

Civil Procedure Exam  
Professor Sternlight  
December 9, 1994  
8:30 A.M. - 12:30 P.M.

BAGS # \_\_\_\_\_

INSTRUCTIONS

This is an open book exam. You may consult any notes, commercial or personal outlines, hornbooks, etc. However, you may not share these materials with any other person during the exam.

Please check your exam booklet for completeness at this time. It should be \_\_\_\_\_ pages long. Please write your BAGS number on this exam and make sure the BAGS number also appears on any blue book you turn in.

Please read each of the questions carefully before drafting your answers. Also, please be sure to provide me with the reasoning underlying your answers. That is, if you consider but ultimately reject certain options, please explain why. If you find a particular question is ambiguous or if you believe that I have omitted essential information then please explain any such ambiguity or problem and supply any additional information or assumptions you believe to be necessary to permit you to answer the question.

Please put all of your answers in a blue book. I will not give credit for information written on the exam itself. Also, I ask that you write only on one side of the page. You may use abbreviations so long as you define them. I insist that you use only your BAGS number to identify yourself. I reserve the right to fail any student who attempts to identify him/herself by, for example, referring to remarks made in class. Also, please refrain from including any personal notes or greetings in your exam.

You have four hours to complete the exam. I have indicated the approximate point value for each question and you should allocate your time accordingly.

Good luck!

## QUESTIONS

### 1. True/false questions (30 points total; 1.5 points each)

With respect to each of the following propositions please state whether the proposition is true or false. Then, explain in one or two sentences why you believe the proposition is either true or false. You will receive no credit at all unless you provide an explanation for why the statement is true or false. You will also receive no credit unless you come to a conclusion as to whether the statement is true or false. Finally, you will receive no credit for answers exceeding two sentences in length.

(a) The rules of our adversary system of justice provide that if a client instructs his/her attorney not to disclose certain items in discovery the attorney may not be sanctioned under Rule 11 for refusing to produce those items.

(b) One party is sometimes allowed to seize the property of the opposing party before notice has been provided to the opposing party or to the opposing party's attorney.

(c) Defendant makes and loses a motion, pursuant to Fed. R. Civ. P. 12(b)(6), that the court dismiss plaintiff's claim for punitive damages. The doctrine of res judicata prevents that defendant from subsequently filing a motion for summary judgment asking the court to dismiss plaintiff's punitive damages claim on summary judgment.

(d) Plaintiff, a citizen of Georgia, sues defendant corporation, alleged to be incorporated in Florida, on a state common law claim in excess of \$50,000 in federal district court in Florida. During the course of the trial defendant admits that in fact it is incorporated in Georgia, although it has its principal place of business in Florida. The federal district court must immediately dismiss the case for lack of subject matter jurisdiction.

(e) Plaintiffs Mr. and Mrs. Brudney (citizens of Florida) were involved in a car accident with defendants Mr. and Mrs. Weiler (citizens of Georgia). Mr. and Mrs. Brudney each have brought state common law negligence claims against the Weilers. Mr. and Mrs. Brudney each claim damages in the amount of \$30,000. The Brudneys claim that the Weilers were each 50% liable for the accident in that Mr. Weiler negligently distracted Mrs. Weiler, who was driving. The claim may not be brought in federal court because the amount in controversy requirement is not met.

(f) No class action may be certified in federal court unless each member of the potential class is provided with notice and unless each member of the potential class has at least \$50,000 at stake in the litigation.

(g) A client may not be required to disclose the nature of information provided to her attorney in confidence, even where the opposing party has demonstrated substantial need to obtain that information.

(h) Charles Atlas (citizen of California) and Muscle Magazine (citizen of Delaware) enter into a contract allowing Muscle Magazine to use Charles' picture in their advertisements. The contract includes a provision that states: "In the event that the parties cannot resolve a dispute regarding the terms of this contract both parties agree that the federal district court for the Southern District of New York shall have personal jurisdiction to hear this dispute." Charles decides Muscle is violating the contract by using his photo in a soft porn calendar and Charles therefore brings a breach of contract action against Muscle. However, Charles decides to sue Muscle in state court in California, rather than in New York. If Muscle has its principal place of business in California the California state court will have personal jurisdiction over Muscle.

(i) If a federal court judge believes the jury has reached a verdict that no reasonable jury could reach the judge may either vacate the verdict and order a new trial or alternatively reverse the jury's verdict and enter the judgment the judge believes is appropriate, given the evidence presented.

(j) The federal courts located in Florida must apply the Florida Rules of Civil Procedure in diversity cases if those rules would be "outcome determinative."

(k) Plaintiff (citizen of Florida) sues defendant 1 (citizen of Georgia) in federal district court in Florida on a federal question claim. Defendant 1 seeks to add a defendant 2 (citizen of Georgia) arguing that defendant 2 is a "necessary" party in that plaintiff has a related state common law claim against defendant 2. The court may only add the defendant 2 if it has personal jurisdiction over defendant 2 and if plaintiff's claim against defendant 2 arises out of the same transaction or occurrence as did plaintiff's claim against defendant 1.

(l) Plaintiff uses Fed. R. Civ. P. 34 to request certain crucial documents from defendant in discovery. Defendant refuses to produce the documents, arguing that they are exempt from disclosure under the work product doctrine. Plaintiff files a motion to compel and the district court rules that defendant was justified in refusing to produce the documents. Plaintiff is entitled to an immediate interlocutory appeal if she can show that defendant's refusal to produce the documents would be the "death knell" of plaintiff's suit.

(m) Plaintiff (citizen of Florida) files suit against defendant (citizen of Georgia) in state court in Florida on a state common law claim in excess of \$50,000. Defendant removes the case to the Federal District Court for the Northern District of Florida. Defendant then moves for a transfer of venue pursuant to 28 U.S.C. Section 1404 to the Federal District Court for the Northern District of New York and the court grants the request. In resolving the case the Federal District Court for the Northern District of New York must apply Florida substantive law.

(n) Plaintiff Whiney (FSU law student, citizen of New York) sues defendant (FSU College of Law, citizen of Florida), in federal court, arguing that the school has negligently provided her with an inadequate legal education. (Assume that the \$50,000 amount in controversy requirement is met). Moaner (FSU law student, citizen of Florida) seeks to state a similar claim against the law school and files a motion to intervene as a plaintiff as a matter of right. The court allows Moaner to intervene as a plaintiff, as of right. Defendant FSU may not bring a state common law counterclaim against Plaintiff Moaner unless the counterclaim arises out of the same transaction and occurrence as Moaner's claim against FSU.

(o) Plaintiff sues defendant 1 and defendant 2 in federal court. If defendant 1 sues defendant 2 on a cross-claim the court must hear the claim, under the doctrine of supplemental jurisdiction, even if the court would not normally have subject matter jurisdiction over the claim.

(p) Plaintiff (law student) sues defendant (law school cafeteria) for negligently serving the student a hot dog which caused the student to suffer food poisoning. Defendant files an answer stating, as its sole defense, that the law school did not provide the hot dog to the student. Thirty days after filing the answer defendant files a motion to implead its supplier, Marriott Corp., arguing that if in fact the law school provided a poisoned hot dog to the student, Marriott Corp. was responsible in whole or in part for the fact that the hot dog was poisoned. Unless and until the law school amends its answer the court must disallow the proposed impleader.

(q) So long as the requirements of personal jurisdiction and subject matter jurisdiction are met a federal court may not dismiss a case for lack of venue, but rather may only transfer the claim to a district where venue would be appropriate.

(r) Plaintiff Patsy sues Clod Company and Supervisor Sleaze in federal court for sex discrimination, arguing that she was fired for discriminatory reasons. Sleaze files a counterclaim against Patsy accusing her of having slashed the tires of his car. Sleaze also seeks to bring Patsy's boyfriend Paul into the case, arguing that he participated in the tire slashing with Patsy. Assuming personal jurisdiction and subject matter jurisdiction exist Sleaze may bring Paul into the case.

(s) Plaintiff sues Defendant. Defendant fails to raise the defense of lack of personal jurisdiction, which was then available to him, either in a pre-answer motion or in his answer. Five days after filing the deficient answer Defendant realizes his mistake and immediately files an amended answer raising the defense of lack of personal jurisdiction. The court must allow the amended answer to be filed.

(t) Plaintiff sues defendant for breach of contract in federal court and does not demand a jury trial. Defendant answers and also counterclaims for slander. Defendant deliberately does not demand a jury trial on either the claim or the counterclaim. (Defendant believes she would fare better in front of a judge than in front of a jury.) Upon receiving the counterclaim plaintiff demands a jury trial as to the slander counterclaim. Plaintiff is entitled to a jury trial as to the slander counterclaim.

\*\*\*\*\*

Question 2 (28 points total)

Review the following allegations, law and evidence in preparation for drafting a motion for summary judgment on behalf of defendant. You should also prepare a response on behalf of the plaintiff. Assume that this case is being heard in federal court and that the requirements of personal jurisdiction, subject matter jurisdiction and venue have all been met. Assume further that the complaint was filed on November 4th, 1994; that you are reviewing the items outlined below today, December 9, 1994; and that trial has been set for June 1, 1995. Finally, assume that the district in which this matter is being heard has opted out of the mandatory disclosure provisions of Rule 26.

a. complaint

Plaintiff Priscilla Professor is a professor at Nirvana State University ("NSU") College of Law. Greg Griper is a second year student at NSU College of law. Priscilla's complaint alleges that on October 31, 1994 at 1pm Greg Griper committed the tort of battery against Priscilla by throwing a rotten tomato at Priscilla's face as she entered the law school building. Priscilla alleges that Greg bore a grudge against her ever since he got a B- in her contracts course the previous year. Priscilla alleges that she tripped and sprained her ankle as a result of being temporarily blinded by the rotten tomato, that she lost pay, and that she also suffered great emotional distress as a result of the tomato throwing incident.

In the complaint Priscilla seeks compensatory damages consisting of compensation for physical and emotional suffering and back pay. Priscilla also asserts a claim for punitive damages, alleging that Greg acted willfully, maliciously and outrageously in throwing the tomato.

b. law

The relevant state law of Nirvana defines battery as follows:

"An actor is subject to another for battery if

- (a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and
- (b) a harmful contact with the person of the other directly or indirectly results."

The relevant state law of Nirvana states that punitive damages may be recovered where a party is shown to have acted "maliciously or outrageously."

c. evidence

The relevant evidence for purposes of your summary judgment motion is fully available to both sides. It consists exclusively of the following:

(1) deposition of Greg Griper

Q: "So Greg, did you throw that tomato at Priscilla Professor?"

"No way did I throw the tomato at that lady. I can't stand her, and I've said that to lots of people, but I wouldn't try to hurt her. Anyway, on October 31st at 1pm I was working at my job downtown. I can produce lots of witnesses to support me on that."

(2) deposition of Priscilla Professor

Q: "Do you know who threw the tomato at you?"

A: "I'm quite sure that young man Greg Griper is the one who threw the tomato. I would know that ugly jacket of his anywhere. And, he had been threatening to get me back for months, ever since I gave him that grade. There's no one else who could possibly have done it."

Q: "What if any injuries did you suffer as a result of being hit by the rotten tomato?"

A: "How was I hurt? I'll tell you how. First, there was the physical pain. When I slipped on that tomato it not only caused me to sprain my ankle but it also threw my back out. Also, I had to miss a full week of classes, and I was in really excruciating pain."

Q: "What if any evidence do you have that Greg intended to throw the tomato at you?"

A: "Well, I guess I have the evidence that he threw it. A tomato hardly leaves one's hand by accident, does it?"

### (3) affidavit of Warren Witness

"Greg is my best friend, and I'm sure he would never have tried to hurt Priscilla Professor. In fact, I was with him all day long in the library on the day of October 31st and I can tell you for sure he never threw any tomato."

### (4) affidavit of Tillie Telltale

"I got to the scene right after Greg threw the tomato that hit Priscilla Professor in the head. As I arrived, I saw Greg running away, real fast. Then, when I got there, like five professors all told me they saw Greg throw the tomato. I saw her lying on the floor and screaming. I didn't see anything after that because I had to go to class."

## Questions

2(a) (13 points) Draft a memorandum in support of a motion for summary judgment or partial summary judgment on behalf of Greg Greedy. Set out and analyze the relevant legal standards, arguments, cases, and evidence as you would in a real legal brief.

2(b) (15 points) Now, switch roles to represent Priscilla Professor. Draft a memorandum in opposition to the summary judgment motion you just drafted on behalf of Greg Greedy. Again, your memo should discuss all relevant legal standards, arguments, cases and evidence.

Question 3 (30 points total)

Perry and Daniella got married in Florida in 1980. They had a very romantic ceremony, in Key West, and lived together happily in Key West for the next five years. During that time they also had a child, Charlie. After five years of happy marriage Daniella decided she was fed up with Perry, fed up with marriage, and fed up with motherhood. She left Perry and Charlie and moved to Crested Butte, Colorado to become a professional mountain biker.

Perry raised Charlie on his own. Although his lawyer told Perry he was entitled to child support Perry did not know where Daniella had gone and thus could not sue her. Finally in December 1994, by which time Charlie was eleven years old, Daniella had made it big as a TV commentator on mountain bike racing and other dare devil sports. Perry found out Daniella was living in Crested Butte and decided to file suit against Daniella for child support in state court in Florida. (Perry, who earns his living working in a bookstore, could not afford to sue Daniella in Colorado). Perry's attorney filed the complaint against Daniella in state court in Florida and then sent a copy of the summons and complaint to Daniella's car fax machine. Daniella received a copy of the complaint on her car fax machine as she was driving through the northwest corner of Florida. (In case any of you don't know, a fax machine receives documents sent over the phone lines and prints those documents on a printer). No other copies of the complaint were served on Daniella.

Daniella had not set foot in Florida since leaving the state, in 1985, until she drove through and was "served" in 1994. She estimates she was in Florida for about four hours the day she was served. The only property Daniella owns in Florida is a bank account containing approximately \$2,000 and the clothes and furniture she left in the house with Perry. Since leaving Florida Daniella has been "living free" from such requirements as taxes, voting and car registration. That is, she has not voted, paid taxes, registered a car, nor obtained a driver's license since she left Florida. She doubts her Florida credentials are still valid. Most of Daniella's person wealth, including a BMW, a half million dollar ski condo, and a million dollar bank account, are located in Colorado.

(a) (7 points) You are the attorney representing defendant Daniella. Your client (who knows just a little about civil procedure) tells you she strongly believes the court lacks personal jurisdiction to resolve the claim. Thus, Daniella tells you her inclination is to simply ignore the suit. What are Daniella's alternatives? What are the pros and cons of each approach? What do you advise? (Do not, in this subpart, go into detail regarding the validity of personal jurisdiction. Instead, simply advise Daniella as to her options.)

(b) (23 points) Daniella's attorney decides to respond to the complaint by filing a pre-answer motion protesting lack of personal jurisdiction and inadequate service of process (Florida equivalent to motions pursuant to Fed. R. Civ. P 12(b)(2) and 12(b)(5)). You are the law clerk to the judge assigned to handle the case. The judge has asked you to write a detailed memorandum discussing whether the court can hear the case. Your memo should come to a conclusion as to whether and why the court can/should hear the case. Your judge is very concerned she may be reversed on appeal and thus asks you to set out all your reasoning in detail and also to discuss any counterarguments that might be raised to your position. Your fellow law clerk has already written a memorandum establishing that personal jurisdiction and service were proper pursuant to the Florida longarm statute law so you need not address these issues. Do not spend time in your memo recounting the facts in an introduction section. However, you should discuss the relevant facts in the course of your analysis.

Question 4 (12 points)

Please comment on the following statement.

"The recent reforms in the Federal Rules of Civil Procedure have gutted our American adversary system of justice. In the good old days parties and lawyers were free to use their wits to develop their cases. Today judges are more managers, than arbiters of right and wrong. Federal judges spend their time policing piddly pretrial disputes rather than presiding over trials. Meanwhile, lawyers are so busy turning their files to their opponents that they can't adequately prepare their own case. The result is more delay and less truth and justice. We should abolish most of the Federal Rules of Civil Procedure and allow parties to establish the validity of their claims through a fair fight in court."

Your comments should include (a) analysis of whether and why you agree or disagree with the author that there have been recent dramatic changes in our litigation system; (make detailed reference to Rules and/or cases, as appropriate); (b) whether and why you agree or disagree with the author that any recent dramatic changes have been bad; and (c) what if any steps you think should be taken to reform our civil litigation process.