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Civil Procedure I

The University of Oklahoma College of Law
Course 5103-600
Fall 2014

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FINAL EXAMINATION: PART TWO

Notes and Instructions

1. The duration of Part Two of this exam is two hours.
2. This is an open-book exam. You may use any printed material including, but not limited to, books, commercial outlines, group outlines, and your own notes. You cannot use electronic or interactive resources including, but not limited to, the internet and your cell phone.
3. There is no word, page, or line limit on responses.
4. Do not turn the page until instructed to begin.
5. You will not receive credit unless you return this booklet at the end of the period with your exam number written above.
6. You may write anywhere on the examination materials – e.g., for use as scratch paper. Only answers and material recorded in the proper places, however, will be graded.
7. Your goal is to show your mastery of the material presented in the course and your skills in analyzing legal problems within the scope of the course's subject matter. It is upon these bases that you will be graded.
8. During the exam: You may not consult with anyone – necessary communications with the College of Law staff being the exception. You may not view, attempt to view, or use information obtained from viewing other student examinations or from viewing materials other than your own.
9. After the exam: You may not communicate regarding the exam with any enrolled member of the class who has not yet taken the exam, and you must take reasonable precautions to prevent disclosure of exam information to the same.
10. Base your exam answer on the general state of U.S. law, including all rules, procedures, and cases discussed in class.
11. Organization counts.
12. Keep in mind: It may be entirely appropriate for one issue to be dispensed with considerable brevity, while another might require very detailed analysis. You should divide your time according to which issues require the most discussion and analysis.
13. **Bluebooks:** Make sure your handwriting is legible. I cannot grade what I cannot read. Skip lines and write on only on one side of the page. Please put answers to each section in a separate blue book and label the blue books accordingly. Please write in pen using blue or black ink.
14. **Computers:** Please clearly label your answers to each section.
15. Do not write your name on any part of the exam response or identify yourself in any way, other than to use your examination I.D. number appropriately. Self-identification on the exam will, at a minimum, result in a lower grade, and may result in disciplinary action.
16. Good luck.

Marjorie Minks and Alice Arehardt were sisters and best friends. Less than two years apart in age, they were inseparable as kids. The two were often seen running to the neighborhood park where they would swing as high as they could and explore the park's little river. On rainy days, they stayed indoors, playing dress up or building toys in their dad's garage.

As they grew older, the two became separated by distance but not feeling. Marjorie settled in Arizona where her penchant for dress up turned into a career as a seamstress. Alice settled in Oregon. Her passion for carpentry transformed into a career making furniture with reclaimed wood. Both sisters had successful shops on Etsy, an online marketplace for buying and selling unique goods.

Once a year, every year, the sisters took a road trip together. It didn't much matter to them where they traveled. What mattered was that they were together, enjoying the open road, and singing, as always, their favorite song: *Sisters*.

In June 2012, the sisters decided to drive from El Paso, Texas to Tulsa, Oklahoma. Just after sundown, not far from Carlsbad, New Mexico, the sisters were involved in a car accident. An 18-wheeler driven by a local man, Darius Durbin, drifted from the eastbound lane and hit Marjorie's car. The sisters flipped and spun off the road.

Emergency crews rushed to the scene, and the sisters were taken to Carlsbad Medical Center. Both suffered serious injuries. Marjorie's head had slammed into the door and the windshield. She had whiplash and traumatic brain injury. Alice fractured four ribs, suffered a collapsed lung, and broke her femur. Despite the litany of injuries, both Marjorie and Alice survived. And although they weren't able to finish their road trip, they did return home undeterred from the possibility of future car trips together.

Marjorie was the first to consult an attorney. She soon filed suit against Darius in the U.S. District Court for the District of Arizona, claiming that his negligence caused the accident.

Darius secured the services of Larry Lamore, the toughest defense lawyer in the Southwest. Larry investigated the accident thoroughly. He interviewed the three individuals identified as witnesses in the police report and spent several days in Carlsbad chatting up the locals. As a result, he found an additional 10 witnesses not identified by the police. One witness named in the police report, Frank Farnsworth, subsequently had a heart attack and died. Another witness named in the police report, Geraldine Gillian, left for a 2-year Peace Corps mission to Sierra Leone soon after speaking with Larry. Larry has signed statements from all 13 witnesses as well as personal notes about their statements.



FIGS. 1 & 2: Rosemary Clooney and Vera Ellen sing "Sisters" in the 1954 hit movie *White Christmas* (above). The movie also includes a parody performance by Bing Crosby and Danny Kaye (below).

Marjorie wanted copies of Larry’s witness statements from Frank and Geraldine as well as a list of all the witnesses he interviewed. She served a request for production of the two witness statements, and she served an interrogatory asking for the names of the other individuals interviewed. Larry refused to provide the materials requested, leaving Marjorie no choice but to file a motion to compel.

U.S. District Court Judge Jimmy Jagerson denied her motion.

Larry responded by filing a Rule 11 motion against Marjorie’s attorney, Sally Smothers. Larry sought reimbursement for the costs of opposing Marjorie’s “spurious” motion to compel as well as for the costs of filing a Rule 11 motion.

District Court Judge Jagerson granted Larry’s motion.

During the course of discovery, it became clear that the defense strategy was going to be to argue that Darius had been reasonably careful and therefore, non-negligent, coupled with a theory that Marjorie herself had negligently caused the accident. At Marjorie’s deposition, Larry secured an admission that Marjorie “didn’t love” driving at night but, on the night of the accident, she wanted to “push it” to Hobbs, New Mexico (about one hour East of Carlsbad) where she and her sister had booked a hotel room. He also secured an admission that Marjorie had taken a Benadryl antihistamine tablet one hour before the accident because her “allergies were acting up at dinner.” Because Benadryl can cause drowsiness, Larry used these admissions to bolster his argument that Marjorie herself had negligently caused the accident.

Larry also managed to obtain photographs of Darius’ truck approximately 25 yards before the accident. A local animal rights group had installed motion-activated cameras on the side of the highway hoping to prove that a recent construction project resulted in an increased number of skunks crossing the highway around sundown. Darius’ truck was captured in two photographs. In both, he could be seen driving well within his own lane.

On the strength of this evidence, Darius moved for summary judgment. Marjorie responded with her own affidavit and that of her sister, Alice, stating that Darius had drifted into their lane of traffic, causing the accident.

Judge Jagerson granted the motion for summary judgment and, thereafter, entered judgment in favor of Darius. Disheartened by and reeling from the costs of her lawsuit, Marjorie did not appeal.

Nine months later, Marjorie received a call from Darius’ ex-wife, Wanda Wilson. Wanda told Marjorie that she and Darius were “sexting” (trading sexually explicit photographs and messages via cellphone) at the time of the accident. She further told Marjorie that Darius’ employer, D&D Defense Contractors, conspired with the local authorities in Carlsbad to hide evidence of this misconduct because D&D supplied 70% of the jobs in Carlsbad and an unfavorable civil suit would have hurt the town economy.



FIG. 2: Larry Lamore’s 2012 advertising campaign.

Wanda sent Marjorie copies of her “sexting” correspondence with Darius, which, indeed, took place immediately before the accident.

Alice sent Marjorie some money to hire a private detective, Perkins Parvati, to look into these claims. Perkins confirmed the authenticity of Wanda’s texts. He also discovered Quincy Quirrell, 18, a local youth, who had been on a school-sponsored “ride-along” with the Carlsbad Police Department on the day of the accident. Quincy was one of the first to arrive at the accident scene in a vehicle with Carlsbad police officers Harold Hawser and Tom Townsend. Quincy was instructed not to leave the cruiser. But he watched as the two officers searched Darius’ truck. He saw the officers recover a cellphone from the passenger side of the car. Quincy could see that the phone was on as its brightly lit LCD screen was clearly visible in the night. Quincy saw the officers speak with Darius. He then saw Darius turn off the cellphone, reach into the cab of his truck, and appear to tuck the phone behind the driver’s seat.

Marjorie used this evidence to file a motion for a new trial, which Judge Jagerson denied.

On the same day that Marjorie filed her motion for a new trial, Alice filed her own suit against Darius Durbin in the U.S. District Court for the District of Oregon. She also named as defendants D&D Defense Contractors and Carlsbad Police Officers Harold Hawser and Tom Townsend.

In her complaint, Alice alleged that Darius negligently injured her because he was sexting at the time of the accident. She alleged that D&D was responsible for Darius’ conduct as his employer and, further, that D&D was negligent in training and supervising Darius. In paragraph 13 of her complaint, Alice alleged:

Defendant D&D Defense Contractors employs numerous truck drivers to transport its materials from its headquarters in Carlsbad to destinations around the country. Despite employing a large number of commercial drivers, D&D does not have company rules for its drivers concerning the use of cellphones while driving. D&D also does not train its drivers on federal rules that ban truck drivers from texting while driving commercial vehicles.

Alice also alleged, in paragraph 20 of her complaint:

Defendants Darius Durbin, Harold Hawser, and Tom Townsend conspired to hide evidence of Darius’ negligence. Officers Hawser and Townsend falsified their reports to indicate that there was no evidence Darius had been using a cellphone at the time of the accident despite the fact that it

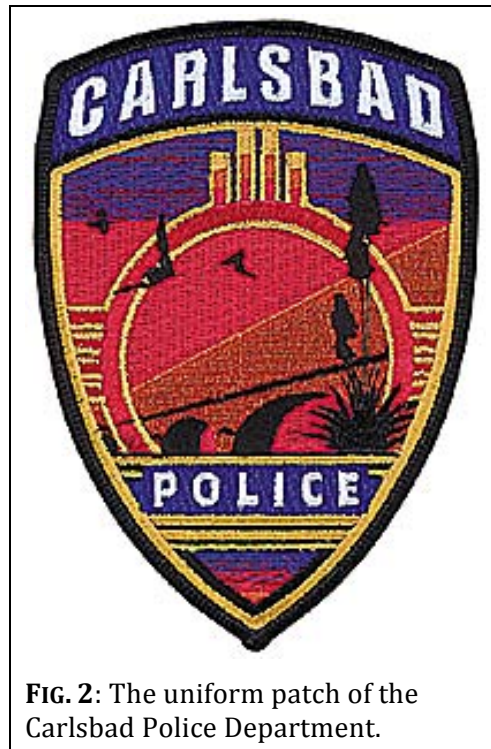


FIG. 2: The uniform patch of the Carlsbad Police Department.

was found turned on and in the foot-space of the passenger seat. Darius, Hawser, and Townsend worked together to hide this information.

Darius, D&D, Hawser, and Townsend each file motions to dismiss (1) for failure to state a claim, and (2) on the basis that Alice's lawsuit is precluded by Marjorie's litigation. The motions are denied by U.S. District Court Judge Nancy Nguyen.

QUESTION

Assess the legal issues that arise from the above facts. Organize your response as follows, clearly labeling the subparts:

Subpart A: Discuss any issues concerning Marjorie's motion to compel.

Subpart B: Discuss any issues concerning Larry's motion for sanctions.

Subpart C: Discuss any issues concerning Darius' motion for summary judgment.

Subpart D: Discuss any issues concerning Marjorie's motion for a new trial.

Subpart E: Discuss any issues concerning Darius' motion to dismiss.

Subpart F: Discuss any issues concerning D&D's motion to dismiss.

Subpart G: Discuss any issues concerning Hawser & Townsend's motion to dismiss.

Subpart H: If there is anything else you wish to discuss, which does not belong in any of subparts A through G, please put it under this Subpart H.

Note: this is a civil procedure exam. Do not analyze substantive torts questions.

Keep in mind the subparts will not be given equal weight. The subpart structure is provided for organizational purposes only. It may be entirely appropriate for one subpart to be answered with considerable brevity, while other subparts might require very detailed analysis. Pace yourself appropriately, and plan ahead to put information where it belongs.

Avoid needless repetition. Do not repeat the exact same analysis with substituted parties. If appropriate, you may incorporate analysis by reference to another portion of your exam answer.

Some suggested abbreviations for your answer:

AA: Alice Arehardt

DD: Darius Durbin

GG: Geraldine Gillian

HH: Harold Hawser

JJ: Judge Jimmy Jagerson

LL: Larry Lamore

MM: Marjorie Minks

NN: Judge Nancy Nguyen

PP: Perkins Parvati

SS: Sally Smothers

TT: Tom Townsend

WW: Wanda Wilson