

Spring 1993 Final Exam (Civil Procedure B)

FINAL EXAMINATION
Civil Procedure B
Spring 1993
Mr. Brill

1. a) Question 1 is worth 10 points. Answer it. 10 points
- b) Questions 2, 3 and 4 are worth 20 points.
- Answer 2 of them. 40 points
- c) The multiple choice questions are worth 30. 30 points
- d) Sherwood v. Douglas 20 points

100 points

2. This examination is designed for three and one-half hours. However, you may have four 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 ten pages of written materials to complete this examination.
6. You must take this examination in Room 328 or Room 326, 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 sheets in at Room 328 by 12:30 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.

During a Mardi Gras fling, Al Arkie purchased a cup of "jumbo gumbo shrimp" at Louisiana Louie's sidewalk cafe in New Orleans. Delighted with the Cajun cooking, Al purchased a giant container of the shrimp, Louis packed them in dry ice and Al took them home to Pine Bluff, Arkansas.

During a party in Pine Bluff, Al served the shrimp to his family and friends. Al suffered a severe attack of food poisoning, was hospitalized, and missed two weeks of work.

Al brought an action in Arkansas state court, seeking \$55,000 in damages from Louisiana Louie's. Louie removed the action to federal district court. Louie filed a third party action against Texas Gulf Shrimp, Inc. (-TGS), a corporation located in Beaumont, Texas, but incorporated in Arkansas, seeking indemnity in the amount of \$55,000. Louie had purchased the shrimp from TGS.

Now that Al Arkie is aware of the supplier of the shrimp, Al amends his complaint to assert a count directly against TGS for \$55,000 under Rule 14. TGS files a Rule 12(b)(1) motion to dismiss, relying on *Kroger v. Owen Equipment Co.* and arguing a lack of diversity between Al Arkie and TGS.

You represent Al Arkie. Make the best argument you can to defeat TGS's motion. Be imaginative.

2. The following article (slightly edited) appeared in the *Arkansas Democrat-Gazette*:

PRIVACY LAWSUIT

Susan Cromwell of Jonesboro, Arkansas has filed suit in federal district court in Memphis on behalf of 100,000 female customers of Goldblatt's Department Store. It was recently revealed that from 1988 to 1991 Goldblatt's used closed circuit television, still cameras and other devices to observe activities in dressing rooms in the women's clothing section in an attempt to discourage shoplifting. The lawsuit seeks \$55,000 per customer for invasion of privacy.

You represent the Defendant Goldblatt's, a Tennessee corporation. The plaintiff has filed a motion for class certification. You are standing in front of the federal judge. You are to make the best argument you can in opposition to class certification. (Be logical, thorough, organized, comprehensive, imaginative).

3. Whole Hog Meats, Inc., a meatpacking company, sued Cold Storage, Inc., a warehouse company, for damages after a fire swept through the Cold Storage warehouse, completely destroying 5,000 Whole Hog Christmas hams. The suit was brought in federal district court, with jurisdiction based on diversity, and a jury trial was held. Whole Hog offered proof that it had stored the hams with Cold Storage and that they had a wholesale value of \$50,000. Whole Hog produced experts who gave their opinion, based on inspection of the premises after the fire and of an adjoining warehouse owned and operated by Cold Storage and built at the same time, that the fire was caused by faulty wiring.

On cross examination, the experts admitted that the cause of the fire would never be known with certainty, but, as one expert put it, "Fires don't just start themselves. Poor wiring is the most logical explanation of this fire." At the close of Whole Hog's case, Cold Storage moved for a directed verdict, which was denied.

Cold Storage called three witnesses. One was its electrician and maintenance man who testified that he had inspected the wiring in the warehouse the day before the fire and had found no problems. The second was a night watchman who testified that on the night of the fire he had chased some teenagers out of the parking lot behind the warehouse, where they had been drinking beer. He further testified that one of the teenagers had yelled at him, "We'll get you, you old man." The third witness was Cold Storage's President who testified that he had no idea what had caused the fire. At the close of the evidence, Cold Storage moved again for a directed verdict, which was denied. The court then instructed the jury, without objection, that "the burden, in this case Whole Hog, must prove by a preponderance of evidence that any loss was the fault of the warehouseman, in this case Cold Storage."

The jury returned a general verdict for Whole Hog in the amount of \$25,000. The judge had also submitted three special interrogatories to the jury, and the jury answered them as follows: (1) Did Whole Hog have goods stored with Cold Storage, and, if so, what was their value when stored? "Yes. \$50,000"; (2) If Whole Hog had goods stored with Cold Storage, what was their value after the fire? "None; totally destroyed"; (3) What was the cause of this fire? "Faulty wiring, most likely."

Whole Hog promptly requested the court to enter judgment for it in the amount of \$50,000, or, in the alternative, for a new trial. Cold Storage moved for entry of judgment JNOV or, in the alternative, for a new trial. The trial court entered JNOV for Cold Storage and conditionally granted its motion for a new trial, stating that "the evidence offered in support of liability was insufficient as a matter of law

to sustain a verdict for plaintiff; the jury's own verdict attests to its inability to find the true cause of this fire."

The case is now on appeal. Whole Hog's attorney has argued that (1) the trial court gave erroneous jury instructions and improperly placed the burden of proof on Whole Hog because, under applicable state law, when a bailor proves delivery of goods in sound condition and the failure of a bailee to `return` them in good condition, the burden shifts to the bailee to prove his own due care; and (2) the trial court erroneously denied Whole Hog's post-trial motion for a judgment in the amount of \$50,000; and (3) the trial court erroneously granted the JNOV for Cold Storage. How should the court of appeals rule? Why? Discuss, making sure to consider arguments for both sides.

4. In August 1992 plaintiff Peter Potter, a resident of Fort Smith, 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 lives and works in Henryetta, Oklahoma, 50 miles from Fort Smith. The action, which was filed in federal district court for the Western District of Arkansas in January 1993, under diversity jurisdiction, is against the Kansas 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 weedeater engineer to come to Fort Smith for a deposition. Defendant moves for a protective order.
- C) The defendant requests that the judge issue a subpoena to be mailed to John Taylor directing him to appear for an oral deposition in Henryetta. 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, which reimburses plaintiff for claims against him. 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 and works in the Eastern District of Arkansas, 300 miles from Fort Smith. 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, she is not competent to testify as an "expert". The plaintiff claims the defendant has waived the objection.