

CIVIL PROCEDURE FINAL EXAMINATION
Ventura College of Law
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QUESTION 1

Moe was a contestant on a TV reality show, "Law School Survivor." Prior to being permitted to participate in the show, he signed an agreement with the producers of the show, the essential terms of which provided that he agreed to be bound by the contest rules and that the producers' interpretation of the rules and decisions concerning all matters of the game are final. Moe was voted off the island in the second week. He feels that the manner in which he was voted off violated the contest rules. Moe files suit in the federal district court for the Central District of California, alleging that in permitting him to be voted off the island the producers violated the Federal Broadcast Standards Act (a law enacted by the United States Congress), breached their contract with him and in violating the rules also committed the tort of intentional infliction of emotional distress. The producers (defendants) make a motion to dismiss the Federal Broadcast Standards Act claim arguing that Moe has failed to state a claim for which relief can be granted under that act. The district court grants the motion. The court also dismisses the breach of contract and tort claims on the grounds that there is now no federal claim which would permit the court to exercise supplemental jurisdiction over the state law claims.

Moe then files a complaint in the California Superior Court alleging the breach of contract and tort claims as well as the Federal Broadcast Standards Act claim. (Assume that the California state court has concurrent subject matter jurisdiction to hear the federal claim.) The defendants make a motion to dismiss all of the claims in the state lawsuit, arguing that the claims were heard, considered and disposed of by the federal court. How should the state court rule on each claim? Discuss fully.

Assume that the case proceeds to trial in the state court on the breach of contract and tort claims. The defendants want to argue that a previous contestant, Curly, had sued them alleging breach of contract and fraud and the court found that the provision of the rules providing that the decision of the producers was final meant they had unfettered discretion to eliminate contestants. The producers argue that they are entitled to a finding in their favor on this issue and that Moe is not entitled to an opportunity to litigate whether or not the decision of the producers is final. How should the court rule?

QUESTION 2

Bert was a resident and citizen of Nevada. He had previously been a resident of California but moved to Nevada a few weeks before he received a substantial royalty payment on a book he wrote while living in California. Based on this, the California Franchise Tax Board (FTB) audited Bert and determined that he owed California state taxes and also imposed civil fraud penalties in excess of \$200,000. Bert then filed suit against the FTB in federal court in Nevada. He alleges that FTB directed "numerous and continuous contacts ... at Nevada" and committed several torts during the course of the audit, including invasion of privacy, outrageous conduct, abuse of process, fraud, and negligent misrepresentation. In addition to damages of \$1,000,000 he asks the court for a declaratory judgment ruling that the FTB has no authority to tax him. The FTB files an answer to the complaint. It asserts the affirmative defense that under California law the FTB is immune from lawsuits arising out of its taxing and auditing activities.

Both Nevada and California have waived their sovereign immunity from suit in federal court and have extended the waivers to their state agencies or public employees except when state statutes expressly provide immunity. Nevada has not conferred immunity on its state agencies for intentional torts committed within the course and scope of employment. California has expressly provided the FTB with complete immunity for intentional torts.

Assume that the facts are undisputed and further assume that it is undisputed that at least some of the conduct alleged to be tortious occurred in Nevada, and that the only issues in the case are legal issues.

Discuss fully the following:

- How would the FTB go about getting the federal court to rule on its immunity claim?
- Is the federal court sitting in Nevada, obligated to apply California's immunity statute or should it apply Nevada law?

QUESTION 3

Fred, a citizen of South Carolina, was involved in a traffic accident in New York City while visiting there. Fred is alleged to have struck Barney, a citizen of New York, causing extensive injuries. Barney sues Fred in a federal district court in South Carolina. The claim is for negligence and the amount prayed for as damages is \$250,000.00. The case goes to trial. At trial, the only witness called by the plaintiff's attorney is Barney himself. Barney testifies that while he was a pedestrian crossing the street at the corner of 51st Street and Lexington Avenue, Fred made a right turn against a red light and struck him. Barney also testified to the nature and extent of his injuries. Barney testified regarding medical bills he had received totaling \$80,000 for treatment as a result of the accident. Fred's attorney did not object to the admission of the medical bills into evidence. Barney also testified to the amount of wages he lost as a result of not being able to work as well as his pain and suffering. Fred's defense consisted of him testifying in his own behalf that he did not make a right turn against a red light. He also calls in his behalf as witnesses a dozen nuns who were aboard a Circle Line bus at the time of the accident each of whom testifies that they saw Barney running West on 51st Street trying to catch a Transit Authority Bus and that he ran broadside into Fred's car which was completely stopped at the intersection waiting for the light to turn green. The jury returns a verdict in favor of Barney for \$250,000.

Discuss fully the following:

- Fred thinks that the jury's verdict is contrary to the evidence. What steps must he have taken to preserve his right to challenge the verdict on this ground and by what means may he challenge it in the trial court?
- Two days after the jury rendered its verdict, Fred runs into one of the jurors (no pun intended) while having breakfast at the local Waffle House. The juror tells Fred that he thought he should have won but that the jury was hopelessly deadlocked and eventually decided the case by flipping a coin. Is this a basis for overturning the verdict and how would Fred get this issue before the court?
- Assume that any challenges by Fred to the verdict have been denied in the trial court. Fred appeals. May he argue on appeal that the medical bills should not have been admitted into evidence because they are hearsay and not the best evidence?

MODEL ANSWER TO QUESTION 1

Claim Preclusion

The issue here is whether the claims that were dismissed by the federal court, can be litigated in the state court.

While every party is entitled to their day in court, the rules of former adjudication are designed to insure that a party has only one day in court. Once a party has been given a full and fair opportunity to litigate a claim, former adjudication prevents a party from relitigating that claim again. In order to be barred under claim preclusion there must be identity of claims, identity of parties, and there must have been a final decision that was on the merits.

In order to decide whether a prior decision or order will have preclusive effect in a subsequent lawsuit the court where the subsequent suit is brought will accord it the same preclusive effect it would have been given in the rendering court. Here the rendering court was the federal court, so the California state court will apply the claim preclusion rules that would have been applied should the second suit have been refilled in the federal court.

Same Claim. Federal courts use the transaction or occurrence test as defined by the Restatement Second of Judgments to determine whether a claim is barred. The transaction or occurrence test states that where the original and subsequent claims arise out of the same common nucleus of facts such that the evidence, testimony and witnesses necessary to prove the claim would be the same for both the original claim and the subsequent claim, the claim is the same. (This is in contrast to California which uses a primary rights theory to define the scope of a claim.) Here, the claims brought in the first and second lawsuits involve the facts and circumstances involving Moe's appearance and dismissal from the reality TV show, hence they involve the same claim.

Same Parties. This test is satisfied as there is no question that the parties are identical.

Final Judgment on the Merits. Although the dismissal under Rule 12(b)(6) for failure to state a claim for which relief can be granted came at an early stage of the proceedings and was not based on any "evidence" it is nevertheless a judgment "on the merits." In federal court a 12(b)(6) motion is treated as if it were "on the merits" because there was an opportunity to reach the merits. Mere opportunity to reach the merits suffices to make the judgment on the merits. Since the federal court would treat a subsequent claim for violation of the Broadcast Standards Act as being barred a California court must accord it the same *res judicata* effect. In contrast, the state law claims were

dismissed for lack of subject matter jurisdiction, i.e., there was no supplemental or pendent jurisdiction to hear these state law claims that otherwise would have been brought and involved closely related issues of fact to the federal claim. A dismissal for lack of subject matter jurisdiction is not a dismissal on the merits.

The Broadcast Standards Act claim would be barred in state court. The breach of contract and tort claims would not be barred.

Issue Preclusion

Collateral Estoppel. Whether the producers can use the finding in their favor from the first lawsuit with Curly to preclude Moe from litigating it in his lawsuit depends on the rules of issue preclusion. Issue preclusion bars subsequent litigation on an issue previously litigated where the issue was actually litigated and decided and was necessary to the judgment. Here, although the issue of the finality of the producer's decision was actually litigated and decided in the producer's favor in the litigation with Curly and it would appear to have been necessary to that judgment, Moe has never had his opportunity to litigate this issue as he is a different party from Curly. In order for issue preclusion to bar relitigation in a jurisdiction that recognizes non-mutuality (i.e., has abandoned the identity of parties requirement) it still requires that the party to have had the opportunity to have litigated the issue. Moe never had the opportunity to litigate this issue; hence, the state court should not bar him from litigating this issue in his lawsuit on the breach of contract and tort claims.

MODEL ANSWER TO QUESTION 2

Motion for Summary Judgment

The facts of the question stipulate that the underlying facts of the problem case are undisputed and the only issues that remain are issues of law. Such a case is properly the subject of a **motion for summary judgment**. A motion for summary judgment under FRCP 56 is appropriate where the material facts of a case are undisputed and the only issues that remain are issues of law. Such a motion would be initiated by filing a notice of motion accompanied by a legal brief or memorandum of points and authorities demonstrating why the moving party is entitled to summary judgment in its favor. The moving party would also have to support the motion with admissible evidence in the form of affidavits, deposition excerpts and discovery responses. The party opposing the motion would have to respond with its own memorandum of authorities and citations of evidence. Pursuant to the U.S. Supreme Court case of *Celotex* the burden of proof on summary judgment would track the burden of proof at trial. That is to say the party that would have the burden of establishing the existence of a fact at trial would also bear that burden on summary judgment.

Erie Doctrine

This is a lawsuit between citizens of different states wherein the amount in controversy exceeds \$75,000 exclusive of interests and costs. Hence, it is being heard by the federal court pursuant to its diversity jurisdiction (28 U.S.C. § 1332). In a diversity case the federal court applies the substantive law of the state in which it sits and the Federal Rules of Civil Procedure. (*Erie v. Tompkins*.) "Substantive" law means both statutes enacted by the legislature as well as judge made case law. Although the substantive law of Nevada is that one of its own state agencies would not be entitled to immunity for its torts, California's law is to the contrary. California state agencies do enjoy such immunity. According to the **full faith and credit clause** of the Constitution Nevada must accord recognition to the public acts, records and judicial proceedings of California. That means that a Nevada court would have to accord the California agency the same immunity it would be entitled to in a California court. A federal court, sitting in diversity, is essentially another state court. Hence, the federal court would have to grant immunity and dismiss the suit against the California FTB. Since the only issue is one of law, the effect of California's immunity statute, the FTB is entitled to summary judgment in its favor.

MODEL ANSWER TO QUESTION 3

If Fred thinks that the verdict was contrary to the evidence, then he should make a motion pursuant to F.R.C.P. 50 for **judgment as a matter of law** (formerly known as judgment notwithstanding the verdict [J.N.O.V.]) In order to be able to make such a motion though, Fred must have previously made a motion for judgment as a matter of law, (formerly known as a directed verdict) at the close of the presentation of the evidence. The standard for ruling on a motion for judgment as a matter of law is that it can only be granted if there is no legally sufficient evidentiary basis for a reasonable jury to find for the non-moving party on that issue. Judged by this standard, Fred's motion for judgment as a matter of law would have to be denied. Substantial evidence means evidence of ponderable legal significance. It is a greater quantum of evidence than was required under the old "scintilla" of evidence test that has now been rejected in most jurisdictions. Even though the plaintiff was the only witness to testify in his own behalf, the testimony of a single witness whom the jury believes is sufficient to prove any fact. The judge can't weigh the credibility of witnesses on a motion for judgment as a matter of law as that usurps the jury's fact-finding province. Fred might have better luck making a **motion for new trial** under F.R.C.P. 59. A judge can weigh credibility of witnesses in ruling on such a motion. Although the judge cannot vacate the judgment in favor of the non-moving party and enter judgment in favor of the moving party, as is the case with J.N.O.V. the judge can order a new trial if he or she feels that the verdict is against the weight of the evidence. Such a motion must be filed within 10 days after entry of judgment. The motion for new trial may be joined with the motion for J.N.O.V.

If what the juror whom Fred had the chance encounter with says is true then the jury clearly committed misconduct by basing their verdict on chance and not deciding the case based upon the evidence presented at trial. However, Fred will have a difficult time getting this information before the court. The general rule is that **a juror may not impeach his or her own verdict**. Only if some third person witnessed or overheard the misconduct could this be brought to the court's attention and considered. The rationale behind the prohibition on juror's impeaching their own verdicts is to protect the sanctity of the deliberation process and to encourage candid discussion among jurors while deliberating.

Appeal

Although Fred is a party who is aggrieved by the judgment and is thereby entitled to appeal, he cannot raise issues of the admissibility of evidence if he failed to object in the trial court. Here, Fred's attorney failed to object. He has waived the right to claim any error. The policy behind requiring

objections at the trial level is to give the trial court the opportunity to consider the point and to prevent "sandbagging."

