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UNM School of Law
Professor Occhialino
Three Credits

Spring 2004
Tuesday, May 4, 2004
1:30 p.m. to 4:00 p.m.

CIVIL PROCEDURE I

Final Examination

Instructions

1. Write your examination number on the top of this page in the space provided and on every bluebook or typed page of your exam answer.
2. This is a two and one-half hour examination. It is worth 3/4 of your final grade.
3. This is a closed book exam except that you may bring into the exam any standard Federal Rules of Civil Procedure Supplement. The Rules Supplement may be annotated rule-by-rule but the volume may contain no course outlines or portions of course outlines.
4. There is a single fact pattern for this examination. There are five questions. **You are to answer ANY THREE of the five questions.** Each question is worth the same amount of points.
5. Time Suggestion: I suggest that you spend one-half hour simply reading and becoming familiar with the facts and the questions. I suggest that you then spend forty minutes on each of the three questions that you choose to answer.
6. The fact pattern occurs in New Mexico and the litigation described in the fact pattern occurs in the New Mexico State District Court. You may assume that the New Mexico Rules of Civil Procedure are the same as the Federal Rules of Civil Procedure except where the Appendix contains a provision from the New Mexico Rules of Civil Procedure.
7. Please begin each question in a separate blue book if you are writing the examination. Please begin each question on a separate page if you are typing the exam.
8. Be sure to write the number of the question you are answering on the outside cover of the bluebook or the top of the page if you are typing the exam.
9. ***** Please write on only one side of a page. Write only on every other line on each page.** Write as neatly as possible under the circumstances.

In the late afternoon of February 1, 0000, Able, an employee at LJS Inc.'s (LJS) Long John Silver Restaurant in Carlsbad, New Mexico heard popping noises, smelled burning electrical insulation, and saw smoke in the area of the restaurant's fryers. On closer inspection, Able noticed the four fryers' heating coils glowing bright red, which they do not normally do. Able turned the fryers off, but the oil in them caught fire nonetheless. Able and the other employees attempted unsuccessfully to control the fire; it soon spread to other parts of the restaurant, causing great damage to the restaurant. Fortunately, no one was injured

The Fryers and the Heating Coils

The fryers were manufactured by Hobart Corporation (Hobart). A week prior to the fire, on January 24, 0000, LJS asked Hobart to examine the fryers because they had not been heating properly. Hobart's special trouble-shooting technician, Hal Holbrook, who lives in Chicago Illinois, was sent to Carlsbad to examine the fryers. He recommended that LJS have new heating coils installed. LJS agreed and ordered new heating coils from Hobart through Holbrook. Filling out the order form for the new heating coils, Holbrook wrote: "Four Replacement Titanium Heating Coils (No. HC-123-T) to be shipped from Hobart manufacturing plant in Chicago, Illinois." The price was \$325 per heating element. On January 29, 0000, Holbrook delivered and installed the new heating coils in the LJS restaurant.

The Sprinkler System

The LJS restaurant contained a fire-suppression/sprinkler system manufactured by Kidde Corporation (Kidde). One sprinkler unit was located in the exhaust fan area directly above the fryers. LJS had hired Fire Safety Industries, Inc. (Fire Safety) to conduct regularly scheduled inspections of the LJS fire-suppression/sprinkler system in the restaurant. On January 29, 0000, Frank Flame, an experienced employee of Fire Safety, conducted its semi-annual inspection and that day sent a letter to LJS stating that the system was in perfect working order and had no defects or need for maintenance.

The LJS Investigation of the Cause

When the fire occurred, the restaurant was evacuated and the fire department put out the fire. That same day LJS hired Juan Azcarate, an independent fire investigator, to determine the cause of the fire. LJS's "Safety First" corporate policy is to hire independent persons to

investigate all incidents in its restaurants which might pose a threat of harm to customers or employees. The "Safety First" policy has as its motto "Find It and Fix It to Prevent Harm and Lawsuits." For ten days, Azcarate conducted his investigation. He spoke with employees Able, Baker and Charley who were working in the kitchen at the time of the fire. He took written statements from each of them. He also learned the identity of four customers (Delta, Engel, Frank and Gore) who were in the store at the time, by obtaining time-stamped credit card receipts from the cash register and then seeking out the persons whose names were on the credit cards. He got written statements from each of them concerning the fire and its aftermath.

On February 10, 0000, Azcarate concluded his investigation. On that date, he mailed the original of his report to corporate headquarters in Texas, and mailed a copy to Anna Abogado, the attorney for LJS. The Abogado copy contained Azcarate's hand written comment: "There's plenty here to sue the bastards!" The body of the written report reviewed the physical evidence and summarized the conversations with the employees and customers.

Azcarate's report also stated that Azcarate had hired Watt, an electrical engineer, to inspect the premises, including the heating coils in the fryers. Attached to Azcarate's report was the written report of Watt. Watt's report stated that Watt had entered the fire-damaged restaurant and investigated and inspected the fryers, the heating coils and the fire/suppression/sprinkler system above the fryers. He stated that in his opinion the new coils in the fryers were defectively manufactured, causing them to overheat, which caused the oil to catch fire. Watt also concluded, after inspection and analysis of the sprinklers still on the premises above the fryers, that the sprinklers "may well have not activated during the fire, though I (Watt) was unable to form an opinion on whether they did or did not activate." The Azcarate report concluded: "I urge you to remove the fryers, with the coils, and the fire-suppression/sprinkler system from the premises and to preserve them as evidence as they apparently will support a claim by LJS against Hobart for defective coils and against Kidde for a defect in the sprinkler system."

On February 12, 0000, Derby Demolition Company tore down the building at the request of LJS as had been ordered by the City of Carlsbad because the gutted building constituted a public nuisance. The debris was deposited in a landfill and is no longer obtainable.

On February 12, 0000 Azcarate's report was delivered to Anna Abogado's law office. The office was closed for Lincoln's Birthday and was not read until February 13.

On February 14, 0000, the report reached corporate headquarters in Dallas, Texas.

The Law Suit

On December 1, 0003, two months before the statute of limitations applicable to all possible causes of action arising from this transaction expired, LJS filed suit against Hobart and Kidde in New Mexico State District Court in Carlsbad, New Mexico. The complaint alleged that Hobart defectively designed the replacement coils and this caused the fire. The complaint also alleged that Kidde's fire-suppression/safety system was defective and the failure of the sprinklers to go on above the fryers caused greater damage to the restaurant than would have occurred had the sprinklers gone on when the fire started.

On January 2, 2004, service of the summons and complaint properly was made on Hobart and on Kidde.

On January 19, 0004, Hobart served its answer. In the answer, Hobart admitted that it manufactured the replacement heating coils but denied that the replacement coils were defective.

On February 1, 0004 all applicable statutes of limitations expired.

On February 27, 0004, Hobart discovered some letters and e-mails (see below).

On February 28, 0004, Hobart made a motion to amend its answer. In the proposed amended answer, Hobart now seeks to deny that it manufactured the replacement heating coils and alternatively states that, if it did manufacture the heating coils, they were not defective.

On March 1, 0004, disturbed that Hobart now wants to deny that it manufactured the replacement coils, LJS sent an interrogatory to Hobart asking who manufactured the replacement heating coils and asking what proof Hobart has that the coils were not manufactured by Hobart. LJS also made a Rule 34 request for any documents relevant to the question of who manufactured the replacement heating coils.

On March 15, 0004, Hobart answered the interrogatory stating that on February 27, 0004, Hobart first discovered originals and copies of a series of totally unauthorized letters sent in January, 0000 from its employee, Hal Holbrook to the President of Phoney Manufacturing Company, a Philippine Corporation. In the letters, Holbrook falsely stated that he was an independent distributor of replacement heating coils for restaurant fryers in the American Southwest, including Arizona, New Mexico and Texas. Holbrook said to Phoney that his customers wanted relatively inexpensive replacement heating coils. He attached a Hobart HC-

123-T titanium model and asked if Phoney could make a steel copy for \$75 that would look like the titanium model. Phoney replied that it could do so and subsequently manufactured 1000 of them, shipping them to Holbrook in Chicago. The letters show that, as requested by Holbrook, each unit came in a box labeled "Hobart Replacement Heating Coil HC-123-T"

Hobart also described and turned over to LJS a newly discovered e-mail sent from Holbrook's computer to the president of Phoney dated February 5, 0004. In the e-mail, Holbrook stated that "Your replacement heating coils are defective and have caused a fire at an LJS Restaurant in Carlsbad, NM. Litigation has begun against Hobart. Under no circumstances admit that your company and I contracted for replacement heating coils. Best to leave Hobart alone exposed to suit."

On March 20, 0004, disturbed by this turn of events, LJS investigated the Phoney Corporation and learned that:

--Phoney is incorporated in the Philippines and has its principal place of business in Manila.

--Phoney manufactures metal parts for machinery. It has worldwide sales of over \$100 million per year. Only .05% of those sales (\$500,000) are in the United States and all of those United States sales are to companies in Oregon and the State of Washington, except for the single sale to Holbrook in Chicago, Illinois.

--Phoney has been impressed by the metallurgy department of the University of New Mexico and over the past ten years has sent fifty employees to UNM to study. Phoney paid for round trip transportation, for room, board, tuition and books for each employee. Each of the fifty was in New Mexico for two years and each got a graduate degree from UNM. There are currently five Phoney employees enrolled at UNM. Phoney Corporation keeps \$750,000 in a Wells Fargo Bank in Portland, Oregon. It draws checks on that account to provide money to its employees in New Mexico for expenses. The employees then cash the checks at the UNM Branch of the Wells Fargo Bank.

QUESTION ONE

Should the court grant the February 28, 0004 motion of Hobart to amend the pleading to withdraw its admission that it manufactured the replacement heating coils that Holbrook

installed in the LJS restaurant? Explain fully.

Assume for the remainder of the exam that the trial court granted the motion of Hobart to amend its pleading and thus allowed Hobart to deny that it manufactured the replacement heating coils.

On April 15, 0004, LJS filed a motion to amend its complaint to add Phoney Corporation as a defendant in the New Mexico state action. Phoney entered a special appearance and asserted two reasons why the court should not grant the motion: 1) The statute of limitations has run on any action that could now be brought against Phoney; 2) It makes no sense to amend to add Phoney because Phoney is not subject to personal jurisdiction in New Mexico.

QUESTION TWO

Should the court deny the motion to amend to add Phoney Corporation as a defendant on the ground that the statute of limitations has run and would bar recovery? Explain fully.

QUESTION THREE

Should the court deny the motion to amend to add Phoney Corporation as a defendant on the ground that the New Mexico court cannot obtain personal jurisdiction over Phoney Corporation? Explain fully.

Defendant Kidde has denied that its fire-suppression/sprinkler system failed to operate once the fire began. Kidde properly served a Rule 34 request on LJS asking that LJS produce for inspection and testing the parts of the sprinkler system that were located above the fryers. LJS filed a timely response stating that the parts were damaged in the fire and were lost when the restaurant was torn down on the order of the City and the rubble was deposited in the landfill where it is no longer available. After learning, by interrogatories addressed to LJS, about the Azcarate and Watt reports, Kidde filed a Rule 34 request seeking from LJS copies of Azcarate's report to LJS and Watt's report to LJS. LJS responded that the reports were protected from discovery.

Kidde filed two motions concerning the discovery requests.

- A) Kidde sought an order compelling LJS to turn over the entire content of Azcarate's report and Watt's report to Kidde. Kidde argued that the reports were relevant, and not material prepared in anticipation of litigation. Kidde also asserted that if the reports were material prepared in anticipation of litigation, they should still be discoverable because of the difficulties posed by the disappearance of the fire-suppression/sprinkler system that was above the fryers;
- B) Kidde sought a sanction against LJS for failure to produce the portion of the fire-suppression/sprinkler system that was above the fryers. Kidde proposed that the court enter a default judgment against LJS dismissing with prejudice LJS's claim against Kidde.

QUESTION FOUR

How should the trial judge rule on the two motions? Explain fully.

Assume for the question that follows that the court denied Kidde's motion for default judgment but ruled that the Azcarate and Watt reports must be made available to Kidde and that LJS complied with the court order.

At the close of discovery, Kidde made a motion for summary judgment, claiming that there was no material issue of fact in dispute and that it was entitled to judgment as a matter of law. In support of its motion Kidde attached: 1) an affidavit by Frank Flame of Fire Safety and a copy of his report, both showing that the fire-suppression/sprinkler system was in perfect working order on January 29, 0000, only three days prior to the fire. Kidde also attached: 2) a copy of Watt's report to LJS, Inc. which stated that the sprinklers over the fryers "may well have not activated during the fire though I (Watt) was unable to form an opinion on whether they did or did not activate." Finally, Kidde attached: 3) portions of the deposition of the president of LJS in which the president admitted that the dismantling of the restaurant and the resulting loss of the sprinkler components made it impossible to get additional expert testimony to establish that the system

failed to operate properly after the fire started.

In response, LJS filed only a single affidavit—that of its employee, Able. Able’s affidavit was dated February 5, 0000, four days after the fire. In relevant part, the affidavit stated: “I was the only one in a position to see what happened in the area where the fire began. I saw the fire start. I tried for two minutes to put the fire out. The sprinkler system went off in some parts of the restaurant but did not go off at the critical spot—above the fryers.” A week after giving the affidavit to LJS Able was arrested for committing perjury in a criminal trial in which he was a witness. Two days after being released on bail, he jumped bail, disappeared and his whereabouts are unknown.

QUESTION FIVE

Should the trial court grant Kidde’s motion for summary judgment? Explain fully.

End of Examination Question

Appendix Follows

Appendix

New Mexico Statute Annotated 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.

N.M. 1-015. Amended and supplemental pleadings.

C. **Relation back of amendments.** Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment:

- (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits; and
- (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.