

DO NOT TURN THE PAGE UNTIL INSTRUCTED TO DO SO

INSTRUCTIONS

1. You may have with you the 1993 Civil Procedure Supplement to Cound, Friedenthal, Miller and Sexton, your casebook (Cound, Friedenthal etc.), any course handouts, and any class notes or outlines which you have prepared. You may not have Glannon, commercial outlines, or other sources. If you have any such items, please stack them in the front of the room.

2. This is a three-hour exam. Answer all sub-parts of questions 1 through 4. On question 5, answer either sub-part A or sub-part B. After each question, I have written a recommended time allotment. Of course, you may deviate from this recommendation. However, the recommended time allotment reflects the approximate weight accorded to the question.

3. I recommend that you devote approximately one-third of your time on each essay question to thinking about and/or outlining your answer. This will assure organization, clarity, and completeness, all of which will be recognized in your favor. Rambling discussions of irrelevant material may count against you, they certainly will not help. Turn in only your final answer, not any notes or outlines made in thinking about a question.

4. Write legibly. You may wish to print. While I will make every effort to read your writing, if I cannot make out what you are trying to say you will lose points. I suggest that you skip every other line.

5. This exam consists of 6 pages, including this page. Please be certain that you have the entire exam before starting work.

6. Unless otherwise specified, assume for each question that the current Federal Rules of Civil Procedure are in effect and that the district in which events take place has not opted out of any provision of the Federal Rules.

7. BE SURE TO PLACE YOUR EXAM ID NUMBER ON ALL BLUE BOOKS, AND TO NUMBER AND TURN IN ALL BLUE BOOKS YOU USE.

THIS EXAM IS GIVEN PURSUANT TO THE
CAPITAL UNIVERSITY LAW SCHOOL HONOR CODE.

QUESTION 1. Short Answer (30 Minutes)

Answer all subparts (A through E) to this question, giving a very brief explanation for your answer. Your explanation should be no more than one or two sentences.

Example: Smith sues Jones. Smith's key witness is Brown, who "saw everything" from a position some 100 feet away. Can Jones require Brown to submit to an eye examination?

Sample Answer: No. Rule 35, which provides for physical and mental examinations, applies only to parties. As Brown is not a party, he cannot be forced to undergo an eye exam.

A. Hector and Achilles collided in their automobiles. Hector sued Achilles, alleging negligence. Achilles denied liability. Must Achilles disclose to Hector that he has a liability insurance policy that would be available to pay a judgment?

B. Menelaus sued Paris, alleging intentional infliction of emotional distress. Paris denied causation. Paris served Menelaus with an interrogatory asking if Menelaus had sought psychiatric treatment at any time in the five years prior to the events underlying the lawsuit. Assume that the interrogatory is properly drafted (i.e. there is no question of vagueness or ambiguity, and it does not exceed the allowable number of interrogatories). Is Menelaus obligated to answer?

C. Athena sued Manufacturer for strict liability in tort for a defective product. She then served interrogatories on Manufacturer and Retail Store, which sold her the product. Retail store was not named as a defendant. Store's management does not want to answer. May Store properly refuse to answer the interrogatories?

D. Zeus was injured when struck by a delivery truck owned by the Acme Co. Two months after the accident, an attorney for Acme, anticipating a possible lawsuit by Zeus, took a statement from Apollo, an eyewitness. During discovery, Zeus seeks production of Apollo's statement from Acme pursuant to FRCP 34. Is Acme obligated to produce the statement?

E. Hades was operating a backhoe when it apparently flipped and crushed her. Mr. Hades, the surviving spouse, sued the manufacturer of the backhoe, The Quality Digger Company, alleging defective product design. Hades served interrogatories requesting information about similar accidents involving Quality Digger backhoes, both before and after his wife's death. Quality Digger provided information on accidents before Ms. Hades death, but refused to provide information on accidents occurring after her death. If Mr. Hades moves to compel Quality Digger to answer regarding later accidents, should he prevail on his motion?

QUESTION 2: Short Answer (30 Minutes)

Answer all subparts, (A through E), giving a brief (1 to 2 sentence) explanation for your answer, as in question 1.

Out for a few cheap laughs, Dan threw a lighted firecracker in the Center City Mall. The firecracker landed near Brian, who picked it up and threw it to Carol, who threw it to Peggy. Before Peggy could throw it, it blew up, causing serious injuries to Peggy. Peggy decided to sue in federal court. Assume that there are no jurisdictional problems in any of the problems below.

- A. Can Peggy sue Brian, Carol, and Dan as a defendant class under Rule 237?
- B. If Peggy is unsure about which of the three is legally responsible for her injuries, may she properly join Brian, Carol, and Dan in the same suit?
- C. If Peggy sues only Dan, and Dan believes that Brian and Carol should share in legal responsibility for Peggy's injuries, may Dan properly implead Brian and Carol?
- D. If Peggy sues Dan, Brian and Carol, may Brian properly file a claim against Dan for burns suffered in picking up the firecracker and throwing it to Carol?
- E. If Peggy sues only Dan, and Brian believes he also has a suit against Dan, may Brian intervene as a matter of right in Peggy's action, in order to assert his claim against Dan?

QUESTION 3. (30 Minutes)

The Acme Company bought two industrial pumps from Pump-Rite Industries. The pumps were identical in design and manufacture and purchased at the same time. Some time later, the first pump exploded. Acme sued Pump-Rite, with claims for strict liability, breach of warranty, and design negligence. Acme requested both compensatory and punitive damages. Under the applicable law, punitive damages are available only on the negligence claim.

Before answering, Pump-Rite filed a 12(b)(6) motion on the grounds that state law does not recognize strict liability. This motion was granted by the trial judge.

Pump-Rite then filed an answer, denying all remaining allegations. As affirmative defenses, Pump-Rite asserted contributory negligence (a complete defense under the applicable state law) on the negligence claim, and also alleged that the negligence claim was barred by the applicable statute of limitations.

At the close of discovery, Pump-Rite moved for summary judgment on the statute of limitations defense, but this was denied by the judge. After a three-week trial, the jury returned a general verdict for Plaintiff Acme and awarded compensatory and punitive damages. One month later, the second pump exploded, and Acme sued Pump-Rite once again. In fact, Acme's lawyers simply changed the dates on the first complaint, and filed it as Acme's complaint in the second lawsuit.

Acme has moved for partial summary judgment on the grounds that collateral estoppel precludes Pump-Rite from relitigating (1) the issue of Pump-Rite's design negligence, (2) Acme's contributory negligence, and (3) the statute of limitations defense. Pump-Rite argues that it is not collaterally estopped on any of these issues, but files a cross motion for partial summary judgment on the grounds that Acme is collaterally estopped from relitigating the question of strict liability.

Discuss whether or not collateral estoppel precludes relitigation of each of the four issues mentioned in the preceding paragraph.

QUESTION 4. (45 minutes)

Answer Parts A and B, based on the following facts (DO NOT ASSUME ANY FACTS OR EVIDENCE NOT STATED IN THE QUESTION):

John was fired from his job, and sued his former employer, Acme, for breach of an oral contract of employment. Under the applicable state law, employees are generally considered "at will," meaning that they can be fired by the employer at any time for any reason, or for no reason at all. However, specific oral or written statements guaranteeing employment for a specific period of time, or limiting discharge to specific circumstances, may create a contract of employment and limit the employer's right to fire an employee.

At his deposition, John testified as follows:

Q. (Attorney for Acme): Did you understand that the offer of employment with Acme carried no guarantees of continued employment for any length of time?

A. (John): Death and taxes, Counselor.

Q. Is that a yes?

A. Yes.

Q. Did anyone at Acme ever tell you that there had to be a specific reason or reasons to terminate your employment?

A. No. The subject never came up.

Q. Did anyone at Acme ever tell you that your employment was guaranteed for a specific period of time?

A. I don't recall that.

Acme moved for summary judgment, citing the above testimony and arguing that as a matter of law, the undisputed facts showed that no oral contract existed. In response to the motion for summary judgment, John attached his own affidavit, stating that he was told by Acme's Personnel Manager that he could only be fired for just cause. Acme's motion for summary judgment was denied on the basis that John's conflicting testimony created a credibility issue for the jury.

At trial, John repeated his affidavit testimony that he was told that he could only be fired for just cause. Acme introduced John's deposition testimony to impeach John's credibility. Acme's Personnel Director testified and denied ever telling John that could only

be fired for cause. On the issue of damages, John put on undisputed evidence that he had been unemployed for 11 months after being fired by Acme, with lost wages totaling \$37,000.

After several hours of deliberation, the jury returned with a general verdict for the plaintiff in the amount of \$1500. Within 10 days of the entry of judgment, John moved for a new trial limited to the issue of damages.

A. Was the trial judge correct in denying Acme's motion for summary judgment? Explain.

B. How should the court rule on John's motion for a new trial on damages? Explain.

QUESTION 5. (45 Minutes)

Answer either A or B. Do not answer both.

In answering, you need to identify the premises on which the writer's position rests, and analyze those premises and their implications. There are several good ways to approach either question, but rambling, free association is not one of them. Organization counts.

A. "Recent controversy has centered around the expansion of the province of the judge in the areas of summary judgment and judgment as a matter of law. Some have argued that this increase in the power of the judge versus the power of the jury violates the Seventh Amendment. Those who oppose this encroachment of judges on jury power tend to believe that the jury is a mainstay of liberty and an integral part of democratic government. Those favoring greater judicial activism in removing cases from jury consideration tend to see the jury as an outmoded, and none too reliable, institution for resolving disputed questions of fact. Emotionally, we prefer the first approach. But looking at things rationally, the latter approach is closer to the truth. For that reason, we should expect, and welcome, continued expansion of the judge's role in granting summary judgment and judgment as a matter of law."

Comment on the above passage.

B. "The theoretical justifications for class action lawsuits are rooted in the notion that such mechanisms are necessary to offer judicial relief from real abuses where either individual claims are too small or the endless cost of multiple suits is too great. Regardless of the dubious wisdom of that notion, clearly such actions were not intended to convey to lawyers a ready key to corporate treasuries in the early stages of litigation.

"The judicial system is now plagued by lawyers shamelessly soliciting clients and engaging in monstrous class action suits filed only for the purpose of obtaining settlement, and the outlandish fees allowed by the courts in sordid squabbles over the division of spoils from pointless litigation. All too often, the dispute is nothing more than a fight over attorney's fees, ginned up in a phony settlement where defendants purchase a release from future suits, defense lawyers bill time, and plaintiffs' lawyers claim credit for benefits which are either non-existent or which they did not produce. It appears that nothing short of the repeal of FRCP 23(b)(3) can solve the problem."

Comment on the above passage.

END OF EXAM