

STETSON UNIVERSITY COLLEGE OF LAW
Gulfport, Florida

GENERAL INSTRUCTIONS

THE ATTENTION OF ALL STUDENTS IS CALLED TO THE FOLLOWING INSTRUCTIONS:

1. The answers and the pledge are to be identified by examination number only. **DO NOT WRITE YOUR NAME ON ANY BLUEBOOKS OR ANYWHERE ON THE EXAMINATION; USE YOUR EXAMINATION NUMBER INSTEAD.**
2. During the course of the examination, the examination and answers may not be removed from the rooms prescribed for taking the examination as posted on the Bulletin Board.
3. This examination ends at the expiration of the time indicated, or when the examination is turned in, whichever comes first.
4. The instructor will be permitted to grade only answers that have been submitted during the examination, in the method indicated by the instructor.
5. At the conclusion of the time prescribed for the examination, students are forbidden from communicating with the instructor with reference to the final examination until the grades have been turned in to the Registrar's Office except that students may communicate with the instructor at any time concerning matters related to the Code of Student Professionalism and Conduct or the Academic Honor Code.

TIME: THREE AND ONE-HALF HOURS

SPECIAL INSTRUCTIONS

1. This is a LIMITED OPEN BOOK examination. You have previously been advised as to which materials you may use during the examination. You may bring with you to the exam the required books for the course, any handouts distributed as part of class, your class notes and any outlines you prepared yourself or in conjunction with others. You may also bring a calculator with you. You may not bring with you commercial materials other than the required texts. You also may not bring with you any of my past exams or answers.
2. There are ten (10) pages included in this exam. You should check now that you have all pages.
3. There are two sections in the examination. Section I has a single question with multiple sub-parts calling for essay responses. **YOU MUST ANSWER ALL PARTS TO THE QUESTION POSED IN SECTION I.** The question in Section I is worth eighty (80) points. I suggest you allot two hours and forty-five minutes to complete Section I. Section II of the exam contains two questions. **YOU MAY PICK WHICH OF THESE**

TWO QUESTIONS YOU ANSWER. YOU DO NOT NEED TO ANSWER BOTH QUESTIONS. Section II is worth twenty (20) points. I suggest you allot forty-five minutes to complete Question #2.

4. Any statute that you may need to consult in connection with this exam is included as an appendix to this document. Unless you conclude one of these statutes apply, you should assume that the issue will be governed by general common law principles. To the extent you believe there are competing common law principles, you may wish to address all of them when rendering your advice.
5. With respect to both questions, please assume that the events at issue take place in the fictional state of Stetson. Stetson is a common law jurisdiction and has adopted the statutes set forth in the appendix. Stetson is one of the United States. As such, you should assume that the United States Constitution applies in Stetson. With respect to any litigation you should assume that to the extent state law controls, the law of Stetson would be applied. Stetson has not adopted the Uniform Commercial Code (“UCC”). However, you should feel free to refer to principles we addressed concerning the UCC to the extent you deem them relevant.
6. If you believe that you require additional facts or need to make any assumptions, make sure that you identify such matters in your answer. When you are able to come to a specific dollar figure, you should do so. In those situations in which you cannot do so, you should be sure to explain the way in which you would reach such a figure.
7. When answering questions you should disregard whether (1) interest would or should be awarded on any monetary recovery; (2) any monetary recovery would or should be reduced to present value; (3) any party would be entitled to receive costs or attorneys fees; (4) any insurance policies would provide a subrogation remedy; and (5) any remedial defenses are applicable to the claims at issue.

END OF INSTRUCTIONS

GOOD LUCK!

**Section #I: Points Available: Eighty (80)
 Suggested Time: Two hours and 45 minutes**

Wind Works, Inc. (“Wind Works”) is a company doing business in Stetson State. Wind Works makes and sells parachutes. It has a single business location just outside Central City, Stetson. It manufactures all its products and conducts all its sales and marketing from this location.

You may wish to know a few general things about Wind Works’ business. Wind Works currently manufactures three different models of parachutes: (1) the SuperChute (discussed more fully below); (2) the StandardChute; and (3) the HighFlyer. The StandardChute was Wind Works’ original model. The HighFlyer started in production only last year as described more fully below. The unique feature of the HighFlyer is the placement and construction of the ripcord (used to deploy the chute) that makes it easier for beginning parachutists to use. In addition, all three products use the same raw materials (including canvas) in connection with their manufacturer. The only difference in materials is that the Highflyer uses an extra piece for the ripcord. That extra piece is made of an exotic variety of Chinese silk.

All three of these products are marketed solely for recreational skydiving. In the past few months, Wind Works has begun attempts to enter the military parachute market. As of this point, however, Wind Works has not obtained or made any military sales although, as described below, it has entered into a contract with the Navy.

The chart below sets forth some information concerning Wind Works’ expenses for the relevant period:

Expense	Amount
Electricity	\$50,000
Advertising – General	\$25,000
Government Contract Expenses	\$25,000
Silk – Cost of Purchase	\$100,000
Canvas – Cost of Purchase	\$300,000

Thus, in the relevant period of time, Wind Works had total expenses of \$500,000.

The following chart sets forth Wind Works' revenues during the relevant period of time. Also set forth in this chart is information concerning the number of sales of each of Wind Works' products during the relevant period of time:

Product	Number of Sales	Revenue
SuperChute	1,000	\$50,000
StandardChute	100,000	\$500,000
HighFlyer	25,000	\$250,000

Thus, in the relevant period of time, Wind Works sold a total of 126,000 parachutes of the three types. The total revenue from these sales was \$800,000.

Wind Works has a number of significant problems about which it is seeking your advice. You should assume you are a lawyer admitted to practice law in Stetson. Set out below is a summary of the information Wind Works gave you at a series of meetings about these various problems. Although this summary is divided into several sections focusing on the problems Wind Works is having with certain other people or entities, you may use any facts in the following discussion to discuss any issue.

Problems with Polly Purebred ("Polly")

Polly is a member of one of the several parachute clubs in Central City. She purchased a "SuperChute" model parachute for use in an upcoming parachute competition that was to take place outside of Central City. Wind Works had only recently introduced the SuperChute to the market. The SuperChute was lighter than other parachutes on the market allowing better control, or so Wind Works claimed.

Polly planned to use the SuperChute in the competition. She was only able to take one practice jump before the competition began. The practice jump went off without a hitch. Unfortunately for everyone involved, the actual competition jump did not go well. When Polly pulled the ripcord on the SuperChute nothing happened right away. Polly was able to pull the back-up ripcord. However, she slammed into the ground at a greater speed than usual.

Polly was severely injured as a result of the accident. She has had several surgeries to repair the injury to her legs. Her total medical expenses were \$100,000. Luckily, Polly had medical insurance that paid the damages. And, as luck would have it, she had negotiated a clause that she would not have to pay her insurance company back should she ever recover money in the context of a lawsuit. Polly was glad she paid her \$10,000 in health insurance premiums.

The medical bills, however, were only the start of Polly's issues related to the accident. First, she has experienced incredible pain as a result of the accident. She has trouble sleeping and cannot engage in many of her former hobbies. She has been told that she will eventually recover fully, but the pain will continue for some time. Polly lost only \$25,000 in wages due to

the nature of her job as a proofreader. She was able to return to this home based occupation while she was still in recovery.

The only good thing that has come from the accident is that Polly has written a book called "I Survived the Fall" about her experiences. She was paid a flat fee of \$75,000 for the rights to the book. She has no entitlement to royalties.

Polly has recently filed a lawsuit against Wind Works. Polly claims that Wind Works should be liable under Stetson's product liability laws. Her specific claim was that Wind Works knew that there was an issue with the ripcord but went ahead with the production of the product in any event.

Wind Works has told you that it is concerned about Polly's claim for a number of reasons. One of the most important reasons for this concern is that Mr. Underdog, the Project Manager for the SuperChute raised a number of issues about the safety dangers associated with the ripcord. It turns out that Underdog's boss, the Director of Engineering, never acted on these concerns.

We will return to Wind Works' question concerning Polly below in discussing the company's request for your advice.

Issues concerning Roberts, Inc.

Wind Works entered into a contract with Roberts, Inc. ("Roberts") pursuant to which Roberts agreed to provide Wind Works a Chute-O-Matic machine. The Chute-O-Matic was the device Wind Works planned to use to manufacture a parachute for sale to the United States military. Indeed, Wind Works had obtained a contract with the U.S. Navy to sell military parachutes. That contract with the Navy would have yielded Wind Works a net profit of \$5 million over its term.

Under the terms of its contract with the Navy, Wind Works needed to obtain a new machine to make military quality products. It was this need that led Wind Works to Roberts.

Representatives of the two companies met. At that meeting, Wind Works told Roberts of its contract with the Navy and of its need to obtain a military-quality production machine. Roberts indicated that it could provide such a machine – the Chute-O-Matic – by a date certain specified in the contract. In exchange, and upon delivery of the machine, Wind Works would pay Roberts \$100,000. The contract also provided as follows:

"Under no circumstances shall either party to this agreement be subject to the imposition of consequential damages should there be a breach of this agreement."

Roberts delivered the Chute-O-Matic as provided in the contract. Wind Works paid the \$100,000 as it was required to do. After securing the machine, Wind Works had tremendous problems. Simply put, the Chute-O-Matic did not work. The Navy inspected some of the

prototype parachutes made with the Chute-O-Matic. Thereupon, the Navy cancelled the contract with Wind Works as it was allowed to do.

Wind Works believes that Roberts has both breached the contract and committed the tort of negligence in its defective manufacturing process. We will return to this issue below with the company's request for your advice.

Issues Concerning American Mental Health, Inc.

American Mental Health, Inc. ("AMH") is a corporation in the business of owning and operating in-patient mental health clinics. AMH has indicated that it plans on opening an in-patient mental health clinic on the lot next to Wind Works' lot. The area is zoned for businesses and there is nothing in the zoning code that requires any special pre-operational approvals for AMH. The proposed AMH clinic is to specialize in the treatment of violent sexual offenders.

Wind Works is concerned that the proposed AMH clinic will cause it significant problems. Wind Works' first concern is that its property values will decrease as a result of being located near a mental health clinic, especially one dealing with violent sexual offenders. The second concern is that the clinic will dissuade customers from visiting the Wind Works' showroom at the Wind Works location.

Both of Wind Works' concerns were enhanced because it has recently learned that AMH has had problems in the past. At several of its other clinics, patients have evaded security measures and made it outside of the facility. There has never been any harm caused by the escaped patients, but the escapes made Wind Works nervous.

Wind Works wants to know if it can do anything to stop the clinic from opening. There is no rush because AMH has indicated it will not begin operation of the clinic until its issue with Wind Works is resolved. We will return to this issue below in discussing the company's request for your advice.

Issues Concerning Frodo Enterprises

The final issue Wind Works has concerns Frodo Enterprises. Frodo is a competitor of Wind Works in the parachute industry. Frodo has told Wind Works that it believes Wind Works stole the computer program used to operate the machine that produced the HighFlyer parachute.

Wind Works has provided you with some information from experts in the parachute industry. They have told you that a lot goes into the manufacture of a parachute but that the computer program used to operate a machine is a significant component of the ultimate product. However, these experts disagree as to how much of the value of the product is attributable to a computer program for the production machine. The experts' estimates ranged from 25% to 60% of the value of the product. Frodo has told Wind Works that it plans to file a lawsuit against Wind Works seeking damages, other monetary recovery as well as an immediate order, along with a permanent one, preventing Wind Works from using the computer program to manufacture the HighFlyer.

Request for Advice

Wind Works has requested that you prepare a memo addressing the following issues. You should not discuss any declaratory remedies that might be applicable. You should assume all lawsuits are in Stetson State court.

- 1. The remedies that Polly could potentially recover from Wind Works, assuming Polly prevails in a lawsuit concerning the parachute accident.**
- 2. The remedies that Wind Works could recover from Roberts. Wind Works hopes to bring claims for both breach of contract and negligence in manufacturing the Chute-O-Matic.**
- 3. If Wind Works is likely to be able to prevent the AMH clinic from opening.**
- 4. The remedies that Frodo could potentially recover from Wind Works concerning Frodo's claims that Wind Works is inappropriately using the computer program for the HighFlyer. You should not discuss punitive damages with respect to this issue.**

**Section #II: Points Available: Twenty (20)
 Suggested Time: 45 minutes**

Answer only ONE of the following questions:

1. Justice Scalia and some academic commentators have suggested that the United States Supreme Court's decisions concerning constitutional limitations on punitive damages (e.g. Gore and Campbell) are incapable of principled application. They suggest that the decisions should be overruled. Others believe that Gore and Campbell are fundamentally correct but need tinkering to improve their operation. Finally, still other observers maintain that the decisions are fine as they are. What is your view about this line of cases? Be sure to support your conclusion with reasoned argument.
2. As we discussed in class, in Indemnity Insurance Co. v. American Aviation, Inc., the Florida Supreme Court clarified the situations in which the economic loss rule applies in Florida. Some commentators believe that the Court restricted the doctrine too greatly. Others assert that the Court did not go far enough in restricting the rule. Still others believe that the Court's approach was the best way in which to proceed. What is your view concerning this issue? Be sure to support your conclusion with reasoned argument.

ON MY HONOR, I HAVE NEITHER
GIVEN NOR RECEIVED AID
ON THIS EXAMINATION.

Statutory Appendix

Stetson Statute #1: Stetson Tort Reform Act

In all actions for personal injury or wrongful death, non-economic damages shall be limited to no more than \$250,000. The jury shall not be informed of this provision of law.

Stetson Statute #2: Collateral sources of indemnity

(1) In any action to which this part applies in which liability is admitted or is determined by the trier of fact and in which damages are awarded to compensate the claimant for losses sustained, the court shall reduce the amount of such award by the total of all amounts which have been paid for the benefit of the claimant, or which are otherwise available to the claimant, from all collateral sources; however, there shall be no reduction for collateral sources for which a subrogation or reimbursement right exists. Such reduction shall be offset to the extent of any amount which has been paid, contributed, or forfeited by, or on behalf of, the claimant or members of the claimant's immediate family to secure her or his right to any collateral source benefit which the claimant is receiving as a result of her or his injury.

(2) For purposes of this section:

(a) "Collateral sources" means any payments made to the claimant, or made on the claimant's behalf, by or pursuant to:

1. The United States Social Security Act, except Title XVIII and Title XIX; any federal, state, or local income disability act; or any other public programs providing medical expenses, disability payments, or other similar benefits, except those prohibited by federal law and those expressly excluded by law as collateral sources.

2. Any health, sickness, or income disability insurance; automobile accident insurance that provides health benefits or income disability coverage; and any other similar insurance benefits, except life insurance benefits available to the claimant, whether purchased by her or him or provided by others.

3. Any contract or agreement of any group, organization, partnership, or corporation to provide, pay for, or reimburse the costs of hospital, medical, dental, or other health care services.

4. Any contractual or voluntary wage continuation plan provided by employers or by any other system intended to provide wages during a period of disability.

Stetson Statute #3: Pleading in civil actions; claim for punitive damages

(1) In any civil action, no claim for punitive damages shall be permitted unless there is a reasonable showing by evidence in the record or proffered by the claimant which would provide a reasonable basis for recovery of such damages. The claimant may move to amend her or his complaint to assert a claim for punitive damages as allowed by the rules of civil procedure. The rules of civil procedure shall be liberally construed so as to allow the claimant discovery of evidence which appears reasonably calculated to lead to admissible evidence on the issue of punitive damages. No discovery of financial worth shall proceed until after the pleading concerning punitive damages is permitted.

(2) A defendant may be held liable for punitive damages only if the trier of fact, based on clear and convincing evidence, finds that the defendant was personally guilty of intentional misconduct or gross negligence. As used in this section, the term:

(a) "Intentional misconduct" means that the defendant had actual knowledge of the wrongfulness of the conduct and the high probability that injury or damage to the claimant would result and, despite that knowledge, intentionally pursued that course of conduct, resulting in injury or damage.

(b) "Gross negligence" means that the defendant's conduct was so reckless or wanting in care that it constituted a conscious disregard or indifference to the life, safety, or rights of persons exposed to such conduct.

(3) In the case of an employer, principal, corporation, or other legal entity, punitive damages may be imposed for the conduct of an employee or agent only if the conduct of the employee or agent meets the criteria specified in subsection (2) and:

(a) The employer, principal, corporation, or other legal entity actively and knowingly participated in such conduct;

(b) The officers, directors, or managers of the employer, principal, corporation, or other legal entity knowingly condoned, ratified, or consented to such conduct; or

(c) The employer, principal, corporation, or other legal entity engaged in conduct that constituted gross negligence and that contributed to the loss, damages, or injury suffered by the claimant.

Stetson Statute #4: Punitive damages; limitation

(1) (a) Except as provided in paragraphs (b) and (c), an award of punitive damages may not exceed the greater of:

1. Three times the amount of compensatory damages awarded to each claimant entitled thereto, consistent with the remaining provisions of this section; or

2. The sum of \$ 500,000.

(b) Where the fact finder determines that the wrongful conduct proven under this section was motivated solely by unreasonable financial gain and determines that the unreasonably dangerous nature of the conduct, together with the high likelihood of injury resulting from the conduct, was actually known by the managing agent, director, officer, or other person responsible for making policy decisions on behalf of the defendant, it may award an amount of punitive damages not to exceed the greater of:

1. Four times the amount of compensatory damages awarded to each claimant entitled thereto, consistent with the remaining provisions of this section; or

2. The sum of \$ 2 million.

(c) Where the fact finder determines that at the time of injury the defendant had a specific intent to harm the claimant and determines that the defendant's conduct did in fact harm the claimant, there shall be no cap on punitive damages.