

**IIT CHICAGO-KENT COLLEGE OF LAW
FINAL EXAMINATION IN CIVIL PROCEDURE**

INSTRUCTIONS

1. This examination consists of 12 pages. Please check to make certain you have the complete examination, including the appendices.
2. Read these instructions carefully, read each question, and read the appendices carefully. As you answer each question, make use of any materials in the appendices that are pertinent. Think each problem through before you write and treat every appropriate issue in each question. Be direct and concise.
3. Answers will be graded upon the reasons given as well as the conclusions drawn. If more than one reason is pertinent to an answer, state every reason.
4. While you have been permitted to bring materials into the examination room, answering the questions appropriately will put time pressure on you. You should not do extensive research during the examination. Credit will be weighted according to the time allocations shown. Manage your time accordingly.
5. You may decide, in answering one or more questions, that a complete answer would require legal research. If this is so, you should identify the specific issue that you would research. If you have a mastery of the basic concepts, you will be able to frame research issues very narrowly and precisely.
6. It also may be that more factual information is required to answer a question. If this is the case, you should say what factual information is required and why you need it. A mastery of the underlying concepts will permit you to frame any factual inquiries very narrowly and link them precisely to the legal issue involved.
7. Organization and clarity are very important. A shorter answer that is well organized and evidences a clear understanding of basic concepts and their interrelationships is better than a long answer with disconnected fragments of information.
8. Do not write outside the margins of your bluebook pages, but write clearly. If it's not legible, it will not get credit.
9. Write your examination number on your bluebook(s) and on each page of this examination. Do not use your name.
10. When you have finished the examination, place it inside your bluebook(s) and deposit them in the appropriate box in the examination room.

MATERIALS WHICH MAY BE TAKEN INTO THE EXAMINATION ROOM

Any material including any outlines whether commercially prepared or not, whether accessible by computer or not. No communication by e-mail, blog or Facebook posting, cell phone, voice-over-IP, or any form of instant- or text-messaging is permitted during the exam.

GOOD LUCK!

QUESTION I

Hometown Merchants is an innovative e-commerce portal (a website) that seeks to build its business on the desire of many customers to trade with merchants located in their local communities. The homepage of Hometown Merchants features a map. When a user clicks on a particular state, the website renders a page featuring that state with counties and towns shown. Each county and town link is also clickable. The county and town areas of the website show a surprisingly extensive list of goods and services that can be obtained, apparently from merchants located at that place.

Hometown Merchants' webpage displays a prominent notice: "We back everything we sell. You give your business to your local merchant, and we guarantee your satisfaction, effective as soon as you place your order."

In fact, the business entity that runs Hometown Merchants is in the People's Republic of China. All of its websites and the servers hosting them are located in China. It ships all goods via FedEx and UPS from China, but with shipping labels that prominently display the name of a fictitious merchant with an address and zip code that appear to be from the location from which the customer ordered. No one from Hometown Merchants and no one that contracts with Hometown Merchants has ever been to the United States.

Tim Dunnington has a pet boa constrictor that has a big appetite. Tim recently moved to Chicago from Farmington, Missouri, where he bought the snake. He hopes that the original pet store can supply food for the snake in large quantities. He browses the web, does not find any website for the pet store, but does find Hometown Merchants, which displays a link to a Big Box Pet Store in Farmington that has very attractive prices. Tim has never heard of the store, but concludes that it must be something new. He orders a six-month supply of boa constrictor food and receives it about a week later. Unfortunately, the food is laced with formaldehyde and the boa constrictor dies after its first meal.

Tim, distraught, comes to you and asks you to represent him in a lawsuit against Hometown Merchants. You hear Tim's story and share some of his outrage, so you agree to represent him on a contingency basis. The boa constrictor was not expensive—it cost \$1500—but you believe that he also may have a good claim for negligent infliction of emotional distress under some Missouri caselaw you have found.

- A. **(45 minutes)** You can't find any evidence of any physical presence by Hometown Merchants in Illinois, but you're pretty confident that you can obtain personal jurisdiction in Farmington, Missouri, so you file a civil action in the United States District Court for the Eastern District of Missouri, which encompasses Farmington. You cannot locate a physical presence for the Big Box Pet Store.

You present a summary of your efforts to make service and seek authorization from the district court to serve the summons and complaint by attaching them to a message on Hometown Merchants "contact us" link. The court is unwilling to authorize that form of service without holding a hearing on personal jurisdiction. What facts do you produce and what arguments do you make that personal jurisdiction exists? What arguments do you make that the court should authorize service in the way you have requested? What are your prospects for success?

- B. **(20 minutes)** You obtain a default judgment from the federal court in Missouri. Afterwards, you discover that the defendant maintains a merchant bank account with Eighth Fifteenth Bank in Chicago. How would you go about seizing the bank account to satisfy the judgment? Summarize all methods and identify and explain the most efficient one.

QUESTION II

Royce Buchanan and his husband, Davis Merrick, run a small startup drone business as a common-law partnership that has entered into a contract with a Birmingham, Alabama television station, Skyvu6, to provide aerial newsgathering support via small unmanned aircraft, known as drones. Both Merrick and Buchanan have lived all their lives in Illinois. Their only contact with Alabama has been to negotiate the terms of the arrangement with Skyvu6, which they did by email and telephone. They have hired a private pilot, a resident of Alabama named Palmer Beebe, to fly newsgathering missions when he is "called out" by the station. Beebe is eager to take on the responsibility because it allows him to earn money flying drones to defray the cost of his further flight training, necessary to launch him on his desired aviation career. Alabama common-law follows the Restatement (2d) of Torts guidance on trespass to land, negligence, and invasion of privacy.

A recent newsgathering operation flown by Beebe for Skyvu6 took the drone over land belonging to Cynthia Rhubarb, an entrepreneur who has allowed her property to be

used for illegal drug cultivation. The particular event giving rise to the controversy in question involved a police raid on Rhubarb's property. Skyvu6 was eager to cover the raid for its 6:00 PM news broadcast on the day of the raid.

Rhubarb is unhappy with the raid and with Skyvu6's exclusive coverage of it. She files a civil action in the Circuit Court of Jefferson County, the state court of general jurisdiction, against Beebe, Skyvu6, Buchanan, and Merrick for trespass to land. She seeks only \$30,000 total in nominal, compensatory, and punitive damages.

- A. **(20 minutes)** You represent Merrick and Buchanan. Your research has revealed that they have a "section 333 exemption" from the FAA authorizing them to fly drones commercially for newsgathering. You prefer to be in federal court. Can you force the case out of state court into federal court? How? Through what procedural steps? What are your prospects for litigating the merits in federal court? You believe your strongest defense is preemption of state common-law by federal aviation law.
- B. **(15 minutes)** Your clients' contract with Skyvu6 obligates Skyvu6 to "defend and indemnify [your clients] for any litigation growing out of performance of the contract." You want to make sure that any judgment against your clients, if they lose the lawsuit, is also a judgment against Skyvu6. How can you ensure that, procedurally?
- C. **(20 minutes)** Rhubarb amends her complaint to ask for \$100,000 in damages instead of \$30,000, but still pleading only one count of common law trespass to land. Your discussions with your clients and your investigation show the following: Beebe says that he was flying the drone at 200 feet above the ground. The drone recorded flight data, including the profile for the entire flight. Those data are in a file on the mini SD card in the drone. The formal section 333 exception granted to your clients explicitly authorizes them to fly newsgathering missions at up to 300 feet above the ground. Beebe tells you that Rhubarb's roommate, who was apparently tending the pot plants on Rhubarb's property when the drone flight occurred, shook her fist at the drone and screamed, "you're trespassing! Get away! Get out of our airspace!" An Alabama statute, awards civil liability for "defiant trespass" at double the amount of

compensatory damages. The statute defines defiant trespass as persisting in an intrusion on another's land after being told to stay off.

What, if anything are you obligated to disclose to Rhubarb without waiting for a discovery request? When must you disclose it?

- D. **(20 minutes)** Your clients' contract with Skyvu6 obligates them to maintain the confidentiality of all trade secrets, defined explicitly to include data about the times, places, and all other information about news gathering flights. You receive a set of interrogatories and a request for production that demand that you provide the mini SD card with the flight data on it and respond to the following interrogatory for each flight shown on the mini SD card:

"Describe the circumstances, identify any person requesting the flight, identify any events for which the drone captured imagery, and specify whether Channel 6 broadcast that imagery as part of its programming."

Your clients want to maintain good business relations with Skyvu6. Can you refuse to respond to the interrogatory? What must you do in conjunction with your refusal? Is there any other action you can take to immunize you from having to disclose this or similar information?

- E. **(20 minutes)** One week before the deadline set by the scheduling order for completion of discovery, Rhubarb files a motion to amend her complaint to add a second count—a claim for defiant trespass—and alleges that the roommate Rhubarb placed in control of the property saw the drone and ordered Beebe to keep it away from the property. She also files an amendment to her mandatory disclosures listing the roommate as a person with knowledge of the dispute. What, if anything, can you do to block the amendment to the complaint? What are your prospects for success and why?
- F. **(20 minutes)** During Rhubarb's deposition of Beebe, her lawyer asks Beebe to get the drone out of its case and fly it in the deposition room to make a "supplementary video transcript of the deposition record." Beebe is represented by his own lawyer, who simply nods toward the case. You would prefer that Beebe not fly the drone in the deposition room. What, if anything, can you do? What are the pros and cons of the various alternatives?

APPENDICES

Missouri Revised Statutes

Summons and petition, how served--service by mail, authorized when--notice by mail and acknowledgment form.

506.150. 1. The summons and petition shall be served together. Service shall be made as follows:

(1) Upon an individual, including an infant or disabled or incapacitated person not having a legally appointed guardian or conservator, by delivering a copy of the summons and of the petition to him personally or by leaving a copy of the summons and of the petition at his dwelling house or usual place of abode with some person of his family over the age of fifteen years, or by delivering a copy of the summons and of the petition to an agent authorized by appointment or required by law to receive service of process;

* * *

(3) Upon a domestic or foreign corporation or upon a partnership, or other unincorporated association, when by law it may be sued as such, by delivering a copy of the summons and of the petition to an officer, partner, a managing or general agent, or by leaving the copies at any business office of the defendant with the person having charge thereof, or to any other agent authorized by appointment or required by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant;

* * *

Service by mail or publication.

506.160. 1. Service by mail or by publication shall be allowed in all cases affecting a fund, will, trust estate, specific property, or any interest therein, or any res or status within the jurisdiction of the court, or in any special proceedings in which notice by mail or by publication is authorized, including but not limited to actions to quiet title and actions to ascertain and determine title to real estate. If the defendant so served does not appear, judgment may be rendered affecting said property, res or status within the jurisdiction of the court as to said defendant, but such service shall not warrant a general judgment against such defendant.

* * *

Where process may be served.

506.170. All process may be served anywhere within the territorial limits of the state and may be forwarded to the sheriff of any county for the purpose of service.

* * *

Missouri Supreme Court Rules

54.06. Service Outside the State on Persons, Firms or Corporations Who Do Certain Acts in This State

(a) Service outside the state sufficient to authorize a general judgment in personam may be obtained upon any person, executor, administrator or other legal representative, firm or corporation, whether or not a citizen or resident of this state, who in person or through an agent does any of the acts enumerated in this Rule 54.06:

- (1) Transacts any business within this state;
- (2) Makes any contract within this state;
- (3) Commits a tortious act within this state;
- (4) Owns, uses or possesses any real estate situated in this state;
- (5) Contracts to insure any person, property or risk located within this state at the time of contracting;
- (6) Engages in an act of sexual intercourse within this state with the mother of a child within or near the probable period of conception of that child.

* * *

(c) Only causes of action arising from acts or conduct enumerated in [Rule 54.06\(a\)](#) or [Rule 54.06\(b\)](#) may be asserted against a defendant in an action in which jurisdiction is based on this Rule 54.06.

(d) Service of process may be made as provided in [Rule 54.14](#) . . .

54.14. Personal Service Outside the State

(a) **By Whom Made.** Personal service outside the state shall be made:

- (1) By a person authorized by law to serve process in civil actions within the state or territory where such service is made, or by the deputy of a person so authorized;
- (2) By a person appointed by the court in which the action is pending.

* * *

Illinois Code of Civil Procedure

(735 ILCS 5/12-650) (from Ch. 110, par. 12-650)

Sec. 12-650. Short Title. Sections 12-650 through 12-657 of this Act may be cited as the Uniform Enforcement of Foreign Judgments Act.

(735 ILCS 5/12-651) (from Ch. 110, par. 12-651)

Sec. 12-651. Definition. As used in Sections 12-650 through 12-657, “foreign judgment” means any judgment, decree, or order of a court of the United States or of any other court which is entitled to full faith and credit in this State.

(735 ILCS 5/12-652) (from Ch. 110, par. 12-652)

Sec. 12-652. Filing and Status of Foreign Judgments.

(a) A copy of any foreign judgment authenticated in accordance with the acts of Congress or the statutes of this State may be filed in the office of the circuit clerk for any county of this State. The clerk shall treat the foreign judgment in the same manner as a judgment of the circuit court for any county of this State. A judgment so filed has the same effect and is subject to the same procedures, defenses and proceedings for reopening, vacating, or staying as a judgment of a circuit court for any county of this State and may be enforced or satisfied in like manner. A judgment filed or registered under this Act shall be construed to be an original Illinois judgment from the date it is filed with the clerk of the circuit court and for purposes of enforcement and revival, shall be treated in exactly the same manner as an Illinois judgment entered on that same date.

* * *

(735 ILCS 5/12-656) (from Ch. 110, par. 12-656)

Sec. 12-656. Optional Procedure. The right of a judgment creditor to bring an action to enforce his judgment instead of proceeding under this Act remains unimpaired.

Case

2013 WL 4058745

Only the Westlaw citation is currently available.

United States District Court,
E.D. Missouri,
Eastern Division.

JOE HAND PROMOTIONS, INC., Plaintiff,

v.

Stephen SHEPARD, Defendant.

No. 4:12cv1728 SNLJ. | Aug. 12, 2013.

MEMORANDUM AND ORDER

STEPHEN N. LIMBAUGH, JR., District Judge.

*1 This matter is before the Court on the plaintiff's motion for order of substituted service (# 10). Plaintiff asserts that it has been unable to serve defendants Stephen Shepard and Steve & Colleen's Sports Bar, Inc., d/b/a Zach's Sports Bar & Brill ("Zach's") and requests that the Court authorize service on defendants by sending a copy of the Summons and Complaint via two Facebook.com accounts allegedly owned by defendant Shepard. The Court requested and received supplemental briefing on the matter of whether service through Facebook could be adequate under the Federal Rules of Civil Procedure.

Federal Rule of Civil Procedure 4(e) sets out the rules for "Serving an Individual Within a Judicial District of the United States." The summons and complaint may be delivered to the individual personally; it may be left at the individual's home with someone of suitable age and discretion who resides there; or it may be delivered to an agent authorized to receive service. Fed.R.Civ.P. e(2).

Plaintiff states it has taken the following steps to effectuate service on defendants. First, the process server attempted to serve Zach's at its principal place of business, but the building was vacant and had been for about a year. Next, plaintiff determined that Zach's was being run as a sole proprietorship with Shepard as its proprietor, thus it decided that Shepard would be appropriate to serve in both his individual capacity and on behalf of Zach's. Plaintiff's counsel used a Westlaw program to locate an alternate address for Shepard, apparently in Mineral Point, Missouri, but the process server reported that the house was vacant. Next, plaintiff's counsel attempted to serve defendants' former attorneys, but the attorneys declined to accept service until the attorneys could contact their client. Plaintiff then found a Facebook.com page for Zach's, which indicated Zach's was out of business, but which also states that Shepard (apparently) has opened a new eating establishment called TOP's (The Only Place) and another new business called Shep's Canoes in Steelville, Missouri. Plaintiff located TOP's business address on Facebook and discovered that its address and telephone number are the same as those that had been listed for Zach's. Plaintiff's process server attempted to serve defendants at TOP's, but the process server could not "because the bar was not open when our process server went to make the service attempts." (# 10 at 4.)

Plaintiff states that it has "exhausted all of standard means by which [it] can serve the defendants ... and

[has] incurred great expense in doing so.” (Id.) Plaintiff further states that its counsel’s online research shows that Shepard has active Facebook accounts in the name of Zach’s and TOP’s. Plaintiff thus wishes to serve defendants by attaching a copy of the summons and complaint to a message/e-mail to be sent to the Zach’s and TOP’s Facebook accounts.

Plaintiff rationalizes that service via Facebook is akin to service by electronic mail, which plaintiff states is authorized by Rule 4(f)(3). That Rule, however, applies only to “Serving an Individual in a Foreign Country,” and is a broad provision allowing service “by other means not prohibited by international agreement, as the court orders.” Fed.R.Civ.P. 4(f)(3). To be sure, electronic service of process via e-mail has been permitted by federal courts in certain circumstances, including within the Eighth Circuit. See *Fraserside IP LLC v. Letyagin*, 280 F.R.D. 630, 630 (N.D.Iowa 2012) (permitting service via e-mail on “international intellectual property scofflaws”); *Rio Properties Inc. v. Rio Intern. Interlink*, 284 F.3d 1007, 1018 (9th Cir.2002) (affirming e-mail service on foreign internet business entity); *U.S. Commodity Futures Trading Comm’n v. Rubio*, No. 12–CV–22129, 2012 WL 3614360 *3 (S.D.Fla. Aug. 21, 2012) (permitting e-mail service on individual evading service outside the United States); *FTC v. PCCare 247 Inc.*, No. 12 Civ. 7189(PAE), 2013 WL 841037 (S.D.N.Y.2013) (permitting service via e-mail and Facebook on foreign defendants).¹ However, all of those matters involve service on foreign defendants. In addition, in each of those cases, plaintiffs bore the burden of proving that the e-mail service was “reasonably calculated ... to apprise [the defendants] of the pendency of the action.” *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

*2 Rule 4(f) may allow for electronic service on foreign defendants in some circumstances, but Rule 4(e), which applies to domestic defendants, allows service only on the individual, their agent, or delivery to their abode. Fed.R.Civ.P. 4(e)(2)(A)-(C). Rule 4(e)(1) also authorizes service on an individual by “following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made.” Fed.R.Civ.P. 4(e)(1). However, Missouri does not provide for electronic service of process. In Missouri, if delivery fails to a defendant’s person, abode, or agent, RSMo § 506.160 recognizes mail or publication as substituted service. In the case of a defendant who has absconded or concealed themselves and cannot be found, the court “shall issue an order of publication of notice to such defendant.” RSMo § 506.160(3).

Thus, the federal rules do not permit electronic service for the defendant in this matter. See *Int’l Telemedia Assocs.*, 245 B.R. at 720 (“the Court is unaware of any domestic precedent authorizing service of process by electronic mail”); Ronald J. Hedges et al., *Electronic Service of Process at Home and Abroad: Allowing Domestic Electronic Service of Process in the Federal Courts*, 4 Fed. Cts. L.Rev. 55, (2010) (“Currently, electronic service of process is only available in federal practice under [Rule] 4(f)(3) ... in the context of ‘Serving an Individual in a Foreign Country’ “). This case indisputably involves a domestic defendant, so Fed.R.Civ.P. 4(f)(3) is inapplicable. Fed.R.Civ.P. 4(e) does not permit electronic mail as a means of substituted service unless the state where the action is brought permits it. Missouri does not authorize electronic mail as a form of substituted service. If plaintiff is unable to serve process via e-mail, it certainly has not shown that it can properly serve process via Facebook.²

Finally, the Court notes that plaintiff’s service efforts were not exhaustive. Plaintiff tried serving defendant at only one residential address and apparently used only one search engine to locate an address. Numerous other internet (and other) address search options, including, e.g., Missouri’s case.net system, exist. In addition, plaintiff’s process server tried to serve defendant at TOP’s business location, but the process server apparently did so when the business was closed. Plaintiff thus has ample other avenues through which to attempt service through the means authorized by Rule 4(e).

Accordingly,

IT IS HEREBY ORDERED that plaintiff's motion for order of substituted service (# 10) is DENIED.

IT IS FURTHER ORDERED that plaintiff is granted 30 days from the date of this Order in which to effectuate service.

Slip Copy, 2013 WL 4058745

Footnotes

- 1 Plaintiff's reliance on *FTC v. PCCare 247 Inc.*—the only available decision in which service of process through social media has been permitted—is unavailing. In that case, the FTC sought to serve summons and a complaint on five international defendants who allegedly perpetuated a consumer fraud scheme from India. 2013 WL 841037, at *1. After substantial discussion, the court held that service via e-mail satisfied due process because the FTC had demonstrated that the e-mail was likely to reach the defendants. *Id.* at *4. Although the FTC used Facebook as a means of supplemental service, it was not the only means of service, and the court expressed doubt that Facebook alone would satisfy due process. *Id.* (“anyone can make a Facebook profile using real, fake, or incomplete information, and thus, there is no way for the Court to confirm whether the Facebook page belongs to the defendant to be served.”).
- 2 Plaintiff states without support that “each and every time a message is sent through Facebook, the application automatically generates and sends a notice to the user’s e-mail address that a message has been sent to that User.” That is incorrect. According to Facebook’s website, users can pick and choose which “notifications” they would like Facebook to send by e-mail. See <https://www.facebook.com/help/www/327994277286267> (last visited Aug. 9, 2013); see also *PCCare 247 Inc.*, 2013 WL 841037, at *5.

Restatement (2d) of Torts

§ 158 Liability for Intentional Intrusions on Land

One is subject to liability to another for trespass, irrespective of whether he thereby causes harm to any legally protected interest of the other, if he intentionally

- (a) enters land in the possession of the other, or causes a thing or a third person to do so, or
- (b) remains on the land, or
- (c) fails to remove from the land a thing which he is under a duty to remove.

§ 159 Intrusions Upon, Beneath, and Above Surface of Earth

(1) Except as stated in Subsection (2), a trespass may be committed on, beneath, or above the surface of the earth.

(2) Flight by aircraft in the air space above the land of another is a trespass if, but only if,

(a) it enters into the immediate reaches of the air space next to the land, and

(b) it interferes substantially with the other's use and enjoyment of his land.