, transportation, and uniforms. Then the total is taken of all lost earnings including retirement and fringe benefits, and they must be reduced to their present value. That is, reduced by the amount when invested at a reasonable interest rate, would produce the amount of money lost over the period of years during the decedent's working life and for retirement benefits to his life expectancy. The interest rate selected would be the one

most likely to prevail over the working life, at the safest and most liquid investments. Then this figure must be increased for the inflation rate, that is, the amount by which the

wages would be expected to increase for that period for inflation, increased productivity of the economy, and any increases that the plaintiff can prove that he would most likely have earned, just as promotions or raises during that period. Whatever method is selected, it must include both inflation and discount rates. Some jurisdictions will offset these by a fixed amount or at zero. In most, expert witness testimony establishes these figures.

5            Income taxes are not payable on personal injury or wrongful death recoveries, and the question is whether the jury should be instructed of this fact. In federal cases and in some jurisdictions, the instruction is given. In a few, it is in the discretion of the court. In most there is no instruction.

10 points at the discretion of instructor.

SAMPLE ANSWER QUESTION NO. 3

- 10 In the United States attorneys' fees are generally governed by the American Rule that each party must pay their own fees. Peter may seek attorneys' fees under the private attorney general theory. There is no private attorney general theory in federal courts, and some states do not have them. However, some states do, and the rule is that if the case benefits the public or a large number of persons the plaintiff can recover attorneys' fees from the defendant City.
- 10 Here, Peters acting primarily for his own benefit, and his action has benefited only himself and a few neighbors, so this won't apply. However, if the litigation establishes that the City must conduct reasonable engineering studies on the effects of such construction on neighboring properties, the court could decide that this will benefit the public, especially in the future, and on such basis the court might award Peter attorneys' fees under the private attorney general theory.
- 15 Peter may also file a civil rights action which allows him attorneys' fees if successful, because he alleges racial discrimination. A civil rights plaintiff is entitled to attorneys' fees if successful but not a successful defendant, unless the plaintiff brought his action frivolously or in bad faith. Here, the action does not seem frivolous or in bad faith, and if the court so finds, the City is not entitled to attorneys' fees for the civil rights action, even if it wins. If Peter is entitled to attorneys' fees under the private attorney general theory but does not win the civil rights cases, fees must be apportioned only for the recovery under the private attorney general portion of the action and not the civil rights action. Generally, although apportionment is necessary, if there are combined issues, courts are liberal to the plaintiff on how much work is attributable to the recoverable portion of the litigation. Attorneys' fees must be reasonable depending on the amount of time the attorney spent, whether that was reasonable, the difficulty of the tasks and a proper hourly charge.
- 10 The contract between the plaintiff and the attorney is relevant, but not dispositive on the amount of fees. The attorneys' skill and usual hourly charge may be figured into what is called the "Lodestar" guideline, as attorneys with more skill and higher reputation are entitled to greater fees, and the plaintiff is entitled to hire such an attorney. Because the attorneys' skill and reputation are figured into the Lodestar, no adjustment is usually allowed for superior work absent special circumstances.
- 10 Some courts have allowed the attorneys' fees to be multiplied for extremely difficult cases but the Supreme Court has generally frowned on this, unless it can be shown that such an award is necessary to enable the plaintiff to obtain counsel because it would be very difficult to obtain counsel without it. This is a difficult burden to prove, and even if that is allowed, there is only a 1/3 increase for this amount and not a multiplier factor.

15 Peter may also seek to recover against his neighbors for conferring a benefit to them for his construction. If a party is enriched when one party confers a benefit on another, and the second party would be unjustly enriched if he did not pay for the cost of the benefit, the court can award the plaintiff the amount of the benefit conferred under a quasi contract theory.

20 In the instant case Peter's neighbors have been enriched by his construction and by bringing the action, by at least \$100,000. If they have been unjustly enriched, they should share with Peter in the cost of the temporary wall. However, they did not order the wall, they did not request it, nor did they agree to pay for it, so while they have been enriched, it has not been unjust. On the other hand, the City of Refuge seems to have wrongfully constructed its drainage system to damage Peter's property, and he has incurred at least \$50,000 worth of damages, and will incur \$150,000 more, so he should be able to recover this amount from the city. Though his property has been made more valuable by the diversion wall, this should not be offset against the damages.

10 points at the discretion of instructor.