

Torts II

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FINAL EXAMINATION - MODEL ANSWER

Pinnacle Peak

PRACTICE EXAM NO. 1 FROM "COULISSE CANYON"

NOTES:

The "Pinnacle Peak" practice exam facts are a subset of the facts used on the Spring 2015 Torts II exam, "Coulisse Canyon." The model answer produced below comprises the relevant portions of the publicly released model answer for that Spring 2015 exam.

The following notes accompany the "Coulisse Canyon" model answer: *This model answer was made from amalgamating the work of multiple students. Because of the cherry-picking involved, what you have here is a composite that is better than any real response that was received. So, in many ways, this answer is better than the best. Yet this model answer is not perfect. Student-drafted work done under deadline pressure, of course, never would be perfect. And I have intentionally shied away from trying to make this answer perfect in the compositing process. All things considered, however, this is extremely good.*

What this all means for you is that you should be wary of comparing your own response to this one as a way of gauging your preparedness for the exam. This is a beyond-the-top-grade response. So don't worry if you can't do as well. Yet at the same time, if you see issues not represented here, it may not be because you are mistaken; it may be because you are perceptive.

What are good lessons to draw from this model? One thing this response does very well is the way in which the law is applied to the facts. Rather than copy-and-pasted blackletter law or needlessly reiterated facts, this exam response focuses on providing analysis. That's excellent, because the analysis is the key to doing well on the exam. Also laudable is the sense of judgment this exam response frequently displays with regard to conclusions: Close calls and toss-ups are presented as such. Rock-solid conclusions are made without hedging.

Note that the exams from which this response was composited used various abbreviations. But for this model answer, I have standardized references to names and not used abbreviations. I have also aimed for cohesive writing with cleaned up grammar, spelling, and punctuation. Real exams are not so tidy.

QUESTION

Analyze the issues as follows:

- 1. Morgan Morgan v. Griff Gunderson**
Discuss any claim or claims Morgan Morgan has against Griff Gunderson. Include in your discussion whether Morgan Morgan may be entitled to punitive damages. Omit discussion of other remedies issues.
- 2. Griff Gunderson v. Jerica Jernigan & Kevin Karling**
Discuss any claim or claims Griff Gunderson has against Jerica Jernigan and Kevin Karling. Omit discussion of remedies issues.

RESPONSE

[729 words, including section headings]

1. Morgan Morgan v. Griff Gunderson

Morgan Morgan has a sure-fire claim against Griff for fraud. Griff made a misrepresentation in saying he would show up on Pinnacle Peak, and this was material because his appearance was the entire point of hiring him. There's scienter because Griff knew he wouldn't show up -- that was his plan all along, as he explained in the phone call. It's obvious that Griff intended to induce Morgan Morgan to rely on his misrepresentation -- as that's how he would be able to get Morgan Morgan to send the check. Morgan Morgan actually relied on the misrepresentation as demonstrated by their sending the check and showing up on Pinnacle Peak. And I think it is clear that the reliance was justifiable, since there is nothing to indicate that Morgan Morgan would have known Griff to be an unreliable trickster. In general, it seems justifiable to rely on someone who is a famous naturalist to show up where they say they will for nature-guide services. Finally, Morgan Morgan was actually damaged because they lost their \$150,000 payment and had two hours of downtime during which they could have gained the benefit of other employee-morale-boosting activities.

Morgan Morgan also has a good chance at punitive damages for the fraud claim since it was willful (and even beyond that, it was intentional and calculated), as demonstrated by Griff's gloating. A jury could be persuaded that punitive damages are appropriate to deter such conduct in the future.

2. Griff Gunderson v. Jerica Jernigan & Kevin Karling

Jerica and Kevin were acting in concert because they were working together in a joint enterprise, so they are equal tortfeasors vis-à-vis Griff, and they will be jointly and severally liable.

Griff has a good right of publicity claim against Jerica and Kevin because they used Griff's name and recognizable likeness on merchandise, which counts as an actionable commercial use. There is no reason to expect that there is a good First Amendment defense in this case, as this is a core merchandise case, and First Amendment defenses seem not to succeed in such cases.

Griff might have a plausible defamation claim against Jerica and Kevin. The First Amendment comes into play because Griff is a public figure -- he is a famous celebrity with a cable-television show. Thus, Griff must show falsity. This will be the toughest part of the defamation case for Griff. We can assume it's not true that he got STDs from animals. The problem, however, is that there's a good argument that this is not a statement of purported fact, as it can be argued that it is so silly and over-the-

top, that it cannot reasonably be taken as anything but a joking way of expressing an opinion. Also tending in this direction is the medium of a t-shirt, which one would be less likely to take seriously. The rest of the analysis is not problematic for Griff: Public-figure status also requires Griff to show actual malice, but he can do this since Jerica and Kevin knew their statements had no basis in fact. Moving to the common-law analysis, the statement that Griff has gotten STDs from animals is definitely defamatory -- since it harms his reputation with regard to his profession as a naturalist, a per-se category; says he has a loathsome disease, another per-se category; and it even implies a lack of chastity, for a per-se-category trifecta. The statement is of and concerning the plaintiff, since it names him, and we know it was published to at least one person, since third persons have bought shirts over the internet. Further, the extra condition is met because the defamatory communication falls within the per-se categories.

Griff has a plausible claim against Jerica and Kevin for false light. Jerica and Kevin, by putting this shirt online, made a public statement about Griff. They acted with actual malice because they acted with reckless disregard as to whether the statement was true or not -- the facts say it had no basis in fact. The hardest issue is whether it truly places Griff in a false light, since a court might hold the statement not to be purported fact since it is arguably so silly. It certainly is highly offensive to the reasonable person, because no one wants to be thought of as having contracted STDs from animals.