

Spring 1991 Final Exam (Civil Procedure B)

FINAL EXAMINATION
Civil Procedure B
Spring 1991
Mr. Brill

1. a) Questions 1, 2 & 3 are worth 10 points each. Answer two of them. 20 points
- b) Question 4 is worth 20 points. 20 points
- c) Dobbins v. Skyways 10 points

50 points

2. This examination is designed for two hours. However, you may have two and one-half hours to answer it. "The additional time is to permit better organization, more careful thinking and neater handwriting. (No credit is given for illegible answers.) The questions will be graded on the quality of analysis, thought and conclusions, not on the number of words.

3. Read the questions carefully. Particularly note whether you are to be a judge, advocate, adviser or dispassionate scholar.

4. The multiple choice questions are to be answered on the scantron. Failure to `return` the multiple choice questions will result in failure in the course.

5. You may use the Supplement and three pages of notes to complete this examination.

6. You must take this examination in Room 328, the official typing room, or the official smoking room, but in no other location.

7. In answering the essay questions:

a) You may answer the questions in any order you wish.

b) Begin the answer to each question on a new page of the bluebook.

c) Write on each line, but only on one side of the page. (The other page may be used for corrections and belated additions to your answer.)

d) on the front of each bluebook, put the number of each question answered within.

8. Turn your bluebooks, multiple choice questions, scantrons, pencils and qualification sheet in to Room 328 by 4:30 p.m.

9. Your grade on the essay questions is based upon the context of your answers and the manner in which you communicate your knowledge. Grades may be lowered for essays that so violate fundamental rules of grammar and style that the reader's ability to comprehend the content is impaired.

10. You may keep the essay questions.

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In August 1989 plaintiff Peter Potter, a resident of Ozark, Arkansas, was injured when a weedeater exploded as he was trimming grass in his back yard. The only witness to the accident was John Taylor who moved to Atlanta, Georgia in September 1989. The action, which was filed in federal court in Fort Smith in January 1990, under diversity jurisdiction, is against the Montana corporation that manufactured the weedeater.

Each of the following petitions, motions or requests is directed to the federal judge in Fort Smith. Each petition is properly brought and is properly opposed by the other side.

You are the federal judge in Fort Smith. You are to rule on each petition with a "for plaintiff" or "for defendant" followed by no more than two sentences of explanation. In ruling you should not assume any unique or unusual facts.

- A) Two months before filing the action, the plaintiff files a petition to take the deposition of John Taylor. Defendant objects.
- B) Six weeks after filing the action, the plaintiff notifies the defendant's weed-eater engineer to come to Fort Smith for a deposition. Defendant moves for a protective order.
- C) The defendant requests that you issue a subpoena to be mailed to John Taylor directing him to appear for a deposition in Atlanta. Plaintiff objects.
- D) Plaintiff's expert witness, who will testify at trial, is Karen Lynch of Austin, Texas. After discovery of her name through interrogatories, defendant notifies plaintiff's attorney to produce her at a deposition in Austin. Plaintiff objects to the notice.
- E) Defendant requests plaintiff to produce his homeowner's liability insurance policy. Plaintiff objects.
- F) Plaintiff asks defendant to admit in writing, for the purpose of this litigation, that you "are doing business in Arkansas". Defendant objects to the propriety of such a request for admission.
- G) The plaintiff requests documents. The defendant responds in a timely fashion by providing some and objecting to the remainder. Plaintiff petitions the court for appropriate sanctions, including the establishment of certain facts. Defendant objects.
- H) A former employee of the defendant now lives in Memphis, Tennessee. Plaintiff wishes to have a subpoena issued by the clerk in Fort Smith to compel him to be a witness at the trial. Defendant objects to the issuance of the subpoena.
- I) At trial plaintiff wishes to use the deposition of John Taylor instead of his live testimony. Defendant objects because of the crucial importance of Taylor's testimony.
- J) At the deposition of Karen Lynch, the defendant did not object to her qualifications as an expert. At trial she does not testify, but the plaintiff offers her deposition. The defendant objects and wishes to bar her entire deposition on the ground that, as a matter of law, a 22 year old person with a B.S. in engineering is not competent to testify as an "expert".

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2. Patricia filed an action alleging negligence against Ernie, an employee of Speedy Messenger Service, in a state court of general jurisdiction seeking only to recover \$3,500 in property damage resulting from an automobile accident that occurred in the course and scope of Ernie's employment. Ernie filed an answer denying his negligence. The jury returned a verdict for Ernie, finding no negligence. The court entered judgment in favor of Ernie.

Patricia subsequently brought an action against Speedy in the same state court seeking damages in the amount of \$25,000 for personal injuries arising out of the same accident. The complaint alleged that Ernie was negligent and that Speedy was liable under the doctrine of respondeat superior. Speedy answered and denied the allegations of the complaint, pleading as an affirmative defense the earlier judgment in favor of Ernie, and filed a motion for summary judgment. With this motion, Speedy filed an affidavit stating the facts of the earlier case, and attached a certified copy of the pleadings and findings.

How should the court rule on Speedy's motion for summary judgment? Does res judicata apply? Does collateral estoppel apply?

Note: This question comes from the February 1989 Arkansas Bar Examination. However, this fact pattern is set in a mythical state court of general jurisdiction.

3. Pearl had a homeowner's insurance policy with the Western Insurance Company. Pearl lives on University Drive in Wichita, Kansas, a fairly busy street. Pearl brought an action against Western, a Missouri Company, in the United States District Court to recover the value of her twelve karat diamond ring which was allegedly stolen from her. Defendant denied all the material allegations of the complaint.

At the trial, Pearl testified that on May 1, 1990, she heard a knock on the door at 12:00 noon. When she opened the door she saw a masked man standing with a gun pointed at her stomach. The masked man demanded that she open the wall safe, and give him all the jewelry contained therein. She did so, and the jewelry was given to the masked man. It consisted of the 12-karat ring, several necklaces and bracelets, and several strands of pearls. The 12-karat ring was valued at \$75,000; the remaining items at a total of \$10,000. Pearl also testified that about a week later she received a package in the mail which contained all items except the ring. She produced the wrapper which had a typewritten address label, and a local Wichita, Kansas postmark.

Defendant introduced the testimony of several of Pearl's friends who said that about three weeks before the alleged robbery Pearl had been complaining about losing her diamond ring. On cross examination, each of these witnesses testified that Pearl had told them after the robbery that she found the ring a week after she lost it. Defendant also produced traffic volume figures which showed substantial traffic on University Drive at noon, that about one car passed Pearl's door every five seconds, and evidence that Pearl's door was "completely in the open" and only ten feet from the sidewalk. Defendant also produced a local realtor who testified that Pearl's house was the cheapest on the block, that other neighbors were known to keep substantial amounts of valuables in their houses, and that there had been no robbery in the area for the past year. Defendant moved for a directed verdict, which was denied.

Following the summations, the Trial Judge charged the jury correctly concerning the applicable legal principles. He concluded his charge as follows

I want to emphasize that my comments are for your guidance; any decision must be solely your own. In this case, I believe that it is important for you to carefully consider your decision. Personally, I have grave doubts whether plaintiff has told the truth. Things just don't happen that way in the real world. Accordingly, you should pay careful attention to her testimony since, if you bring in a verdict for the defendant, it is my intention to bring this matter to

the attention of the United States attorney for this District with a view to prosecuting the plaintiff for perjury.

Both parties objected to this charge, and demanded a mistrial. The plaintiff's attorney was concerned about the judge giving his strong opinion, and the defense attorney was troubled because the hint of "perjury" might create sympathy for the plaintiff. The judge denied both motions.

After about two hours of unsuccessful deliberations, the jury was sent home for the evening. The next day, Juror No. 7 walked into the jury room with a portable television set, and proceeded to set it up and watch. He said that he was tired of deliberating, had already made up his mind, and thought he would spend the time "doing something useful." As it so happened, he turned on a movie entitled "The Jewel Thief" which told of a daring daylight jewel thief who robbed persons, took all their jewelry, furs, Art objects, and other valuables, kept only the most valuable, and returned the remainder. The movie ended at 11:00 a.m.; at 3:00 p.m. the jury brought in its verdict for plaintiff.

Within the proper time, defendant moved (1) for judgment nov; and (2) for a new trial on the grounds of (a) the faulty charge and (b) misconduct of the jury - submitted together with the affidavit of juror No. 12 describing the television incident.

You represent the plaintiff Pearl. You are to make the best argument you can to the trial judge that (1) the judgment NOV should not be granted and (2) a new trial should not be granted.

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