

WASHINGTON UNIVERSITY SCHOOL OF LAW

FINAL EXAMINATION
IN
CIVIL PROCEDURE

(§§ 1, 4)

Dean Levin
CLOSED BOOK - Special Instructions

Three Hours
Friday, April 23, 1993

INSTRUCTIONS:

1. The examination is closed book, except that you are permitted and expected to bring your Civil Procedure supplement to the exam. Any writing in the supplement must be brief and must pertain directly to the statutes, rules, or cases reprinted where the writing appears. Violations of this restriction are enforceable under the Honor Code.

2. The examination consists of four essay questions. Suggested time allocations accompany each question. I strongly advise you to devote adequate time to thinking about and organizing each of your answers. Although no single exam-taking strategy is necessarily right for everyone, I feel that most students will benefit from spending at least half of the allotted time planning their answers before beginning to write.

3. Each question tells you explicitly what issues to address, and you should adhere to those limits. You will not receive credit for analyzing issues that you think the parties could have raised, but that you have not been asked to discuss.

4. Each question will be graded separately. Do not make cross-references to prior answers.

5. In the interest of saving a few trees, I do not require you to begin a new bluebook for each separate question.

Note to Post-1993 Civil Procedure students:

This is a modified version of the 1993 exam. A few editorial changes have been made to update the problems and to eliminate drafting errors and inadvertent ambiguities in the facts. One essay question has been omitted because it may be used on a future exam.

EXAMINATION BEGINS ON NEXT PAGE

QUESTION I
(65 minutes)

Alf Nobel, who lives in a walk-up flat in New York City and works in New Jersey, is the principal salesman for Boom, Inc., a Delaware corporation engaged in the manufacture and sale of sparklers and other firecrackers. Boom's manufacturing and retail sales facilities are located in the southern part of New Jersey near Atlantic City, within a few miles of the Pennsylvania border. In an effort to expand the company's market, Nobel made several trips to Pennsylvania during the first six months of 1992 in an effort to interest Pennsylvania stores in selling Boom sparklers to the general public. Unfortunately, those trips were totally unsuccessful.

On July 1, 1992, two students at Academy Law School, in Brooklyn, New York, went on vacation. They were Oscar, who is from Las Vegas, Nevada, where he was a blackjack dealer, and Tony, who has come to law school after several years as a rock music record producer in Los Angeles, California. They stayed at a motel in Chester, Pennsylvania, within a few miles of the New Jersey border. For the past two years the two have shared an apartment in Brooklyn near the law school; for the past two summers they have had jobs at prominent New York City law firms.

On July 2, 1992, Oscar drove into New Jersey to gamble at Harrah's in Atlantic City, and while there he purchased some sparklers from Boom, Inc. The sparklers were sold to him by Nobel himself, who assured Oscar that they were "the safest ever made."

On July 4, 1992, Oscar and Tony drove to a picnic site in Chester to celebrate the holiday with a cookout. After the meal, Oscar attempted to light a sparkler, which exploded in his hand, causing severe injury to him and to Tony, who was standing nearby.

Oscar and Tony sought legal advice when they returned to finish their third year of law school in late August. Their attorney, a very recent Academy graduate, discovered that earlier that month Nobel had been successful in making his first sale in Pennsylvania. Noxious Novelties, Inc., a novelty store in Philadelphia, had taken \$40,000 worth of Boom sparklers on consignment to see whether they might sell.

On December 15, 1992, Oscar and Tony joined together and commenced an action in the federal district court for the Eastern District of Pennsylvania against Nobel and against Boom, Inc., each plaintiff seeking \$80,000 from each defendant on the grounds of negligence, breach of implied warranty of fitness, and misrepresentation. A copy of the summons and complaint was sent, with a request for waiver of service of process, to Boom by first class mail delivered to the New Jersey headquarters, with the requisite waiver form enclosed. Nobel was served personally in Philadelphia when he came into the state to attend a Philadelphia Eagles football game. Assume that the Pennsylvania jurisdiction statute is the same as the New York Civil Practice Law and Rules provision that is set out in the jurisdictional statutes section of your Civil Procedure Supplement]. In addition, to "hedge their bets," Oscar and Tony obtained a writ of attachment and, after proper notice to defendants, seized the sparklers being held in Philadelphia by Noxious Novelties on consignment.

Pennsylvania has a two year statute of limitations for tort actions. It also recently enacted a statute prohibiting the initial institution of personal injury actions in the Pennsylvania courts and requiring all personal injury claimants to present their claims to a Mediation and Reconciliation Panel within one year of the date of the injury. According to the statute, if the Panel does not achieve a settlement among the parties, it issues a recommendation as to whether there is liability and, if so, the amount of damages. The plaintiff then has an option of accepting the Panel's recommendation or instituting a lawsuit. But, if the plaintiff fails to establish liability or succeeds on the liability issue but fails to recover more than the amount recommended by the Panel, the plaintiff will be taxed the full costs of the litigation, including attorneys' fees.

This morning Nobel and Boom, Inc. have come to the Law Offices of Emmy O. Ward for advice on how best to defend this action. Ward asks you, her associate, for a memorandum discussing what pretrial motions might be made, which are likely to be successful, and why.

QUESTION II
(50 minutes)

Leila Wrestler ran a sporting-goods company in Virginia. The company was successful for decades, but in the early 1980's started losing money badly. Fearing that if the trend continued she would be unable to meet all of her obligations, Wrestler consulted Richard Lassitude, a Washington, D.C., lawyer who specializes in bankruptcy. Lassitude recommended that Wrestler file for bankruptcy under Chapter 11, in order to reorganize the business. Thereafter Wrestler, with Lassitude as her lawyer, filed for bankruptcy in the United States District Court for the Eastern District of Virginia. Pursuant to the Bankruptcy Code, the district court appointed Mike Grainfield as a trustee to oversee the reorganization. Grainfield's function was to insure that the interests of Wrestler's creditors would be adequately protected during the reorganization.

Three months later, Grainfield approached Wrestler with the following proposal: Given that the business was continuing to decline, Grainfield would agree to take over the company. Wrestler would sign over her stock to Grainfield, and in return she would be relieved of her obligations to the creditors. Wrestler consulted Lassitude, who advised her to accept the offer. Thereafter, Wrestler agreed, Lassitude prepared the paperwork, and the exchange was consummated. Six months later, business began to pick up dramatically in the sporting-goods company. The following month, Grainfield sold the business to a consortium. All proceeds were distributed to Wrestler's creditors, although the amount of these proceeds was considerably more than Wrestler had owed originally.

In 1991, Wrestler, with the help of her new lawyer Dave Bicker, brought suit against Grainfield in the Virginia federal court. The complaint alleged that Grainfield had breached his fiduciary duty and defrauded her into selling her interest in the company. Specifically, Wrestler asserted that she did not understand that she would not receive any proceeds from the sale of the company over and above the amount necessary to pay off her creditors. The complaint prayed

for damages in the amount of the difference between the sale price and the amount owed to creditors. Grainfield filed an answer denying liability and moved for summary judgment.

The summary judgment motion was based on the following grounds: (1) Under the governing statutes and precedents, Wrestler was precluded from recovery as a matter of law because a reasonable person reading the plain language of the transfer agreement would have understood that she would not receive any proceeds from a subsequent transfer; (2) plaintiff in fact knew that she would receive no proceeds from the transfer. In support of this motion, Grainfield submitted the transfer agreement and two affidavits: (i) an affidavit by Dan Cheating, a noted bankruptcy specialist, stating that in cases such as this the plaintiff's understanding is to be determined by an objective standard; and (ii) an affidavit from Grainfield stating that he had told Wrestler, prior to the signing of the documents, that she would not receive anything in the event of a future sale.

Wrestler's response to Grainfield's motion was threefold. First, she pointed to the allegation in her pleading that she did not understand the documents transferring her stock to mean that she would receive nothing in the event of a future sale. Second, Wrestler submitted an affidavit stating that Lassitude had told her that she would be eligible to share in the proceeds of a future sale. Finally, she submitted an affidavit by Barry Schemer, another bankruptcy expert, asserting that it is the plaintiff's subjective understanding that is relevant, rather than whether a reasonable person in the plaintiff's position would have understood the documents. Both sides agreed to forego further discovery pending resolution of the defendant's motion.

A. In your role as law clerk to the judge, please write a memorandum discussing what issues the judge should consider in ruling on Grainfield's motion, and how they should be resolved.

Now assume, for purposes of the remainder of the question, that Grainfield's motion for summary judgment was granted, with the court issuing the following opinion:

Based on the affidavits submitted to this court, I find that the plaintiff understood the transfer documents. She cannot dispute this issue simply through a contrary allegation in her pleadings; nor may she dress up such an allegation by designating it as an affidavit. In any event, the plaintiff has the burden of proving that a reasonable person would have misunderstood the meaning of the transfer documents, and it is clear that she cannot succeed under this objective test. Summary judgment is therefore appropriate.

Wrestler did not appeal this judgment. Instead, in 1992 Wrestler brought a new lawsuit against Lassitude in the federal district court in Virginia, under diversity jurisdiction. She alleged that Lassitude was guilty of legal malpractice. The gist of her claim was that, because of Lassitude's failure to give adequate advice, she had sold her business in the belief that she could expect to receive any proceeds from a future sale that exceeded the amount owed to creditors. She stated that she therefore had never received the quality of services for which she had bargained, and she asked for a refund of all fees she had paid to Lassitude during his representation of her. She demanded a jury trial.

B. In the present lawsuit, will Lassitude be able to rely on anything decided in the prior litigation? Why or why not?

C. Assuming that Wrestler can proceed with the present lawsuit, is she entitled to jury trial on the claim she is raising?

QUESTION III
(40 minutes)

[[This question has been deleted because it may be used on a future exam.](#)]

QUESTION IV
(25 minutes)

Jughead is an attorney who represents Betty, widow and executor of the late Archie Andrews. She has brought an action in a federal district court action, alleging negligence arising out of an automobile accident at a highway intersection in the forum state. The intersection contained a stop sign at all access roads. Archie died in the accident. Moose, a passenger in the car Archie was driving, spoke with Betty a few days after the accident, before she had consulted Jughead (or any other lawyer). In this conversation, Moose stated that Archie had not come to a full stop before entering the intersection.

Moose too has since died, from causes unrelated to the accident, and no other witnesses who claim to have seen Archie enter the intersection have surfaced. Betty has no reason to doubt the correctness of Moose's statement. Reggie, the defendant in the action, has alleged contributory negligence as a defense (assume that this is a jurisdiction in which contributory negligence is a complete bar to the action).

(A) Reggie has submitted the following interrogatory to Betty:

If you have information about whether or not Archie came to a full stop before entering the intersection where the accident in suit occurred, please state: (a) the substance of that information, and (b) your position as to whether or not Archie came to a full stop at that time.

What should be Betty's response to this interrogatory?

(B) Assume that Moose's statement in the above case was not made to Betty but was made to Jughead in an interview prior to the institution of the action. Would your answer to Question (A) be different? Explain.

END OF EXAMINATION