

Examination Number _____

606 Civil Procedure II
Four Credits
Final Examination

Professor Occhialino
Monday, May 2, 2005
3.5 Hours

CIVIL PROCEDURE II

INSTRUCTIONS

1. You may bring into this examination only a standard "Federal Rules Supplement." You may annotate the rules but may not outline the course, in whole or in part, in your Rules Supplement.
2. Write on only one side of a page. Write only on every other line. Write as neatly as possible under the circumstances. If you type, please double space. Put your exam number on each typed page or bluebook.
3. There are 16 questions in this examination. Four to them are identified as "Essay Questions" and twelve are identified as "Shorter Answer Questions." You are to answer ALL the questions. The four "Essay Questions" are worth a total of 50% of your grade and the twelve "Shorter Answer Questions" are worth 50% of your grade. You should allocate your time accordingly. You should be able to answer the "Shorter Answer Questions" in about 150 words or so, on average.
4. Please answer each of the twelve questions in order if at all possible so that I can read the answers sequentially.

**Winner of "Inspiration for the Exam" Award
Theo Johnson**

"I'm off to the porcupine racetrack to listen to wind in their bristles and watch those little porkies run."
[A possible source for a hantavirus virus infection]

Core Fact Pattern

Tony and Angela Camp are members of the Navajo Nation who reside in Shiprock, New Mexico. They have two children, Ben, age fifteen, and twenty-two year old Tory who graduated from college and now lives and works in New York.

On June 1, 2004, Ben became ill at home. His mother called for emergency help and an ambulance owned by the Navajo Nation and staffed by paramedics employed by the Navajo Nation responded. The paramedics provided initial emergency treatment at his home and then transported Ben to the Indian Health Service (IHS) Hospital in Shiprock, New Mexico. The Hospital is operated by the United States. While at the hospital, Ben was treated by Dr. Goodrich, an employee of the IHS. In the emergency room, Dr. Goodrich was able to stabilize Ben, and then admitted him to the hospital for observation. After three days at the Hospital, Ben was getting no better. Dr. Goodrich decided that Ben should be transported to the University of New Mexico Hospital (UNMH) in Albuquerque, New Mexico for further tests and treatment. Dr. Goodrich arranged for the Navajo Nation ambulance to transport Ben from his home to the IHS hospital in Shiprock.

When Ben arrived at UNMH, he was treated by medical personnel employed by UNMH. Dr. Martinez, a specialist in the relevant field, determined that Ben should be prescribed Potem4, a medication manufactured and marketed by Murky Company, a drug company that is incorporated in Delaware with its principal place of business in New York. Ben took the medication as prescribed.

Ben got worse instead of better. Two weeks after being admitted to UNMH, he died. The coroner stated that the cause of death was "Hantavirus, exacerbated by rare reaction to Potem4."

You have requested and received the following memorandum from Stu Dent, a third year law student. You are to assume that the information provided in the memorandum is accurate.

MEMO

TO: Cipriano Civpro
FROM: Stu Dent
RE: Preliminary Research: Camp Wrongful Death Action.

The Indian Health Service is a department of the United States. Any lawsuit against the United States for medical malpractice must be brought pursuant to the Federal Tort Claims Act (FTCA). The FTCA waives the sovereign immunity of the United States for tort actions sounding in negligence. The FTCA provides that any action alleging the negligence of an employee of the United States must be brought against the United States. The FTCA provides that the federal district courts have exclusive jurisdiction to hear FTCA actions; an FTCA action cannot be brought in state court. Although federal courts have federal question subject matter jurisdiction under the FTCA, the Act provides that the law of the place where the negligent act occurs shall provide the applicable substantive law. This means that New Mexico state tort law controls on the issue of the liability of the United States for negligence during the treatment in Shiprock of Ben Camp. The FTCA provides that no punitive damages can be awarded against the United States. A statutory provision of the FTCA provides that FTCA cases must be tried in a bench trial; the statute precludes jury trials in an FTCA case.

UNMH and the employees of UNMH are deemed to be state entities and are thus covered by the New Mexico Tort Claims Act. There is a waiver of sovereign immunity for negligence of medical personnel at UNMH. Only the State of New Mexico can be named as a defendant. The waiver of immunity is a waiver only of the common law sovereign immunity that the State and UNMH would

otherwise possess. The Tort Claims Act is not a waiver of the State's Eleventh Amendment immunity from lawsuits in federal court. This means that UNMH cannot be sued for negligence **in federal court** under the State Tort Claims Act unless it has waived its sovereign immunity. The State has not waived its Eleventh Amendment immunity and, in accordance with its standard policy, will not do so in any litigation arising from the treatment received by Ben Camp at UNMH.

In general, the negligence law of New Mexico applies to the liability of UNMH. The exception is that the Tort Claims Act contains a cap on liability. The cap on medical expenses, both past and future is \$300,000. The cap on all other damages is \$400,000. Punitive damage awards are forbidden in actions against state agencies, including UNMH. There is a right to jury trial in actions against the state entities under the Tort Claims Act.

The tort law of New Mexico provides for several liability with exceptions not relevant to the Camp wrongful death action. The doctrine of several liability provides that when multiple tortfeasors act separately to cause an injury, no tortfeasor is liable for the whole injury; instead, each tortfeasor is liable for damages only in accordance with its fault compared to the fault of all other wrongdoers, including co-defendants and the plaintiff. Thus a defendant who is 30% at fault is liable for and will pay only 30% of the damages. Although there is an exception to several liability for what is called "successive injuries" all of the persons who have analyzed this fact pattern agree that the "successive injury" exception will not be applicable to any litigation arising out of Ben Camp's death. If a wrongdoer is liable for a defective product under the doctrine of strict liability in accordance with New Mexico law, that tortfeasor's fault is compared with the fault of other wrongdoers.

Many other states apply several liability as does New Mexico. Other states, however, continue to apply the doctrine of joint and several liability under which each tortfeasor is fully liable for the plaintiff's injuries even if there are multiple tortfeasors. Any tortfeasor who pays the full judgment in those states is entitled to contribution from other tortfeasors.

New Mexico has adopted strict liability in tort for defective products. The New Mexico Supreme Court joined about forty states in adopting the formulation of strict products liability provided in the Restatement (Second) of Torts, Section 402(A).

Definition of Defect

Section 402(A) defines a design defect as follows:

The rule stated in this Section applies only where the product is, at the time it leaves the seller's hands, in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him. . . . A product is not in a defective condition when it is safe for normal handling and consumption.

The Restatement (Third) of Products Liability has been adopted in four states. It provides a somewhat different definition of a defective product:

A product . . . is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller. . . .

Six other states and the District of Columbia have adopted their own definition of defect, and no two of them has the exact same definition as another and none of the seven uses the exact definition in the Second Restatement or the Third Restatement.

One state has declined to adopt strict tort liability for products, choosing instead to impose liability for breach of warranty with no requirement of privity.

Defense of Contributory Negligence or Comparative Negligence

The states differ on the question of whether and to what extent the fault of the plaintiff should be a defense to an action for strict product liability. In the United States currently:

Some states do not apply contributory or comparative negligence in products liability cases unless the plaintiff is guilty of assumption of risk, in which case the plaintiff recovers nothing;

Some states apply contributory negligence in products liability cases so that the plaintiff receives nothing in a products liability case if the plaintiff is guilty of any contributory negligence;

Some states apply pure comparative negligence in products liability cases so that the plaintiff recovers an amount reduced by the percentage of fault attributable to the plaintiff, no matter how great the comparative fault of the plaintiff; and

Some states apply modified comparative negligence in product liability cases, so that the plaintiff is barred any recovery if plaintiff's fault is above 50% but recovers an amount reduced by his percentage of fault when plaintiff's fault is below 50%.

Choice of Law New Mexico applies traditional choice of law principles under which, in tort cases, the law of the place of injury determines which state law applies.

Murky Corporation To date, Murky Company has been sued ten times in actions alleging Poten4 is defective. Two of the cases settled, four or pending in four different state courts and three are pending in federal court. In one case, *Primo v. Murky Co.* CV No. 03-9876, filed in the state district court in Nebraska, a jury returned a verdict for the plaintiff, Primo, for \$20,000 in an action alleging injury due to the use of Poten4. The case is pending on appeal. Nebraska is one of the states that has adopted the Restatement (Third) of Products Liability definition of defect.

Murky Company has been losing money lately due to enormous liability judgments against the company for a different drug—Detoba—which has been proven to cause birth defects in children whose mothers ingested the drug during pregnancy.

Counsel for the Camps has learned from public sources that there have been 150 reports to the FDA of adverse reactions to Poten4 since its introduction on the market in 2002. The reactions have ranged from mild pain and inflammation that lasts only a few weeks to very serious side effects, including three reported deaths. More than 100,000 persons have taken Poten4 since 2002. Published reports suggest that Poten4 contains an ingredient that can cause adverse reactions but is not necessary to accomplish the beneficial effects of Poten4.

Examination Continues on Next Page

Additional Facts

Counsel for the Camp is considering filing a class action against Murky Corporation, naming the Camps on their own behalf and on behalf of all other persons who have had adverse reactions to Poten4. The cause of action would be for strict products liability for a design defect. The requested relief would include: 1) Compensatory Damages for all members of the class; 2) Punitive damages for all members of the class; 3) An injunction compelling Murky Corporation to withdraw Poten4 from market until such time as the FDA reinvestigates and reapproves the use of Poten4.

Murky Corporation has exhausted most of its products liability insurance coverage in the litigation involving Detoba, which has now ended. The Multistate Insurance Company (incorporated in Delaware with its principal place of business in New York) insures Murky Corporation against product liability. There is \$15,000,000 in insurance coverage remaining to pay judgments against Murky Corporation for Poten4 injuries. Murky Corporation has \$50,000,000 in net assets apart from its insurance coverage.

New Mexico Rule 1-023 and Federal Rule 23 are exactly the same.

Other associates have determined that the four prerequisites for a class action pursuant to Rule 23(a) will be met. You are to assume this is true.

Essay Question 1: Determine whether one or more of the Rule 23(b) alternative requirements for a class action is likely to be met, explaining fully your reasoning.

Additional Facts: Assume for this question that the Camps would prefer to file and litigate their lawsuit individually and not as a class action and have filed their individual action against Murky Corporation in State District Court in New Mexico.

Essay Question 2: Determine whether Multistate Insurance Company can successfully file an interpleader action in Federal District Court naming as opponents all persons who have Poten4 claims against Murky Corporation. Explain your reasoning fully.

Shorter Answer Question 1: Assume that Multistate Insurance Company can successfully file a statutory interpleader action in federal court: Determine whether the federal court can and will compel the state district court of New Mexico to stay its *Camp v. Murky Corporation* lawsuit and require that the Camps litigate their claim against Murky in the federal interpleader action. Explain your reasoning fully but concisely.

Essay Question 3: Counsel for the Camps would be delighted if the Camps could use the Nebraska judgment in *Primo v. Murky Co.* to establish that Poten4 is a defective product. This will require analysis of the law of collateral estoppel of Nebraska, which we do not now know. In light of our current knowledge of the *Primo* ruling, make a list of all of the issues that must be researched and resolved before a determination can be made whether the Camps will be able to apply collateral estoppel in an action brought by the Camps against Murky in State District Court of New Mexico for themselves alone. As to each of the issues on the list, explain concisely the

possible variations in law that might exist as to that issue and the significance to the Camps of the determination of what the law is as to each such issue. Explain your reasoning fully.

Additional and Different Facts: Assume for all the questions that follow that the Camps have not filed a class action. Instead:

1. They have filed an action in Federal District Court in New Mexico against the United States for negligence by IHS Doctor Goodrich in the scope of his employment.
2. They have filed an action in State District Court in New Mexico against the State under the Tort Claims Act for negligence in treatment by Dr. Martinez and negligence in choosing to prescribe Potemkin to Ben during his stay at UNMH.

Shorter Answer Question 2: Will the first lawsuit to reach a final judgment on the merits be entitled to res judicata in the second lawsuit that has not yet then finished? Explain your reasoning concisely but fully.

Essay Question 4: In the action in Federal District Court in New Mexico, the United States argues that the Navajo Nation, which operated the ambulance that took Ben from his home to Shiprock, was liable under principles of respondeat superior for negligence in the initial diagnosis and treatment of Ben and that this negligence contributed to Ben's illness and death. The United States has made a motion to join the Navajo Nation as a defendant under Rule 19 of the Federal Rules of Civil Procedure or to dismiss the action against the United States. What are the arguments for and against joinder under Rule 19 and what result would you expect the federal court judge to reach on the motion? Explain your reasoning fully.

Shorter Answer Question 3: In the action in State District Court in New Mexico, the State desires to assert that the Navajo Nation through its ambulance employees was negligent and thereby contributed to Ben's illness and death. A) What means are theoretically available for raising this issue in the State District Court? B) Which means is the most likely to be successfully employed by the State? Explain your reasoning concisely but fully.

Additional Facts: For the next four Shorter Answer Questions, assume that the following is true:

The named plaintiffs in the Federal District Court action filed against the United States are: "Tony and Angela Camp as next friend of Ben Camp, for wrongful death of Ben Camp, Tony Camp for himself for parental consortium, Angela Camp for herself for parental consortium and Tory Camp for herself for sibling consortium."

Shorter Answer Question 4: A) Are the plaintiffs correctly identified as the real parties in interest? B) If not, and the statute of limitation has run, what recourse do the

Camps have after the statute of limitations has run to correct the problem? Explain your reasoning fully but concisely.

Shorter Answer Question 5: Assume that the United States impleads Murky Company as a third party defendant under Rule 14 in order to lay off fault on Murky in accordance with New Mexico law of several liability: Can all the plaintiffs amend their complaints to add Murky Company as a defendant in their lawsuits? Explain your reasoning fully but concisely.

Shorter Answer Question 6: Assume that the United States moves to dismiss the claim of Tory Camp on the ground that there is no cause of action in New Mexico for sibling consortium, a matter not free from doubt because New Mexico law permits married and unmarried partners and grandparents and parents to sue for consortium but has not ruled on the issue of whether siblings can sue for consortium. If the Federal District Court judge is not certain whether New Mexico law permits sibling consortium, what means are available for determining the answer? Which is preferable? Why? Explain your reasoning concisely but fully.

Shorter Answer Question 7: Assume that the United States makes a Rule 12(b)(6) motion to dismiss Tory's claim for consortium and the Federal District Court judge grants the motion: If Tory Camp wants to seek an immediate appeal of the ruling dismissing her claim, what is the most likely vehicle for obtaining immediate review? Explain your reasoning concisely but fully.

Additional Facts: For the next two Shorter Answer Questions, assume that in the Federal District Court case against the United States, the Camps made a timely demand for a jury trial despite the fact that Federal Tort Claims Act provides that actions against the United States must be tried to a judge rather than a jury.

Shorter Answer Question 8: Do the Camps have a constitutional right to jury trial in this tort action against the United States? Explain your reasoning concisely but fully.

Shorter Answer Question 9: If the Federal District Court denies the Camps' motion for jury trial, what are the available means of seeking immediate appeal that might be available? Which one is the most likely to be successful? Explain your reasoning concisely but fully.

Additional Facts: For the next three Shorter Answer Questions, assume that Tony and Angela Camp properly filed a wrongful death action in Federal District Court against the United States under the Federal Tort Claims Act and against Murky Corporation for common law products liability, both of whom sought to lay off fault on the State under principles of several liability. The trial court determined fault as follows:

- 20% State
- 25% Murky Corporation
- 25% Ben Camp
- 30% United States

The court awarded damages of \$ 1,500,000 to the Camps and entered judgment against the State and Murky Corporation in accordance with the comparative fault percentages.

Shorter Answer Question 10: If final judgment were entered on the judgment and no appeal was taken, would any or all of the federal court's findings of damages and fault percentages be collateral estoppel in the still-pending action of the Camps against the State in the State District Court action? Explain your reasoning concisely but fully.

Shorter Answer Question 11: Assume for this question that after a final judgment was entered, Murky Corporation alone appealed. Murky argued that neither of the Camps' two trial experts should have qualified under *Daubert* and their testimony should have been stricken. Murky correctly notes that without an expert testifying as to defect, the Camps cannot win a product liability case. Assume further that the court of appeals agrees with Murky's argument.

Should the court grant a new trial to Murky Corporation or should the appellate court enter judgment for Murky Corporation? Explain your reasoning concisely but fully.

Shorter Answer Question 12: Assume for this question that after a final judgment was entered, Murky Corporation alone appealed and the Court of Appeals ruled that Murky Corporation was not liable and entered a judgment for Murky Corporation.

Must the court grant a new trial to the remaining parties or may the court, instead affirm the judgments entered with the single exception of the trial court judgment against Murky? Explain your reasoning concisely but fully.

**End of Examination
Appendix Follows**

Appendix

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.

28 U.S.C. § 1335. Interpleader

- (a) The district courts shall have original jurisdiction of any civil action of Interpleader or in the nature of Interpleader filed by any person, firm, or corporation, association, or society having in his or its custody of possession money, or property of the value of \$500 or more, or having issued a note, bond, certificated, policy or insurance, or other instrument of value of amount of \$500 or more, or providing for the delivery or payment or the loan of money or property of such amount or value, or being under any obligation written or unwritten to the amount of \$500 or more, if

- (1) Two or more adverse claimants, of diverse citizenship as defined in section 1332 of this title, are claiming or may claim to be entitled to such money or property, or to any one or more of the benefits arising by virtue of any note, bond, certificate, policy or other instrument, or arising by virtue of any such obligation; and if
 - (2) the plaintiff has deposited such money or property or had paid the amount of or the loan or other value of such instrument or the amount due under such obligation into the registry of the court, there to abide the judgment of the court, or has given bond payable to the clerk of the court in such amount and with such surety as the court or judge may deem proper, conditioned upon the compliance by the plaintiff with the future order of judgment of the court with respect to the subject matter of the controversy.
- (b) Such an action may be entertained although the titles or claims of the conflicting claimants do not have a common origin, or are not identical, but are adverse in and independent of one another.

28 U.S.C. § 1397 Interpleader

Any civil action of interpleader or in the nature of interpleader under section 1335 of this title may be brought in the judicial district in which one or more of the claimants reside.

28 U.S.C. §2361 Process and procedure

In any civil action of interpleader or in the nature of interpleader under section 1335 of this title, a district court may issue its process for all claimants and enter its order restraining them from instituting or prosecuting any proceeding in and State or United States court affecting the property, instrument or obligation involved in the interpleader action until further order of the court. Such process and order shall be returnable at such time as the court or judge thereof directs, and shall be addressed to and served by the United States marshals for the respective districts where the claimants reside or may be found.

Such district court shall hear and determine the case, and may discharge the plaintiff from further liability, make the injunction permanent, and make all appropriate orders to enforce its judgment.

28 U.S.C. Sec. 2283 Stay of State Court Proceedings

A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

End of Appendix: End of Examination