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Exam No. _____

606 Civil Procedure II
Fall Semester 2005

UNM School of Law
Final Examination
Four Credits

Professor Occhialino
December 15, 2005
9:00 – 12:30 (3.5 Hrs)

Examination Format
Essay Answers

1. **Laptop** computer users: Start the Securexam program entering your examination number, course name, professor's name, & date of examination. Click "proceed" to enter the program. Type START in the next window that is displayed but do NOT press the enter key until the proctor says to begin the exam.

2. **Bluebooks** for writing: write on every-other line and only on the front page of each sheet. On the front of bluebook record the class name, professor's name, date of exam, and your examination number. Make sure to number each bluebook in order. **DO NOT WRITE YOUR NAME ON BLUEBOOKS.**

A five-minute warning will be given prior to the conclusion of the examination. When time is called, stop immediately. If you are handwriting, lay down your pen & close bluebook immediately. If using a laptop, save & exit the program.

Go to the exam check-in table at the conclusion of the exam & fill out an examination receipt.

Professor's Instructions

General Instructions

1. This is a three and one-half hour examination.
2. You may bring into the exam only a standard Federal Rules Supplement in which the particular rules may be annotated but which contains no outline of any portion of the course.
3. This is a two-question examination. The time allocated for each question reflects the relative point value of each question.
4. Start each of the two questions in a separate blue book if writing the examination and on separate pages if typing the examination.
5. PLEASE, if you write your answer:
Use a pen
Write only on one side of a page
Write only on every other line

Special Instructions for Question One

None

Special Instructions for Question Two

6. Question Two consists of a core fact pattern with additional facts that precede most of the sub-questions.
7. Answer each sub-question in order. If you choose to temporarily skip a question and return to it later, leave room in your blue book or typed exam for that question before proceeding. Then return there to answer, so that your answers end up in the correct order.
8. After presenting Additional Facts and then a sub-question, the exam often continues by asking you to assume a certain result occurred in the prior question. Do not read anything into those subsequent assumptions. They are not necessarily correct. Those results are assumed simply to keep the fact pattern progressing toward the questions that follow.
9. You are to assume that the substantive law stated in this question is correct, even though it might not actually correspond to the actual law of the involved jurisdictions.

Question One

Suggested Time: One Hour

An accident occurred at the corner of Yale and Lomas in the state of Numek, a new state with few precedents, but one which has adopted the Federal Rules of Civil Procedure for the Numek state district courts. A bus driven by Sister Susan, a Catholic nun, collided with a bright pink Cadillac driven by Anthony "The Enforcer" Torto. Torto was slightly injured in the accident. He suffered moderate burns, his face now tans more easily than in the past, he spent \$500 in medical expenses and he suffered physical pain and emotional distress as a result of the accident and witnessing his toy poodle get knocked unconscious in the back seat of his car as a result of the accident

Torto filed an action against Sister Susan in Numek State District Court. 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 \$100,000 and punitive damages in the amount of \$900,000.

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. 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, Sister Susan made a Rule 50(a) 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. Torto did not cross examine.

Three pedestrian 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. Torto did not cross examine.

At the close of the all the evidence, Sister Susan made a motion for a judgment as a matter of law.

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

The jury returned a general verdict for Torto for \$200,000 in compensatory damages and \$2,000,000 in punitive damages. Judgment was entered for Torto in the amount of \$2,200,000.

Sister Susan made timely motions for a new trial and for judgment NOV (renewed motion for judgment as a matter of law). In the alternative, she asked that the court grant a remittitur.

You are the clerk to the newly-appointed Numek State District Court judge who must resolve the post-trial motions. The judge has asked you to answer a series of specific questions relevant to the resolution of the post-trial motions and to explain your reasoning. Do so, providing concise but complete answers.

One

- A) What should be the standard for determining whether to grant the renewed motion for judgment as a matter of law?
- B) Should I grant the motion?

Two

- A) What should be the standard for determining whether to grant a new trial?
- B) Should I grant the motion?

Three

- A) What should be the standard for determining whether to grant a remittitur as to the compensatory damage award?
- B) What should be the appellate standard that will be used to review my decision?

Four

- A) What should be the standard for determining whether to grant a remittitur as to the punitive damage award?
- B) What should be the appellate standard that will be used to review my decision?

End of Question One

Question Two

Suggested Time: Two and One-Half Hours

New Mexico Law

Charging Lien

A charging lien recognizes the right of an attorney to recover his legal fees from a fund recovered in litigation. The lien operates by having the court prevent payment of the judgment or the settlement to the winning party until that attorney receives the appropriate fee.

Belli v. Marshall, 137 N.M. 234. (2004)

Duty of Client to Pay Legal Fees

It is the responsibility of the client to pay the attorney fees of the attorney whom the client hires.

Webster v. Brennan, 137 N.M. 345 (2004)

Right of Discharged Lawyer to a Fee

The proper basis for awarding attorney's fees to discharged attorneys and their successors is as follows: Discharged attorneys hired under a contingent fee contract are entitled to recover the reasonable value of their services to the date of discharge, limited by the maximum fee allowable under the fee agreement. A substituted attorney, however, is entitled to the full contingent fee provided for in the contract less any amount that the discharged attorney is entitled to as payment for the reasonable value of his services prior to discharge.

Boise v. Taney, 137 N.M. 678 (2004)

Requirements for a Charging Lien

“The second requirement [for a charging lien] is that there be a fund ‘recovered by’ the attorney. It is not enough to support the imposition of a charging lien that an attorney has provided his services; the services must, in addition, produce a positive judgment or settlement for the client, since the lien will attach only to the tangible fruits of the services. Thus, an attorney's charging lien attaches to the fruits of the attorney's skill and labor. The lien will attach to the proceeds of a judgment obtained by the attorney. If the attorney's work produces no fruit, then the attorney has no lien.”

Walther v. Elmer, 27 N.M. 114, 197 P. 103 (1931)

Federal Law

Settlements of Federal Tort Claims Act Cases

All settlements of cases brought pursuant to the Federal Tort Claims Act must be approved by the court.

MEMORANDUM

To: Leo Lawstudent
From: Pamela Partner
Re: Morse Case

The firm has agreed to represent attorney Steve Morse in his quest to obtain just compensation for his legal work on behalf of Elizabeth Vaccaro. Complex procedural issues are likely to arise. Because you have just completed a course in Advanced Civil Procedure, I am assigning you to be the lead person in the procedural research and planning for our litigation on behalf of Mr. Morse.

New Mexico citizen Elizabeth Vaccaro hired attorney Morse to represent her in a medical malpractice action to be brought against the United States pursuant to the Federal Tort Claims Act (FTCA). Such actions can be brought only in federal court, where jurisdiction is based on the existence of a federal question. The FTCA allows for contingency fees but places a maximum of 25% on the fee that plaintiff's counsel can recover. Vaccaro and Morse signed a fee contract calling for a 25% contingent fee. After doing legal research and factual investigation, and after entering into preliminary negotiations with the United States seeking to settle Vaccaro's case without filing a lawsuit, Mr. Morse was discharged as counsel by Ms. Vaccaro. In his place, Ms. Vaccaro hired Mark Burch to represent her in the FTCA action. Both Morse and Burch are members of the New Mexico Bar and both are citizens of New Mexico. Mr. Burch filed suit on behalf of Ms. Vaccaro against the United States. After the court denied a motion for summary judgment filed by the United States, Burch completed settlement negotiations with the United States. Last week, the United States agreed to pay \$4.8 million dollars to Ms. Vaccaro. From this amount she will pay her counsel fees. The settlement must be approved by the court before it can go into effect.

Mr. Morse has been informed by Ms. Vaccaro and Mr. Burch that they plan on not sharing any part of the attorney fee with Mr. Morse. Mr. Morse insists that he is entitled to a portion of the fee.

As you know, part of my litigation planning is to work out a possible scenario for the likely litigation and to determine how to react to various contingencies that I anticipate might occur. I have done so in this case, and my assumed facts and questions are listed below.

As to each of the questions below, provide an answer, fully explaining your reasoning.

Additional Facts

The settlement has not yet been approved by the court. The United States has liability insurance that covers the complete liability in this case. The insurance coverage is provided by Brown & Root Insurance Company (B&R), a corporation incorporated in Delaware with its principal place of business in Texas.

I am considering sending a letter to B&R informing it that our client, Mr. Morse, has a claim for a portion of the \$4.8 million dollar settlement proceeds that B&R will pay out

after the court approves the settlement and that Mr. Burch and Ms. Vaccaro insist that Mr. Burch alone is entitled to the portion of the settlement that will be used to pay his contingency fee. I would inform B&R that if they pay the full amount to Ms. Vaccaro and Mr. Burch, B&R will have improperly given them money a portion of which rightly belongs to Mr. Morse. I will tell them that Morse will sue B&R for his rightful portion of the fee. I hope thereby to goad B&R into filing an interpleader action in federal court or New Mexico state district court so that we can resolve the fee dispute with Burch in an interpleader action before Vaccaro and Burch receive the \$4.8 million and Burch receives the 25% fee he claims entitlement to.

QUESTIONS

Question One

Will an interpleader action be proper if B&R files for interpleader in federal district court?

Question Two

Will an interpleader action be proper if B&R files for interpleader in state district court?

Question Three

Assuming an interpleader action would be proper in both state and federal court, will the federal and/or state court enjoin the parties from proceeding with the settlement in the *Vaccaro v. United States* case pending the outcome of the interpleader action?

Additional Facts:

The insurance company might inform me that it has no intention of filing an interpleader action. Assume that the settlement has not yet been approved. We may want to file a charging lien in the federal district court action, *Vaccaro v. United States*. However, Mr. Morse is not a party to the action. I believe that for us to succeed in filing the charging lien, Mr. Morse must be a party.

Question Four: Can Mr. Morse successfully move to intervene in *Vaccaro v. United States*?

Additional Facts

Assume that the court granted the motion of Mr. Morse to intervene. At the hearing on the motion, federal district court Judge Knott said: "Mr. Morse, I have grave doubts that you will be entitled to much of a fee. I have seen your work in five prior FTCA cases, and frankly, it has not been good. I am also aware of the fact that you failed the bar three times, and I take judicial notice of the fact that in this Federal District Court you have twice been successfully sued for malpractice after botched FTCA cases. Nonetheless, I will grant your motion to intervene."

Question Five: Will Morse likely succeed if he moves to disqualify the trial judge for bias or prejudice?

Additional Facts

Assume that Judge Knott declined to grant Morse's motion to disqualify herself.

Question Six: What procedural devices are possibly available for Morse to immediately appeal the judge's ruling refusing to disqualify herself? Which is most likely to succeed? Why?

Additional Facts

The court granted Morse's motion to intervene. The settlement has not yet been approved. Morse chooses not to seek immediate appeal of Judge Knott's ruling refusing to disqualify herself.

Question Seven: Is Mr. Burch a party to be joined if feasible in *Vaccaro v. United States*? Can he be joined? If Burch were a party to be joined if feasible, but could not be joined, should *Vaccaro v. United States* be dismissed for lack of an indispensable party?

Additional Facts

Assume that Morse was allowed to intervene and Burch was joined as a necessary party. The settlement has not yet been approved. Morse's complaint in intervention sought only that a charging lien be granted, thus prohibiting B&R and the United States from making any payment to Vaccaro and Burch until the amount of Morse's fee was determined and paid to him from the \$4.8 million settlement.

A thorough search of New Mexico law produced the following from the most recent case on point:

"The second requirement [for a charging lien] is that there be a fund 'recovered by' the attorney. It is not enough to support the imposition of a charging lien that an attorney has provided his services; the services must, in addition, produce a positive judgment or settlement for the client, since the lien will attach only to the tangible fruits of the services. Thus, an attorney's charging lien attaches to the fruits of the attorney's skill and labor. The lien will attach to the proceeds of a judgment obtained by the attorney. If the attorney's work produces no fruit, then the attorney has no lien."

Walther v. Elmer, 27 N.M. 114, 197 P. 103 (1931)

Morse asserted that this meant that if the client received a judgment or settlement, then the discharged attorney was entitled to a portion of it, but that if the client was totally unsuccessful and received nothing, the discharged attorney obviously could not obtain a charging lien since there was no recovery.

Burch asserted that this meant that if the discharged attorney had not obtained a settlement or judgment prior to being discharged, no charging lien was available on any judgment or settlement obtained after the original attorney was discharged.

Question Eight: What are the two ways that the federal district court judge can use to determine whether Morse or Burch is correct in their assertions of New Mexico law? Describe how each works, and inform Partner of the factors that would go into the determination of which of the two might be the preferable approach.

Additional Facts

Assume that the trial judge concluded that Burch was correct about the content of New Mexico law and entered the following order dismissing Morse's complaint in intervention. This order thus left only the underlying suit between Vaccaro and the United States, which was still pending because the settlement had not yet been approved.

"I construe New Mexico law as Mr. Burch explained it. Mr. Morse's failure to fulfill the second requirement is dispositive. I find that Mr. Morse's services did not produce a recovery fund, nor a positive judgment or settlement for the plaintiffs before he was discharged. I find the charging lien, therefore, has no validity as a matter of law. Mr. Morse has no charging lien due to his failure to comply with the second requirement of *Walther v. Elmer*. Moreover, I find that Mr. Morse made absolutely no contribution to the settlement; indeed his work prior to being discharged was wholly detrimental to Ms. Vaccaro's interests."

"The issue of other remedies, if any, is not before the Court."

(Signed Judge Knott)

Two weeks later, Morse filed an action in New Mexico State District Court against Burch and Vaccaro.

The complaint contained a cause of action for quantum meruit against Vaccaro. That claim is based on New Mexico law, which Morse correctly asserts provides that a discharged attorney is entitled to a reasonable fee from the client for the legal work done before being discharged.

The complaint contained a cause of action for unjust enrichment against Burch. That claim was based on the correct assertion that if Burch kept possession of the full 25% contingency fee, he would be unjustly enriched because a portion of the fee was earned by the legal work of Morse before he was discharged.

The complaint also correctly noted (as to both the quantum meruit and unjust enrichment claims) that though Morse may not have been entitled to a charging lien because he did not meet the second New Mexico requirement for a charging lien (i.e. he had not produced a judgment or settlement before being discharged), nonetheless if he made significant contributions to the ultimate settlement, he was entitled to recovery under New Mexico law.

Question Nine: If Burch and Vaccaro seek to dismiss based on the doctrine of law of the case, will either be successful?

Question Ten: If Burch and Vaccaro seek to dismiss on the basis of res judicata, will either be successful?

Question Eleven: If Burch and Vaccaro seek to dismiss on the grounds of collateral estoppel, will either be successful?

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

(a) Except as provided in subsections (b) and Federal statute, in any civil action of which the district courts shall have supplemental jurisdiction to claims in the action within such original jurisdiction or controversy under Article III of the United States Constitution, the district courts shall include claims that involve the parties.

(b) In any civil action of which the district courts have jurisdiction under section 1332 of this title, the district courts shall have supplemental jurisdiction under subsection (a) over claims by plaintiffs under Rule 19, 20, or 24 of the Federal Rules of Civil Procedure to be joined as plaintiffs under Rule 19 of such rules, when exercising such jurisdiction would be inconsistent with the jurisdictional requirements of section 1332.

End of Ex