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Final Examination
UNM School of Law
Three Credits

Examination No. _____

Thursday, May 9, 2002
1:30 p.m. to 5:00 p.m.
Three and 1/2 Hours

512 CIVIL PROCEDURE I

Professor Browde
Professor Occhialino

INSTRUCTIONS

1. You have three and one-half hours to complete this examination.
2. There are two questions. Question One will provide 25% of your grade. Question Two will provide 50% of your grade. Your responses to previously-administered multiple choice questions will provide 25% of your grade.
- 3) Each question is divided into subparts. Each subpart has a suggested time for answering the subpart. The suggested times correspond to the weight assigned to each subpart for grading purposes. The suggested times total three hours and fifteen minutes. You therefore have an extra fifteen minutes to use, perhaps to read the fact patterns carefully before answering questions.
4. You may bring into this examination only a standard-type Federal Rules of Civil Procedure Supplement.
5. Begin Question Two in a separate blue book. It is not necessary to begin each subpart of a question in a separate bluebook.
6. Write as neatly as possible under the circumstances. Write only on every other line. Write on only one side of a page. Write with a pen. Thank you.

QUESTION ONE

(Suggested Time: One Hour and Five [65] Minutes)

The Primus Corporation (Primus) is a retail seller of specialty food and kitchen items. Primus was incorporated in Delaware twenty years ago and established its first and still largest store in New Hampshire. The New Hampshire store thrived and Primus designed a strategy to aggressively expand, including a plan to open a store in Santa Fe. Without registering to do business in New Mexico, in 1998 Primus leased a building in Santa Fe for a ten year period and opened its Santa Fe store. In January of 2000, Primus decided that the Santa Fe store was not meeting expectations because of a decrease in tourism in Santa Fe and Primus decided to close the store at least temporarily. Primus sold its inventory at a steep discount, receiving \$450,000 from the sale. Primus put that money into an account in the Sunwest Bank of Santa Fe. Since then, Primus has sold no food and kitchen items in New Mexico.

Still liable on the lease, Primus subleased the building on a month-to-month basis to another company which pays to Primus 95% of the amount Primus is obligated to pay on the unexpired lease. Primus makes up the difference by paying the landlord the other 5% from the account in the Sunwest Bank. Corporate documents reveal that Primus expects that in a year or two tourism will increase in Santa Fe and Primus may reclaim the premises and reestablish the store.

On January 3 2002, Sally Port, a New Mexico citizen and resident of Bernalillo County, was on vacation in New Hampshire. She went shopping at the Primus store in Concord, New Hampshire and bought several items, including a corkscrew that opens a bottle of wine by piercing the cork and injecting carbon dioxide into the bottle, the resulting pressure thus lifting the cork from the neck of the bottle. The Primus clerk learned that Port was from New Mexico and offered to pack the items, including the corkscrew, and to mail them to New Mexico for an additional charge. Port declined the offer and told the clerk she had plenty of room in her car and would take them with her on the trip back to New Mexico. Port mentioned to the Primus clerk that Port would be driving through Oklahoma on her way back to New Mexico. The clerk said he was sorry that Primus had not yet opened a store in Oklahoma because he would like to return to Oklahoma someday as a Primus employee. The clerk suggested that Port stop in Tulsa to visit the Cowboy Hall of Fame.

On the return trip, Port stopped overnight in Tulsa, Oklahoma to visit the Cowboy Hall of Fame. She bought a bottle of chardonnay wine in Tulsa which she planned to drink in her Tulsa hotel room that evening. Unable to find another corkscrew, Port used the Primus corkscrew which, unfortunately, somehow caused the bottle to burst, seriously disfiguring her face and causing partial loss of vision in one eye.

Port received extensive emergency treatment in Tulsa, Oklahoma, and the Tulsa Department of Consumer Safety did a thorough investigation of the circumstances surrounding the accident. Port later returned to her home in Albuquerque for further treatment of her eye and plastic surgery to correct her disfigurement. During the course of her treatment in New Mexico, she suffered severe pain and blurring of vision.

The limited available evidence shows that Primus may have improperly designed the corkscrew and the design defect may have been the cause of the bursting bottle. Port's damages, including pain and suffering, are probably about \$500,000.

The Concord, New Hampshire Primus store at which Port bought the corkscrew routinely asks customers what their home Zipcode is and enters the answer in its database so that it can get a sense of where its Concord customers are from. Data from last year showed that 87% of all customers at the Concord store were from out of state and a half of one percent of the-out-of-staters (522 customers) gave a New Mexico Zipcode. Of that number, the records show that one-half (261) of the New Mexicans took advantage of Primus' offer to ship the purchased items to New Mexico for an additional charge.

Primus stores contain only one item manufactured in New Mexico, a metal device that holds taco shells upright. For the last five years, Primus has contracted with Belen Enterprises of New Mexico, Inc. (Belen) to supply the device to Primus. Primus initially purchased 5,000 of the items for sale in Primus stores nationwide and has increased its order each year, now purchasing 7,500 each year at a cost of \$10 each, and reselling them at a price of \$20 each. The original contract between Primus and Belen was entered into in New Hampshire when a Belen sales representative showed up at Primus headquarters and made a sales presentation of the product. Since then, at the end of each year, Belen mails to Primus in New Hampshire an order form asking how many units Primus wants and Primus mails back its answer to Belen in Belen, New Mexico. Belen ships the goods from Belen, New Mexico to New Hampshire. The cost of shipping is born by Belen.

Based on all of the foregoing, Port filed a civil action against Primus in New Mexico State District Court in Bernalillo County and the summons and complaint were properly served on Primus before the running of the statute of limitations.

You are a summer law clerk in the law office that represents Plaintiff Sally Port. The chief of the litigation department sent you the following questions together with some additional facts. She also included a New Mexico statute (See Appendix to Question One). Answer each question, explaining your reasoning concisely but fully.

Question A. (Suggested Time: Thirty-five Minutes) Primus has filed a Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction. The chief of the litigation department asks that you write to her telling her the likely ruling of the court on the motion and explaining your reasoning concisely but fully. Do so.

Question B. (Suggested Time: Fifteen Minutes) Fearing the possibility that the court will grant Primus' Rule 12(b)(2) motion for lack of personal jurisdiction, the chief of litigation has asked you whether—if the court grants the motion of Primus to dismiss—Sally Port can refile the law suit, and successfully assert an alternative form of jurisdiction over Primus. Write a response to her providing your answer and explaining your reasoning concisely but fully.

Question C. (Suggested Time: Fifteen Minutes) Assume that the trial court denied the motion of Primus to dismiss for lack of personal jurisdiction. Primus then filed a motion

requesting that the court dismiss the action on the ground of forum non conveniens so that it can be refiled in an Oklahoma court. As part of the motion, Primus stipulated that Oklahoma has a long arm statute that authorizes Oklahoma courts to assert personal jurisdiction to the full extent consistent with the Due Process Clause. The litigation chief wants to know if the court is likely to grant the motion by Primus that the court dismiss the action on forum non conveniens grounds in favor of Oklahoma. Please respond concisely but fully.

(APPENDIX TO QUESTION ONE)

NMSA Sec. 38-1-16 Personal service of process outside state.

A. Any person, whether or not a citizen or resident of this state, who in person or through an agent does any of the acts enumerated in this subsection thereby submits himself or his personal representative to the jurisdiction of the courts of this state as to any cause of action arising from:

- (1) the transaction of any business within this state;
- (2) the operation of a motor vehicle upon the highways of this state;
- (3) the commission of a tortious act within this state;
- (4) the contracting to insure any person, property or risk located within this state at the time of

contracting:

(5) with respect to actions for divorce, separate maintenance or annulment, the circumstance of living in the marital relationship within the state, notwithstanding subsequent departure from the state, as to all obligations arising from alimony, child support or real or personal property settlements under Chapter 40, Article 4 NMSA 1978 if one party to the marital relationship continues to reside in the state.

B. Service of process may be made upon any person subject to the jurisdiction of the courts of this state under this section by personally serving the summons upon the defendant outside this state and such service has the same force and effect as though service had been personally made within this state.

C. Only causes of action arising from acts enumerated in this section may be asserted against a defendant in an action in which jurisdiction is based upon this section.

D. Nothing contained in this section limits or affects the right to serve any process in any other manner now or hereafter provided by law.

End of Question One

QUESTION TWO

(Suggested Time Two Hours and Ten [130] Minutes)

Paul and Pamela Plano have been happily married for fifteen years. In February, 1999, they moved from San Antonio, Texas to El Paso, Texas. On the recommendation of neighbors, Pamela chose as her new gynecologist Dr. Diana Draper, a New Mexico citizen, and a new physician who recently joined the Women's Health Clinic in Las Cruces, New Mexico. On March 30, 1999, Pamela drove to Las Cruces for her first appointment with Dr. Draper. Dr. Draper reviewed Pamela's file forwarded from her previous doctor, took a history of the patient and conducted a pelvic examination of Pamela. Dr. Draper found no problems.

Eight days later, after experiencing physical symptoms, Pamela returned to the Clinic where Dr. Draper diagnosed her as having herpes, a disease usually transmitted by sexual contact. The normal incubation period for herpes is seven to fourteen days after exposure but there have been cases in which herpes lies dormant for as many as twelve years after initial exposure.

Pamela was puzzled by the diagnosis because she had been faithful to Paul for the entire time of their marriage. Nonetheless, she accepted the diagnosis and proceeded on with her life. On March 25, 2002, Pamela read an article in the New York Times that stated that medical researchers had obtained a grant to determine whether and to what extent herpes could be transmitted by unsterilized medical instruments used in gynecological examinations. The article stated that occasional reports of clusters of herpes outbreaks in Denmark among women who had visited the same gynecologist suggested a possibility that unsterilized instruments might be a means of transmitting the disease.

On March 28, 2002, Pamela and Paul contacted attorney Steven Eagle and inquired about the possibility of suing Dr. Draper and the Women's Health Clinic. After reading the New York Times story, faced with the statute of limitations running on April 1, 2002, Eagle had his secretary call the New Mexico Secretary of State who informed Eagle's secretary that there was no "Women's Health Clinic Corporation" registered in New Mexico, but that there was a "WHC Corporation" registered in New Mexico and that it had named Sally Served of Santa Fe as its registered agent for service of process. Eagle immediately prepared a complaint naming Dr. Draper and WHC Corporation as defendants. The complaint, filed in the United States District Court for the District of New Mexico on March 29, 2002, alleged that "Upon information and belief, Dr. Draper was negligent in failing to subject the medical instruments used in conducting the examination of Pamela Plano to proper and necessary sterilization procedures, thus causing Ms. Plano to contract herpes." The complaint alleged that WHC Corporation was the employer of Dr. Draper and was liable for Plano's injuries both under the doctrine of respondeat superior and for negligently failing to properly train and supervise Dr. Draper. The complaint properly alleged diversity of citizenship and damages of \$500,000.

On April 3, 2002, proper service was effectuated on Dr. Draper and on Sally Served as agent for WHC Corporation. Dr. Draper noticed that the complaint named her and WHC Corporation, which she thought strange, because she had joined an existing partnership, the "WHC Partnership"—when she began to work for the Women's Health Clinic.

On April 4, 2002, Dr. Draper notified her malpractice insurer, Ace Insurance Company (Ace) of the lawsuit and met with the attorney assigned to represent her, Al Abogado. Abogado also noticed that the partnership had not been sued, and he explained to Draper that therefore there was no need for him to defend the partnership. (For purposes of this problem, partnerships are liable in the same manner and to the same extent as corporations when properly sued and served).

Abogado immediately began an investigation.

First, he requested that he be given the Women's Health Clinic "Business Improvement Forms" for the period from March 15, 1999 to April 15, 1999. These forms had been instituted at the request of Abogado and Ace and were filled out at the end of each workday by each employee of the Clinic. The Form stated at the top that its purpose is to "record any unusual or bad events that occurred that day or any complaints received so that WHC could improve its service to its patients." These forms were reviewed daily by the Clinic's office manager Olga Manaja, who sometimes thereafter instituted new procedures to correct problems. They were also forwarded to Ace for review.

Second, he asked Office Manager Olga Manaja to conduct interviews of each of the persons employed by WHC Partnership during March and April 1999, to get affidavits from each of them and to turn the affidavits over to Abogado to enable him to get information to prepare an answer and a defense. Olga Manaja did so, and turned over to Abogado the affidavits of thirteen persons who were employed by WHC including Al Affid. It was good that Manaja acted quickly, because Affid left for a CIA assignment in an unknown, secret destination the day after giving the affidavit and it is now impossible to communicate with him.

Third, Abogado contacted Dr. Ellen Exner. Exner is a practicing physician who secretly is also a paid consultant to the Ace Insurance Company. She never testifies, but only provides advice and strategy to Abogado when Abogado defends doctors charged with malpractice. Exner reviewed the relevant "Business Improvement Forms," the affidavits, including the affidavit of Affid, Abogado's notes of his interview of Dr. Draper and the WHC Partnership's "Training Manual," which contains the Partnership's training practices with respect to its Doctors. Afterwards, Dr. Exner met with Abogado for a three hour conversation concerning the merits of the case.

Abogado filed an answer solely on behalf of Dr. Draper, because the WHC Partnership had not been named a defendant.

When Eagle noticed that Abogado filed an answer only on behalf of Dr. Draper and not on behalf of WHC Corporation, he investigated further and discovered that he had sued the wrong defendant. On May 6, 2002, Eagle learned that the Women's Health Clinic was a partnership. The attorney filed a motion to amend the complaint on May 7, 2002 to add the WHC Partnership as defendant in the action initially filed against Dr. Draper and the WHC Corporation. Between the time of the initial service on Dr. Draper and Sally Served and the attempted amendment, the Women's Health Clinic was broken into by drug addicts. It appears that they wrapped the stolen

drugs in the only copy of the WHC Partnership "Training Manual," which is the best evidence of the Partnership's training practices with respect to its Doctors and thus is relevant to Plano's claim that the WHC Partnership negligently failed to train Dr. Draper properly.

Question A. (Suggested Time: Thirty Minutes) You are a clerk in the office of Steven Eagle who represents Plano. Write to Eagle, telling him the likely result the court will reach on Plano's motion to amend the pleading to add WHC Partnership as a defendant and explaining concisely but fully your reasoning.

During discovery Plano's attorney, Eagle, plans to ask Dr. Draper and her counsel for certain information in discovery. You are a clerk in his office. He informs you that he has already worked out the appropriate discovery devices to use to seek the information and needs no help on that, but he is concerned about whether he is entitled to discover some of the information he seeks.

Question B. (Suggested Time: Thirty Minutes) Write to Eagle informing him whether the following items are discoverable, explaining your reasons concisely but fully: i) The Business Improvement Forms now in the possession of Abogado; ii) The affidavits of WHC Partnership employees collected by Manaja; iii) Information about any persons with expertise that Abogado consulted (i.e. Dr. Exner) as part of his representation of Dr. Draper.

Assume that the trial court denied the motion to amend, leaving Plano with a lawsuit against Dr. Draper alleging that negligent failure to properly sterilize the instruments proximately caused Plano to contract herpes. Assume also that the court ruled that Plano was not entitled to any of the three discovery items sought by Eagle (and described in Question B, supra).

In discovery, Plano identified Dr. Lars Finley as an expert who would testify at trial that in his opinion the failure to properly sterilize examination instruments could provide a basis for transmitting herpes from an infected patient to an uninfected patient and that this was the probable cause of Plano's contraction of herpes. Dr. Finley is a licensed gynecologist in Finland and he has published one article on the topic in the Finland Medical Journal. Dr. Finley has never visited New Mexico.

In her deposition, Pamela Plano testified that she had been faithful to Paul ever since her marriage to Paul fifteen years earlier. In his deposition, Paul testified that he had been faithful to Pamela during their fifteen year marriage. Paul also stated in his deposition that he has never had herpes and does not now carry the herpes virus.

In an effort to convince Plano and Eagle to drop the lawsuit, Abogado voluntarily showed Eagle the affidavit of Affid, the former employee who is now on a secret undercover mission of unknown duration for the CIA. The affidavit is the one given to Olga Manaja earlier. It states that Affid was present on March 30, 1999, that his responsibility was to sterilize instruments that

were used by Dr. Draper, that he took each instrument used by Dr. Draper out of the examining room after each examination, that he sterilized each and that he is very sure that the instruments used by Dr. Draper in the examination of Plano were sterilized prior to their use in the examination of Plano.

Abogado has retained two qualified experts to testify at trial. They have been deposed by Plano. They each will give her opinion at trial that there is no valid scientific basis to believe that herpes can be transmitted by examination instruments even if the instruments have not been sterilized properly. Each will support her opinion by quoting from the 2001 application of Dr. Nick Knowitall, the foremost expert in the field, for a research grant concerning this issue. Dr. Knowitall, who recently got the grant to determine whether improperly sterilized examination instruments can transmit herpes, wrote in his application for the grant: "This grant is important because there has been speculation but no proof that contaminated examination instruments can transmit herpes to patients. If this grant request is funded, it is expected that within five years the answer will be known."

In an interrogatory addressed to Dr. Draper asking her for any literature to support her claim that contaminated examination instruments cannot transmit herpes, Dr. Draper identified and attached four recent articles from respectable journals each of which concluded that "With the single exception of a paper published in Finland, based on current evidence, there is no scientific basis to believe that contaminated examination instruments can transmit herpes to patients."

You are the clerk in the office of Plano's attorney, Eagle. Eagle notes that he has not done any summary judgment motions since the "Celotex Trilogy" and that he expects that Dr. Draper may file a motion for summary judgment on the ground that there is no material issue of fact concerning causation in dispute and that defendant, Dr. Draper, is entitled to judgment as matter of law. Based on the information you have, Eagle asks you to:

Question C. (Suggested Time: Forty Minutes) Inform him of the relevant teachings of Celotex and Anderson, and describe what might be the thrust of Dr. Draper's motion and the data in support of the motion as well as explaining whether Plano will have to respond and if so the best response and supporting data, together with a description of the problems if any which Plano will have in overcoming the motion for summary judgment. Respond concisely but fully.

Question D. (Suggested Time: Thirty Minutes) Eagle tells you that he has read a recent case from New Mexico, Bartlett v. Mirabel, which deals with the new Mexico law of summary judgment. Eagle states that he would appreciate it if you could tell him in what relevant ways the result of the expected summary judgment motion of Dr. Draper might be different if Bartlett were the controlling precedent in the federal court. He also tells you that his instinct is that the Bartlett case, rather than Celotex/Anderson, sets the standard for summary judgment in this federal action and he asks if you agree. Respond to both questions, explaining your reasoning concisely but fully.

End of Examination