

**INSTRUCTIONS**

1. This examination consists of THREE fact patterns. The first two fact patterns are followed by a series of short answer questions. The third fact pattern is followed by two long essay questions. The total points for the questions related to each fact pattern are as follows:  
FACT PATTERN 1 – TOTAL POINTS 20  
FACT PATTERN 2 – TOTAL POINTS 40  
FACT PATTERN 3 – TOTAL POINTS 60.
2. Write your answer only in the space provided.
3. Presume that all the questions are set in FEDERAL COURT unless you are expressly told otherwise. Presume that subject matter jurisdiction, personal jurisdiction and venue are proper unless you are expressly told otherwise.
4. You have 2 ½ hours to complete the examination.

**GOOD LUCK !**

**QUESTIONS**

**[IN EACH OF THE SHORT ANSWER QUESTIONS CITE TO THE RELEVANT RULE OR RULES IN THE SPACE PROVIDED, THEN EXPLAIN HOW THE RULE APPLIES. IT IS ADVISABLE TO REVIEW ALL THE QUESTIONS FOLLOWING A FACT PATTERN BEFORE ANSWERING. POINTS WILL NOT BE GIVEN FOR THE “RIGHT ANSWER” IF IT IS PROVIDED IN RESPONSE TO THE “WRONG ANSWER.”]**

**FACT PATTERN 1 – TOTAL POINTS 20**

Plaintiff Paul, a pianist, filed suit for \$60 million dollars in federal court for the injury to his fingers allegedly caused by defendant Dr. David's negligence during surgery. After a grueling 30-day trial the jury announces its verdict on March 15, 1994. It awards plaintiff Paul \$2 million dollars.

Defendant David's lawyer is your old friend Barney, Esq. Barney had made a motion for judgment as a matter of law at the close of all evidence (directed verdict motion). Barney believes this motion is very strong because plaintiff Paul failed to put on any proof of proximate cause (an essential element on which a plaintiff bears the

burden of proof by a preponderance of the evidence). The trial court however, denied this motion.

Barney erroneously believes that his motion for judgment as a matter of law prior to verdict (directed verdict motion) automatically renews itself after the verdict. Barney therefore leaves the country immediately after the verdict is announced. Three weeks later, after a well earned rest in the Bahamas, Barney returns and calls the court to see if it has granted judgment in favor of his client, defendant David, yet! To Barney's dismay the court informs him that it entered judgment on the verdict in favor of plaintiff Paul on April 1, 1994. Barney calls you desperate for help. It is now April 15, 1994. How would you advise him on the following proposals:

A: Barney's first idea is to file a motion for new trial or a motion for judgment as a matter of law post verdict (JNOV motion). Can he?

Rule(s)\_\_\_\_\_

B: Would your answer to the above question change if plaintiff Paul agrees to an extension of time for the filing of such a motion?

Rule(s)\_\_\_\_\_

C: The second option Barney asks your advice on, is to instead file a motion to set aside the judgment arguing that his mistake as to the need to renew his motion for judgment as a matter of law after the verdict was excusable neglect. Would such a motion be likely to succeed?

Rule(s)\_\_\_\_\_

D: When would the above motion to set aside the judgment be due?

Rule(s)\_\_\_\_\_

E: Presume that Barney had not gone to the Bahamas, but instead had remained and in a proper and timely manner had filed a motion for judgment as a matter of law post verdict (JNOV motion). Should the Court grant the motion?

Rule(s)\_\_\_\_\_

### **FACT PATTERN 2 – TOTAL POINTS 40**

Plaintiff Pam files suit in federal court against defendant Dick seeking to recover \$500,000 in damages. The complaint alleges, with particularity, that Dick, a garage mechanic, negligently repaired the brakes on Pam's car, causing them to fail and causing Pam to collide with a tree when she attempted to brake. Pam claims that she was injured in the leg and the back and suffers continuing pain from both.

In the course of litigation the discovery listed below is propounded. Discuss which, if any, should be allowed under the Rules. PRESUME THAT THE OLD RULES

[that is those in effect prior to December 1, 1993] ARE IN EFFECT, UNLESS YOU ARE SPECIFICALLY INSTRUCTED TO APPLY THE NEW RULES.

- A: Defendant Dick propounds the following to plaintiff Pam:
- i. an interrogatory asking the identity of all eye witnesses of the accident
  - ii. a request for production of documents, requesting the notes from any meeting with any such eye witnesses

In response Pam objects and refuses to provide any information or documents. There are two eye witnesses to the accident – Ellen and Sue – both local residents. It was Pam’s attorney Fred who discovered their identity during his investigation after being retained. The only documents responsive to the request are Fred’s own notes in Fred’s file at his firm. These notes were made by Fred when he met with the two eye witnesses Sue and Ellen. After a few sentences describing the accident scene, the notes describe Fred's impression of these eye witnesses and discuss how he would utilize their testimony if the case ever goes to trial. Should the discovery be allowed?

Rule(s)\_\_\_\_\_

B: Presume that the NEW RULES are in effect. What, if anything, would change?  
New Rule(s)\_\_\_\_\_

C: Plaintiff Pam hires an expert, Mr. Carman, to testify at trial that Defendant Dick was negligent in repairing the brakes. Defendant Dick suspects that Pam will use an expert and therefore serves a notice to take the deposition of “any expert retained by you [Pam] to testify at trial.” Should the deposition be permitted? If not, what should Dick do?

Rule(s)\_\_\_\_\_

D: Presume that the NEW RULES are in effect. What, if anything, would change?  
New Rule(s)\_\_\_\_\_

E: On April 1, 1994 Plaintiff Pam notices the deposition of defendant Dick for April 15, 1994 at the offices of her attorney. On the morning of the 14<sup>th</sup>, Dick’s lawyer calls and tells Pam’s lawyer that Dick will not show up because Dick is very busy. Plaintiff Pam’s lawyer insists that the deposition go forward as scheduled, but on the 15<sup>th</sup> Dick fails to show up. What are Plaintiff Pam’s lawyer’s options?

Rule(s)\_\_\_\_\_

F: Presume that the parties’ discovery problems are resolved and that the case is scheduled to go to a jury trial, as demanded in a timely manner by plaintiff Pam. During jury selection defendant Dick uses all three of his peremptory challenges to strike women jurors. After questioning by the Court, Dick admits that the sole reason for striking the jurors was their sex. What, if any, constitutional provision does this violate?

Constitutional Provision(s)\_\_\_\_\_

### **FACT PATTERN 3 – TOTAL POINTS 60**

**Review both questions before you start to answer.**

Mrs. Carter, a Florida resident, sued an asbestos company, ABC, in federal court in New Jersey for \$4 million asserting that its products had caused the death of her husband. The sole basis for federal jurisdiction is diversity. Her husband was exposed to asbestos while working in a New Jersey shipyard, but retired to Florida for the last five years of his life.

ABC moves for summary judgment in its favor pursuant to Rule 56 arguing that plaintiff Carter cannot show that ABC was negligent.

You are a law clerk for the federal judge assigned the case. The judge asks you to research what law she should apply. Your research reveals the following: New Jersey has a wrongful death statute which requires a plaintiff to prove that :

- i. a spouse, parent or child has suffered death:
- ii. that the defendant's product was the proximate cause of that death:  
and
- iii. that the defendant's product was designed, manufactured or produced in a negligent manner.

Florida law is exactly the same except that element iii requires proof of "gross negligence." In contrast, the federal court itself has developed a practice in asbestos cases which requires a plaintiff to prove only elements i and ii, and requires no proof of negligence (i.e. a strict liability standard).

Your research also reveals that New Jersey's conflict of law rules would require a New Jersey state court to apply the law of the state in which the plaintiff currently resides.

A: What law should the federal court apply (Florida, New Jersey or federal law) in deciding the merits of the motion?

B: The second issue the judge asks you to research is the standard that the Court should apply in considering the summary judgment motion. Rule 10 of the New Jersey Rules of Civil Procedure provides:

A motion for summary judgment shall be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no issue as to any fact, material or otherwise, and that the moving party is entitled to a judgment as a matter of law.

Should the federal court apply this standard or the standard set out in Rule 56c of the Federal Rules of Civil Procedure? [For the purposes of this question you may ignore Florida law: only consider if the Court should apply New Jersey or Federal law]

**THE END.**

**HAVE A GREAT SUMMER AND**

**STAY IN TOUCH!**