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PRIVACY TORTS QUIZ

Prof. Bell

NOTE: Choose the one best answer to each question, applying the Restatement of Torts (2d) and relevant case law. As on the MBE, you have 1.8 minutes/answer.

Question 1

Anna, an attractive 20-year-old, attended a street party sponsored by Duff Lite. A Duff employee took a photo of Anna dancing with some of her friends in front of a banner reading, "Party Right with Duff Lite!" Although she held a red cup in her hand, it held water, as Anna did not drink alcohol at the event. Duff later used the photo in an advertisement for a similar event that it planned. Offended at the use of her image, Anna brought suit. What best describes her legal rights?

- (a) Anna has suffered defamation because Duff Lite has falsely implied that she violated laws against underage drinking.
- (b) Anna has suffered appropriation because Duff Lite used her image without her permission to promote its product.
- (c) Anna has suffered intrusion upon seclusion because Duff Lite intentionally publicized matters about her private affairs.
- (d) Anna has suffered no tort.

Question 2

Assume the facts of question 1 and add these: Anna also pleaded false light in her complaint against Duff. What best describes that claim?

- (a) If Anna's defamation claim fails, her false light claim will also fail.
- (b) If Anna's defamation claim succeeds, her false light claim will also succeed.
- (c) Anna's false light claim will succeed because she is a private figure and Duff Lite acted negligently.
- (d) Anna's false light claim will fail because the photo did not harm her reputation in a sizeable minority of any respectable community.

PRIVACY TORTS QUIZ--ANSWER KEY

1.
 - (a) is not the best answer, though it certainly has some merit. The problem is essentially two-fold. First, as a question of fact, does the image really imply that Anna was drinking? People evidently do attend such events without drinking alcohol. Second, is underaged drinking so wrongful an act as to harm Anna's reputation in a substantial minority of a respectable community? Some false claims of criminal acts are *per se* defamatory, but it is not at all evident that the alleged falsehood here qualifies. (See R. (2d) § 571 for details.)
 - (b) offers the best answer. See R. (2d) § 652C.
 - (c) won't work because, while she was engaged in a private pastime, she was in public and publication of the photo does not look likely to "be highly offensive to a reasonable person." R. (2d) Torts § 652B.
 - (d) is wrong because (b) is right.

2.
 - (a) is the best answer, but it is still tricky. To figure this out, you have to first figure out why the defamation claim would likely fail. See above for that analysis. It is most likely, on that analysis, that the failure to imply a falsehood will bring down the defamation claim—a failure equally fatal to the false light claim. And if the defamation claim survives that test, failing instead on the question of reputation harm, the false light claim will probably also fail. Granted, the degree of required harm is slightly less for false light. Here, though, it does not look likely that the alleged falsehood will fail to qualify as defamation and yet still qualify as false light.
 - (b) is not the best answer, though to see why requires some careful thinking about the fate of the defamation claim. If that claim succeeds, Anna will probably manage to show only that Duff Lite was negligent. We have nothing to suggest that Duff Lite acted with reckless disregard of the truth, after all. And false light requires more than mere negligence; see the analysis of (c).
 - (c) is not right because, at least according to R. (2d) Torts § 652E(b), false light requires as showing of at least reckless disregard for the truth.
 - (d) is not the best answer because it misstates the relevant test of harm; it should be a publication "highly offensive to a reasonable person," R. (2d) Torts § 652E(a).