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**606 CIVIL PROCEDURE II**

**Semester I, 1999-2000**

**UNM School of Law  
Final Examination  
Four Credits**

**Professor Occhialino  
Monday, Dec. 13, 1999  
9:00 a.m. to 1:00 p.m.**

**INSTRUCTIONS**

1. First, place your examination number on the top right corner of this page and be sure to return this examination at the end of the exam period.
2. This is a four hour examination. The multiple choice is worth 25%; the essay question is worth 25%; the Take Home Fact Pattern is worth 50 %. Allocate your time accordingly
3. You may bring into this examination only a standard version of the Federal Rules of Civil Procedure.
4. Please begin each essay answer in a separate bluebook. Place your exam number and the number of the essay on the outside cover of each bluebook. .
5. Please write on only one side of a page and only on every other line in the bluebook

**Multiple Choice Questions**

6. Answer each multiple choice question. There is no penalty for a wrong answer, so guess if you must.
7. Using a No. 2 pencil place, answer on the Answer Sheet provided with this examination.
8. **BE SURE** to place your examination number on the Answer Sheet in the area marked "Identification Number," as indicated on the next page.



## Part Two

(Please note that Question 1(b) has been eliminated from this examination.)

NB: The fictitious state of Numek applies the traditional doctrines under which contributory negligence is a full defense and joint and several liability applies to concurrent tortfeasors. Numek has the same rules of civil procedure as New Mexico and construes them in the same manner.

Bill Endorf and his wife Patty Endorf went for a drive in Bill's Mercedes. Patty Endorf drove. At an intersection in Alba, Numek, a collision occurred between the car driven by Ms. Endorf and a vehicle owned and operated by Bill Hicks, a citizen of Indiana who was vacationing in Numek. The accident occurred when Ms. Endorf slowed but did not come to the required full stop at the intersection controlled by stop signs for all vehicles approaching the intersection. The Endorf vehicle struck Hick's vehicle which also failed to come to a complete stop at the stop sign before proceeding through the intersection.

Patty Endorf and Hicks were seriously injured. Bill Endorf was not injured. The Mercedes was also badly damaged. Fortunately, Endorf had collision insurance though there was a \$1,000 deductible which required that he pay for the first \$1,000 in repairs himself.

After receiving all but \$1,000 of the \$9,000 repair bill from his insurance company, Bill Endorf sued Hicks in Numek state court, seeking \$9,000 for damage to the Mercedes. Hicks entered an appearance and served an answer in which he denied that the Numek longarm statute applied to him and therefore claimed no jurisdiction. The answer also asserted that Endorf's insurance company was a real party in interest and an indispensable to the action because subrogation principles called for the company to receive \$8,000 from any recovery obtained by Endorf. Finally, in the answer, Hicks impleaded Patty Endorf into the action, claiming that her negligence contributed to the damage to the Mercedes and therefore she was liable for contribution to Hicks for some portion of any judgment rendered in favor of Bill Endorf for damage to the auto.

1 Decide and explain a) whether Hicks can now raise the defense of lack of personal jurisdiction; ~~whether Hicks can raise the defense of lack of personal jurisdiction; b) whether Hicks properly impleaded Patty Endorf.~~ c) whether Hicks properly impleaded Patty Endorf.

2 Assume that the district court judge denied Hicks' motion to dismiss for lack of personal jurisdiction. Can Hicks immediately appeal this decision? What device is most likely to be available to Hicks to pursue an immediate appeal? Decide and explain.

Assume that the court denied Hicks' motion to dismiss for lack of jurisdiction and found that the insurance company was neither necessary nor indispensable, and that Hicks sought no immediate appeal.

Thereafter, Hicks repeatedly failed to respond to proper discovery requests even when ordered to do so by the court. The court finally properly entered a default judgment against Hicks in the amount of \$9,000 as a sanction pursuant to Rule 37.

Patty Endorf then filed an action in Numek Federal District Court against Hicks for her personal injuries, seeking damages of \$1,000,000. Hicks' answer raised the affirmative defense of res judicata as to Patty's claim. Hicks' answer also contained a counterclaim against Patty Endorf for his personal injuries and damage to his car. In her answer to the counterclaim, Patty Endorf raised the defenses of res judicata and collateral estoppel against Hicks' claim for personal injury and property damage.

3 a) Is Hicks' defense of res judicata good against Patty Endorf? Decide and explain.

b) Is Endorf's defense of collateral estoppel valid against Hicks? Decide and explain.

c) Is Endorf's defense of res judicata valid against Hicks? Decide and explain.

Assume for the remainder of this question that all the motions for case preclusion and issue preclusion were denied.

The case proceeded to trial. Hicks submitted proposed instructions that included an instruction correctly setting forth the doctrine of contributory negligence as it existed in Numek. Hicks also requested that the judge order the jury to return a special verdict and submitted a proposed form of special verdict. Endorf opposed the request for the special verdict on the twin grounds that it would be unduly confusing and also that it was an unconstitutional infringement on the right to jury trial. The judge accepted Hicks' contributory negligence instruction but decided to use a general verdict instead of Hicks' proposed special verdict.

The jury returned a verdict in favor of Patty Endorf for \$85,123. The jury verdicts made no award to Hicks on his counterclaims. The amount awarded to Endorf was precisely 50% of her out of pocket expenses and lost wages, despite the fact that the jury was instructed that contributory negligence was a complete bar to recovery.

Patty Endorf made a timely motion for new trial. Hicks made countermotions for new trial and judgment NOV. Each motion is described below. Rule on each motion, giving a short explanation of your reasoning.

4a) Hicks sought a new trial on the ground that the damage award was against the weight of the evidence because it suggested that the jury ignored the contributory negligence instruction and applied comparative negligence. He asks that the new trial be limited to liability issues only and not to damages. Decide and explain.

4b) Endorf filed a motion for a new trial limited to the issue of damages, arguing that the amount of damages was too low. Endorf argued that the judge should grant the motion for new trial unless the court ordered the defendant to pay \$170,246 (\$85,123 x 2) and the defendant agreed to pay that amount. In support of this request, Endorf cited the case of Smith v. Jones, recently decided by the Numek Court of Appeals, which authorizes the use of additur. Decide and explain.

4c) Hicks filed a motion for a new trial arguing that it was error to deny a special verdict under the circumstances. Decide and explain.

4d) Hicks filed a motion for judgment NOV in his favor, giving as his ground that the verdict was against the clear weight of the evidence. Decide and explain.

EXAM CONTINUES  
ON  
NEXT PAGE.

Part Three

Partial Lineup: (in order of appearance)

New Mexico Nukes:

A corporation incorporated in New York with its principal place of business in  
New Mexico: A Team

Dr. A:

A citizen of Louisiana: A Player

Billy Shark:

A citizen of Iowa: A Player

Iowa Group Home

A non-profit charitable corporation, incorporated in Iowa and conducting  
activities only in Iowa: A Group Home

McDonald:

A citizen of Colorado: A Fan

Denver Dudes

A corporation incorporated in Delaware with its principal place of business in Colorado: A Team

The Bank of New Mexico:

A bank incorporated in New Mexico with all branches in New Mexico: A Bank

The California Crazies:

A corporation incorporated in New York with its principal place of business in  
California

Cooper)

Cousy )

Connie) New Mexico Citizens: Players

Cazzie)

Piper:

A citizen of New York: A League Official

Natural Basketball Association:

A corporation, incorporated in Delaware with its principal place of business in  
New York

The New Mexico Nukes, a professional basketball team incorporated under the laws of New York with its principal place of business in New Mexico, had two players of exceptional talent, Dr. A and Billy Shark. Dr. A is a citizen of Louisiana and Shark is a citizen of Iowa. Both, of course, transact business in New Mexico and in other states in which the league has teams. Shark's contract calls for a straight salary but also contains a clause which pays him a bonus for every "assist" (an excellent pass to another player who then scores a basket) beyond the first 300 assists with which he is credited. Each year Shark has made between \$70,000 and \$100,000 in addition to his base salary because of the assist-incentive clause in his contract. Three years ago Shark pledged to the Iowa Group Home that for five years he would contribute to the Group Home 25% of the amount he received each year in bonuses for exceeding 300 assists. He has honored his pledge in the past and will do so in the future. The reason that Shark leads the league in assists each year is that he teams up with Dr. A exceptionally well; even Shark concedes that he could not qualify for the bonus in the absence of Dr. A as a teammate.

The rest of the Nukes' team members do not match the quality of Dr. A and Billy Shark, and in the Spring and Summer of 1999 the franchise was on shaky ground. To obtain working capital and to bolster the financial standing of the team, the management of the Nukes sponsored a special promotion, selling 1999-2000 season tickets at a discount to those who purchased the tickets before August 1. The brochure and advertisements which promoted this special deal prominently feature the picture of Dr. A and had printed across the front page in large letters the following:

A SEASON OF DR. A!!! DOCTOR A IS WORTH THE PRICE OF ADMISSION--DOCTOR A  
WILL GIVE YOU MORE THAN YOUR MONEY'S WORTH IN EXCITEMENT. WE  
GUARANTEE IT!!! BUY SEASON TICKETS. SPECIAL DISCOUNT IF BOUGHT PRIOR TO  
AUGUST 1.

In response to this brochure and ad, on July 15, 1999, McDonald purchased one hundred season tickets to the Nukes' games. McDonald is a Colorado businessman who planned to distribute the tickets to New Mexico business associates who root for the Nukes. The sale of season tickets between the time the ad was distributed and the August 1 deadline was much greater than normal. The Nukes sold 5,200 season tickets to over two thousand purchasers, who are mostly citizens of New Mexico but also include some citizens of Arizona, Utah, Colorado and Texas, as well as one New York citizen who owns a winter home in Santa Fe. The discounted price was \$1,000 per ticket. In a normal year 1,200 season tickets would be sold during that time period. The Nukes considered the promotion a big success though management noted that many of the persons buying tickets during the promotional



period were existing season ticket holders who would have purchased the tickets in any event and thus were not influenced by the promotional literature or the discount price.

The Nukes' management was delighted with the preseason sales but so was the management of the Denver Dudes. In March of 1999, the Dudes had traded their right to make the first selection in the annual draft of college players to the Nukes. In return, the Nukes agreed to pay the Dudes \$10,000,000, one-half of which the Nukes paid to the Dudes on April 1, 1999 with the remainder to be paid on January 2, 2000. The Dudes, realizing the shaky financial condition of the Nukes, decided to obtain a security interest in the proceeds of all preseason ticket sales by the Nukes, and an agreement to that effect (which you may assume to be valid) was drawn up, signed by the two teams and is in effect. Thus, the \$5,200,000 in the Nukes' preseason sales bank account # 62643 in the Bank of New Mexico is encumbered by a valid security interest in favor of the Denver Dudes.

On August 3, 1999, two days after the promotion ended, the New Mexico Nukes announced that they had agreed to trade Dr. A to the California Crazies. In return, the Nukes are to receive four players, all former stars at the University of New Mexico--Cooper, Cousy, Connie and Cazzie. The Nukes' press release announcing the trade noted that "The trade is subject to approval by Piper, President of the Natural Basketball Association, but approval is expected to be forthcoming." [League rules permit the president of the league to disapprove of a trade when the trade "is not in the best interests of basketball," but the power has been used sparingly in the past.]

Like many fans, McDonald was outraged by the trade announcement. He believes that the absence of Dr. A will destroy the team's chances for a successful season and that the trade, if permitted to go through, would be a fraud upon him and other ticket holders who purchased season tickets on the strength of the representations made in the Nukes' brochure that Dr. A. would provide a season of excitement. Billy Shark was dismayed. The Iowa Group home was despondent at the possibility of receiving nothing from Shark's pledge. The Denver Dudes were pleased because they thought that the trade weakened both the Nukes and the Crazies. Cooper, Connie, Cazzie, Cousy were very pleased to be returning home to New Mexico.

Some law students in New Mexico were pleased because they anticipated that litigation might result and they were anxious to put in long hours for good pay working for law firms that might be involved in the litigation.

#### **And Then . . .**

Sonya, a brilliant third year UNM Law student, moonlights as a peanut vendor at the Nukes' arena. She believed that the trade was a violation of the terms of her employment contract with the Nukes. That employment contract provided that she was to receive a commission of 20% on all sales. A contract provision stated that "Nukes agree to use best efforts to maximize attendance in order to maximize vendor sales and commissions." Last year, Sonya earned \$30,000 in commissions. She estimated that she would make only half of that this year because of the Dr. A trade.

On August 5, 1999, Sonya filed a pro se lawsuit against the New Mexico Nukes in New Mexico State District Court in Albuquerque, alleging breach of contract and seeking damages of \$15,000. Pursuant to Local Rule 2—603—“Court Annexed Arbitration”—the case was assigned to Maureen Sanders to serve as arbitrator. The Nukes sought to take two depositions of Sonya’s friends to find out if Sonya told them she was not planning to work for the Nukes during the semester. The Nukes also sought to depose Dean Winograd to determine how much income earned last year from vendor sales Sonya had listed in her request for a need-based scholarship. Pursuant to her authority to limit discovery in arbitration proceedings, Sanders allowed only one deposition of a friend and denied the Nukes’ request to depose Dean Winograd. On September 5, 1999 Sanders held a trial at which Sonya testified and presented qualified expert Parker who opined that the loss in attendance due to the absence of Dr. A would probably be 50% and that vendors’ commissions would probably be reduced by the same amount. Counsel for the Nukes cross-examined Sonya and Parker and presented testimony of two other witnesses.

On September 10, 1999, Sanders entered her award. She found: 1) The trade of Dr. A was a breach of the contract because Dr. A’s presence on the team was the only reason many people bought tickets to the Nukes. Thus, the trade of Dr. A breached the promise to maximize attendance; 2) Sonya would be entitled to an additional 50% beyond the commissions she actually earned during the coming Nukes season; 3) The amount of damages would be assessed by Sanders after the Nukes season was over and Sonya’s actual commissions could be determined; 4) Sonya was entitled now to attorney fees and costs in the amount of \$7,500. The Nukes chose not to take a de novo appeal as they could have under the Local Rule. As a result, October 10, 1999, the district court entered a judgment in favor of the Sonya consistent with Sanders’ rulings. According to the applicable local rule, the judgment “shall be enforceable and binding as any other judgment or final order.”

On November 10, 1999, Rudy Jewely, a New York citizen who also owns a home in Santa Fe and who bought two season tickets to the Nukes based on the brochure, filed a class action against the Nukes, the Crazies, the Bank of New Mexico and Piper in New Mexico State District Court in Albuquerque. He identified the proposed class as “all persons who have purchased season ticket to the Nukes games for the 1999-2000 season.” He sought certification under Rule 1-023(B)(1), (2) and (3). His complaint asked for a full refund from the Nukes and Bank of New Mexico for all class members. In the alternative, Jewely requested that the court enter an injunction ordering Piper to void the trade and directing the Nukes to return Cousy, Cazzie, Connie and Cooper to the Crazies and accept the return of Dr. A.

Piper immediately filed a Rule 12(b)(2) motion to dismiss as to him for lack of personal jurisdiction. He noted that he has never been to New Mexico and never engaged in purposeful activities there, though the NBA as an institution does business in New Mexico. The trial court granted the motion to dismiss for lack of personal jurisdiction on December 1, 1999.

You are a law student who works in the law firm that represents the Nukes. You receive the following Memo on December 13, 1999.

To: Stu Dent  
From: Pat Partner

Please respond to the following questions, explaining your answer fully. Thank you.

1. Assume that the trial court ruled properly that Piper is not subject to personal jurisdiction in New Mexico: What argument(s) can we make to get the whole case or at least a part of it dismissed as a result? Are we likely to be successful?
2. What are the best arguments we can make in opposition to certification of the case against us as a class action? Are we likely to succeed in preventing the case from being certified as a class action?
3. What, if any, effect might the Sonya lawsuit have on the pending action against us? (The information provided above about Local Rule 2-603 {the Rule mandating arbitration of small-value cases filed in district court followed by a de novo trial if demanded by a party} is all you need to know about the Rule in order to answer this question.)
4. We were not happy with Judge One who was assigned to this case. We used our preemptory challenge to disqualify her. Bank of New Mexico used its preemptory challenge to disqualify Judge Two. The Crazies used its preemptory challenge to disqualify Judge Three. We are now stuck with the worst possible Judge, Judge Four, and we are out of preemptory challenges. What we really want is to be in federal court where all the judges are good and the jury pool is likely to be more favorable to us. Come up with a plan to accomplish this and explain it fully.

END OF EXAMINATION