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Examination No. _____

Final Examination
UNM School of Law
Four Credits

Professor Occhialino
Dec. 15, 2003
9:00 a.m. - 1:00 p.m.

606 Civil Procedure II

Semester I, 2003-2004

FOUR HOURS

INSTRUCTIONS

- 1) You may bring into the exam a standard Civil Procedure Supplement (Rules Book). The book may have annotations next to particular rules but you may not otherwise annotate, or outline any portion of the materials covered in this course. Some students have Rules Books that contain materials that address the doctrines of res judicata and collateral estoppel. Because not all students have access to those materials, students whose Rules Book contains such materials may not consult them during this exam.
- 2) Amendments were made to Rules 23, 51 and 53 on December 1, 2003. Do not answer this exam using the new rules. Use the rules as they appear in your Rules Book
- 3) ****** Please begin each question in a separate bluebook. Please write neatly. Please write only on every other line in the bluebook and on only one side of a page.
- 4) This is a two question examination. Suggested times reflect the relative point values for each question.

Question One
Suggested Time: Two Hours and Forty Five Minutes

Part One
The First Lawsuit: Planning Stages

The University of New Mexico School of Law currently administers its student financial aid program by giving 50% of its scholarship money based on demonstrated academic achievement and 50% based on financial need with special consideration given to minority students. Ollie Oilcatter offered to give the New Mexico School of Law \$20 million for its financial aid program if the School of Law modified its financial aid program so that all future financial aid is given based on academic achievement and none is given based on financial need. Oilcatter's offer provides that if the School of Law does not implement the new financial aid program and condition in a reasonable time, the gift will be void and the \$20 million will be given to Regina University Law School, a private law school owned by a corporation incorporated in Virginia and with its sole place of business in Virginia. Regina University Law School does no business in New Mexico, recruits no students from New Mexico and has no New Mexico students enrolled at Regina.

The Law School Faculty voted to accept the gift with the condition and agreed to implement the program for all students, including those already enrolled and receiving financial aid, effective for the awards to be made next semester—i.e., for the semester starting in January, 2004.

The Byzantium-American Law Student Association (BALSA) is opposed to the Law School accepting the gift with the condition stated because BALSA believes that many of its current and future members will lose existing and future financial aid if aid is

given based solely on academic achievement. A study of current student members of BALSAs shows that of the sixty-two members, 30 would be unaffected by the change, 2 would benefit from the change because they would get increased aid based on academic achievement and 30 would lose financial aid because of the elimination of need-based financial aid. BALSAs has also learned that although there are equal numbers of men and women students at the School of Law, 75% of the top one-third of each class, based on cumulative grade point averages, is female and 55% of the middle-third of each class is female, while only 20% of the bottom third of each class is female. The result is that more women than men will benefit from elimination of need-based scholarships in favor of scholarships based on academic achievement.

BALSAs has hired the law firm in which you are an associate to represent it in litigation to prevent the University of New Mexico School of Law from going through with its decision to accept the Oilcatter gift with the condition attached. Your senior partner, Patricia Pardner, has done preliminary research and has concluded that the University of New Mexico School of Law will violate the due process and equal protection clauses of the New Mexico Constitution if it accepts and implements the Oilcatter gift and condition and will breach its contracts with students who are currently receiving scholarships based on financial need.

Pardner tentatively has decided that she will file suit against the University of New Mexico School of Law and Suellyn Scarnecchia, Dean of the School of Law in the New Mexico **State** District Court in the Second Judicial District. [You may assume that the relevant New Mexico Rules of Civil Procedure are the same as the Federal Rules of Civil Procedure] She plans to ask that the University of New Mexico School of Law and

Dean Scarnecchia be enjoined from accepting and implementing the Oilcatter gift and condition and that the Dean be ordered to continue to award financial aid as it had done before accepting the Oilcatter gift and condition.

Senior Partner has asked you to answer her questions and advise her on proposed strategies in the course of her representation. Do so.

Additional Facts

The president of BALSAs is Ana Mesic, a second year law student. She has received substantial financial aid based on financial need. Pardner is considering filing a class action in State District Court of New Mexico, naming as the Plaintiffs “BALSAs, an unincorporated association, and Ana Mesic, on their own behalf and on behalf of all other persons similarly situated—to wit all members of BALSAs and all present and future students at the University of New Mexico School of Law entitled to financial aid based on existing criteria currently applied by the School of Law.”

Question One: Is the action likely to be certified as a class action as proposed? Explain fully, discussing all issues and problems that might arise.

Additional Facts

Pardner anticipates that the Defendants, UNM School of Law and Suellyn Scarnecchia, will assert that Regina University Law School is a necessary and indispensable party to the litigation and asks you:

Question Two: If the defendants, UNM School of Law and Suellyn Scarnecchia, assert that Regina University School of Law should be joined pursuant to Rule 1-019, is the trial court likely to find that Regina is a party to be joined if feasible and an indispensable party? Explain fully.

Additional Facts

Pardner realizes that the Women’s Law Student Association is likely to oppose BALSAs/Mesic’s lawsuit because its membership will be better off if financial aid is

distributed solely based upon academic achievement rather than financial need, given the data showing that women are disproportionately numerous in the top of the class rankings. Pardner asks you:

Question Three: Can the Women's Law Student Association intervene in the BALSAMesic litigation of right? Explain fully.

Additional Facts

Pardner tells you that she has no interest in having additional parties in the litigation who will oppose the BALSAMesic request for relief and for this reason is planning not to join the Women's Law Student Association or its members as defendants and plans to oppose any attempt by the Women's Law Student Association to intervene.

Question Four: Advise Pardner whether Pardner should join the Women's Law Student Association as a defendant or should oppose its possible attempt to intervene if Pardner does not make it a party to the BALSAMesic litigation. Explain fully.

Additional Facts

Pardner's proposed complaint seeking an injunction alleges three claims: 1) Violation of the New Mexico Constitution Equal Protection Clause; 2) Violation of the New Mexico Constitution Due Process Clause; 3) Breach of Contract due to changing the basis for awarding financial aid from that contained in the catalog at the time current students were admitted to the law school to that implemented as a result of Oilcatter's gift and conditions. Pardner asks you:

Question Five: Are BALSAMesic entitled to a jury trial of right if the proposed complaint is filed? Explain fully.

**Part II
The First Lawsuit is Filed**

Assume for the remainder of the examination question that the following has occurred:

Pardner filed a class action lawsuit in the New Mexico State District Court against the University of New Mexico School of Law and Dean Scarnecchia with Balsa and Mesic as the named plaintiffs. The trial judge has certified a class pursuant to Rule 1-023(B)(2), but narrowed the class membership from that requested in Pardner's complaint. Instead, the certified class is made up of "Balsa members who would suffer diminishment of financial aid under the Oilcatter gift and condition and Mesic and all other law students who would suffer diminishment of financial aid under the Oilcatter gift and condition."

Defendants filed a motion to add Regina University Law School as a necessary and indispensable party. The trial court denied the motion. The Women's Law Student Association chose not to attempt to intervene in the lawsuit.

Additional Facts

The defendants, UNM School of Law and Dean Scarnecchia, have been losing most of the pre-trial motions that they have filed. Their lawyer has been chastised twice by the judge for making frivolous motions. Also, at the hearing on the motion for preliminary injunction, after listening to the Defendants' lawyer speak of the irreparable harm that would occur to students if need-based financial aid were cut off, Judge Judd stated from the bench that "I paid my own way through Duke Law School despite my great financial need and so I know it can be done without undue hardship especially at a law school with low tuition like UNM." The Defendants made a motion to have Judge

Judd disqualify himself from continuing to preside over the trial. Judge Judd denied the motion.

Question Six: Pardner tells you that another associate is researching whether Judge Judd committed reversible error in failing to disqualify himself from the case. Pardner asks you to tell her whether and, if so by what means, UNM can immediately appeal Judge Judd's ruling. Advise her, explaining fully.

Assume for the remainder of this examination question that:

The class action was tried and the result was a total victory for the Plaintiffs. The trial court determined that the New Mexico Constitution's Equal Protection Clause prevented UNM School of Law from abandoning need-based scholarships in favor of scholarships based solely on academic achievement. Indeed, the court went on to rule that the New Mexico Equal Protection Clause required all scholarships at the UNM School of Law to be given based solely on financial need and ordered that UNM School of Law immediately institute a policy of awarding scholarships based solely on need.

Additional Facts

The Defendants filed a timely notice of appeal. Months ago, the UNM School of Law deposited the \$20 million from Oilcatter into a savings account at the Bank of Albuquerque in Albuquerque. Regina University School of Law has made a demand on the Bank to turn over the \$20 million to it because the Oilcatter condition cannot be met due to court's ruling in *BALSA/Mesic v. UNM School of Law and Dean Scarnecchia*.

UNM School of Law has written to the Bank demanding that the Bank allow the Law School to withdraw the money, arguing that the *BALSA/Mesic* judgment will be reversed on appeal.

Question Seven: Pardner fears that the Bank will file an interpleader action in New Mexico Federal District Court and that the court will find that the interpleader is

proper and will enjoin the parties from proceeding in the BALSAMesic case so that the Federal court can definitively determine whether UNM School of Law can keep the money because it can meet the Oilcatter condition. Pardner asks you to determine if her fears are likely to come to pass and to explain fully.

Part Three

The Second Lawsuit: *Reynoso et. al. v. UNM School of Law and Dean Scarnecchia*

Assume for the Remainder of the Exam that:

After determining that they would probably lose the appeal in *BALSAMesic*, UNM School of Law and Dean Scarnecchia abandoned the appeal so the trial court judgment in favor of BALSAMesic became final. One month after the appeal was dismissed, the UNM School of Law reformulated all scholarships this time basing all the scholarships only on financial need as required by the *BALSAMesic* injunction. The School of Law sent out letters to all students telling them of their award for the following semester. Fifty women law students who had received scholarships based on academic achievement learned that they would no longer get any aid. None of these women is a member of BALSAMesic. One week after receiving the letters, the fifty women joined as named plaintiffs and filed a law suit in New Mexico State District Court (*Reynoso et. al. v. UNM School of Law and Dean Scarnecchia*) alleging that the UNM School of Law and its new Dean, Suellyn Scarnecchia, violated their rights of Equal Protection and Due Process as protected by the New Mexico Constitution when the law school abandoned scholarships based on academic achievement. The *Reynoso* plaintiffs added one new claim that had not been raised in the previous litigation---that UNM School of Law's abandonment of academic achievement scholarships unduly impacted women law

students and thus violated the New Mexico Constitutional provision that states that “Equality of rights under law shall not be denied on account of sex of any person.”

The answer of UNM School of Law and Dean Scarnecchia asserted as affirmative defenses the following: 1) law of the case, 2) res judicata, 3) collateral estoppel, and 4) stare decisis, all based on the decision in *BALSA/Mesic v. UNM School of Law and Scarnecchia*. Based on these defenses, UNM School of Law/Scarnecchia moved for summary judgment.

Question Eight: You are the clerk for the trial judge who must rule on the motion. Please draft a memo to the judge evaluating each of the defenses raised, providing a recommendation to the trial judge concerning the validity of each defense and stating your reasoning fully.

Appendix to Question One

N.M. Const. Art. II, Sec. 12

The right of trial by jury as it has heretofore existed shall be secured to all and remain inviolate.

**Appendix
Question One**

28 U.S.C. Sec. 1367. Supplemental Jurisdiction

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

(b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if--

- (1) the claim raises a novel or complex issue of State law,
- (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
- (3) the district court has dismissed all claims over which it has original jurisdiction, or
- (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

(d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

(e) As used in this section, the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

End of Question One

Question Two
Suggested Time: One Hour and Fifteen Minutes

FACTS

On March 1, 2002 an accident occurred at the corner of Yale and Lomas. A bus driven by Sister Susan, a Catholic nun, collided with a bright pink Cadillac driven by Anthony "The Enforcer" Torto. Torto was badly injured in the accident.

On January 10, 2003 Torto filed an action against Sister Susan in federal district court. Jurisdiction was based on diversity of citizenship. In the complaint, Torto alleged that he was proceeding west on Lomas and that the traffic signal was green, in his favor, when he approached the intersection at a speed of 25 miles per hour. He alleged that Sister Susan was proceeding north on Yale, was speeding at about 60 miles per hour, and that she drove the bus through the intersection while the traffic signal controlling her lane of traffic was red. He concluded by asserting that the accident was solely the fault of Sister Susan and requested compensatory damages in the sum of \$9,000 and punitive damages in the amount of \$90,000.

Sister Susan's answer denied that she was speeding, denied that she went through a red light and denied that the accident was caused in part or in whole by her fault.

No summary judgment motion was filed in the case.

Trial began on November 3, 2003. Torto's case-in-chief consisted entirely of his own testimony concerning the causes of the accident. He testified that Sister Susan was speeding at about 60 mph, that she went through a red light when she entered the intersection and that he was proceeding cautiously at about 25 mph when he entered the intersection with a green light authorizing him to do so. Sister Susan's attorney cross-examined Torto and established without doubt that he had four times before been convicted of perjury for testimony he gave in a grand jury proceeding, a senate investigation, a murder trial, and a personal injury action.

At the close of the plaintiff's case, Torto made a Rule 50(a) motion for judgment as a matter of law. Sister Susan made a counter motion for judgment as a matter of law.

The judge denied the motion.

Sister Susan then put on her defense. She testified that she was not speeding but was traveling at 25 mph, well below the speed limit. She testified that the light was green in her favor when she entered the intersection. She testified that the Torto vehicle was speeding and went through a red light. Torto did not cross-examine.

All ten persons on the bus were local religious leaders of various religions who had attended a meeting at the University that day and were being driven home by Sister Susan. Each

testified. Each corroborated Sister Susan's testimony in all respects.

Three eyewitnesses testified. They were professors of philosophy at the university who were standing at the intersection when the accident occurred. They each corroborated the testimony of Sister Susan in all respects.

At the close of the defense, Torto renewed his motion for a judgment as a matter of law. Sister Susan made a motion for a judgment as a matter of law.

The judge denied the motions for judgment as a matter of law.

During the settling of instructions, Torto submitted an instruction on punitive damages. It followed verbatim UJI Civ. No. 13-1827 which provides in relevant part: "If you find that Torto should recover compensatory damages, and if you further find that the conduct of Sister Susan was malicious, willful, reckless, wanton, grossly negligent, fraudulent or in bad faith, then you may award punitive damages."

Sister Susan submitted the identical instruction on punitive damages except that her tendered instruction omitted the phrase "grossly negligent" from the list of types of conduct that the instruction would allow an award of punitive damages for. She did so because she was aware that a case pending in the New Mexico Supreme Court was considering whether gross negligence was any longer going to be acceptable to support an award of punitive damages, but she did not inform the judge of the pending appeal because there had been no ruling.

The court gave the instruction as requested by Torto.

Torto requested a general verdict form be used and proposed the following, taken verbatim from UJI Civ. 13-2201: "We find for the plaintiff in the sum of \$..... OR We find for the defendant"

Sister Susan proposed a general verdict accompanied by special interrogatories. Her proposal called for the following verdict form:

Special Interrogatories

"Was the defendant negligent?
"If so, was the defendant
malicious?
willful?
reckless?
wanton?
grossly negligent?
fraudulent?
acting in bad faith?

General Verdict

We find for the plaintiff in the sum of:

\$..... for compensatory damages

\$..... for punitive damages

OR

We find for the defendant"

The court chose to use the general verdict form proposed by Torto.

The jury returned a general verdict for Torto for \$1,900,000. Judgment was entered for Torto in that amount on November 10.

On November 11, the Supreme Court ruled in the pending case that gross negligence, alone, was no longer a ground for punitive damages. The Supreme Court ruled also that the new ruling applied to "any pending case in which the issue is properly preserved."

On November 12, Sister Susan made timely motions for a new trial on the ground the verdict was against the weight of the evidence and for judgment NOV. She also asked for a new trial on the grounds that the jury instruction on punitive damages was erroneous, and that the court erred in failing to use her proposed General Verdict Accompanied by Answers to Interrogatories.

Torto responded by asserting that judgment NOV was improper, that the jury verdict was not contrary to the weight of the evidence, that if it was contrary to the weight of the evidence it was so only as to liability, not damages, and thus a new trial should be limited to liability only. He also asserted that Sister Susan had not properly preserved error as to the jury instruction on punitive damages, and that even if it were preserved, there was no proof of prejudice since there was no proof that the jury found only gross negligence and not any other of the still-acceptable grounds for punitive damages that were submitted to the jury.

YOU ARE THE CLERK FOR THE TRIAL JUDGE. SHE ASKS YOU WHETHER SHE SHOULD GRANT ANY OR ALL OF THE MOTIONS AND REQUESTS THAT YOU EXPLAIN YOUR REASONING. SHE ASKS THAT YOU ALSO ADDRESS THE ISSUE OF WHETHER A REMITTITUR IS APPROPRIATE UNDER THE CIRCUMSTANCES AND, ASSUMING IT IS, WHAT THE PROPER AMOUNT SHOULD BE.
PLEASE WRITE THE MEMO.

End of Examination