

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

INSTRUCTIONS

1. This examination consists of 8 pages. Please check to make certain you have the complete examination, including the appendix.
2. Read these instructions carefully, read each question, and read the appendix carefully. As you answer each question, make use of any material in the appendix that is 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 or the computer equivalent 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, or follow applicable instructions for computerized exams.

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, cell phone, voice-over-IP, or any form of instant- or text-messaging is permitted during the exam.

GOOD LUCK!

QUESTION I

Luke Carter, a citizen of Arkansas, was the quarterback for the Razorbacks, the football team of the University of Arkansas. The last two seasons before he graduated were weak for the team, despite Luke's stellar performance. He wants to play professional football, but is uncertain whether he will get drafted by the National Football League ("NFL"). As the draft begins, he keeps his cellphone nearby with the ringer volume turned up. On the last day, during the seventh round of the draft, he gets a call from a number with a California area code. He eagerly answers and is surprised to be talking to a Hollywood modeling agency, which offers him a one-year contract to shoot some advertisements for KCrease, a preppy men's wear enterprise. "Why did you call me?" Luke asks. "It was the new videogame, 'Saturday Night Cheers,'" the modeling representative says. "Our client thought you were stunning." Luke receives no phone calls from any NFL team, but telephonic negotiations ensue with the modeling agency, and he enters into a contract for \$100,000—considerably more than he could have earned as a rookie free-agent. (A rookie free-agent is an undrafted college player who contracts to play for an NFL team.) The ads featuring him, all photographed in California and run in *Sports Illustrated*, *People*, *Men's Health*, and *Esquire*, prove enormously popular, boosting KCrease's sales. Luke's contract is extended for an additional three years at \$250,000 per year.

Despite his good fortune, Luke is a bit embarrassed to be modeling instead of playing football, and the idea that he is featured in "Saturday Night Cheers" rankles. Travis White, a fellow Razorback and close friend who has gone on to law school, calls Luke excitedly one day. "Have you ever heard of the tort 'misappropriation of name or likeness'—sometimes called the 'right of publicity tort'?" Travis asks. Luke hasn't, and Travis goes on to explain the legal theory and encourages Luke to sue the maker of "Saturday Night Cheers." Arkansas caselaw has adopted the Restatement (Second) of Torts' definition of invasion of privacy, which reads, in material part:

"§ 652C. Appropriation Of Name Or Likeness

"One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy."

Damages in Arkansas for this tort are measured either by economic loss to the plaintiff, or by recovery of profits earned by the defendant, but not both.

Travis has just been admitted to the Arkansas bar, and Luke agrees that Travis can file suit on his behalf in the United States District Court for the Eastern District of Arkansas, where Travis now lives.

The complaint that Travis files names two defendants, Real Stars, Inc., the producer of the videogame, and Amy Thomas, its sole shareholder, and contains one count for misappropriation of name or likeness. Real Stars is a California corporation with its principal place of business in

San Jose, CA. Amy, who was born in Chicago, went to college in Cambridge, MA, and now lives in an apartment in Little Rock, AR, on which she has a six-month lease. The complaint seeks damages in the form of recovery of profits earned by Real Stars, Inc. and Amy Thomas, exceeding \$75,000.

- A. (15 minutes) Travis and Luke decide to conduct an experiment with Facebook’s face recognition software. They capture 20 still images of the quarterback in the video game, and take 20 photographs of Luke in positions approximating the positions of the videogame character. They tag the actual photographs of Luke with his name, and then upload the images from the videogame into a separate album. Facebook has a feature that suggests names with which newly uploaded images can be tagged. It suggests Luke’s name for only one of the 20 images from the video game, suggesting other names for the other images or not recognizing them at all.

Luke is noticed for a deposition by Real Stars. At the deposition, he is asked, “Have you conducted any experiments with facial recognition technology? If you have, what were the results?” Must he answer? What is the likely result if Travis instructs him not to answer and he follows the instruction?

- B. (10 minutes) Amy serves Luke with an interrogatory which asks, “How much are you entitled to earn from your modeling over the next five years?” Luke and Travis, in a feisty mood, answer the interrogatory, “None of your business.” What risks do they run by giving this answer? Is it likely that Luke will eventually have to disclose the terms of his modeling contract? Why or why not?
- C. (15 minutes) From the early stages of discovery, Luke and Travis learn that the animation for Saturday Night Cheers, including the images of the quarterback, was done by a professional animator named Cydee Bronson, who works and lives in Burbank, California. What steps should Travis take to depose her in Burbank? What remedies are available if she refuses?
- D. (20 minutes) Several federal court decisions around the country have applied the tort of misappropriation of name or likeness under state law, some resulting in victory for the plaintiffs, some for the defendants. Most of them, including all of the Arkansas cases, have rejected defenses based on the First Amendment to the United States Constitution.

A recent California case rejected a right-of-publicity claim by a musician against a videogame producer on First Amendment grounds.

Is the district court obligated to apply the federal caselaw, California caselaw, or Arkansas law? Why or why not? Assume that both Arkansas and California choice-of-law rules apply *lex loci delicti*—the law of the place of the wrong.

- E. (30 minutes) What arguments should Travis make to establish subject matter jurisdiction? What counterarguments should he anticipate? What are his prospects for success?

QUESTION II

Slippery Banana is a high-tech startup which has entered the tablet computing market with a product called “eSlate.” To reduce sales and marketing expenses, it sells the product only through its website, allowing customers to pay either by credit card or through PayPal. Because of the size of the potential markets in California, New York, Illinois, and Florida, it offers special discounts to purchasers from those states. Susan Taylor lives in Hardin, Montana, the county seat of Big Horn County. She tells her friend, Zach Knewsom, who lives in Ponta Vedre Beach, Florida, that she wants a tablet computer, but is reluctant to spend the money. She tells him that her boyfriend, known locally as “Marlboro Man,” has an eSlate, which he ordered from the Slippery Banana website, but won’t let her use it. Knewsom orders an eSlate for Susan from the Slippery Banana website. He delivers it to Susan when he comes to Montana to visit his boyfriend over the Christmas holidays.

The eSlate uses new long-life battery technology, which, unfortunately has resulted in several overheating problems. Other, more established, battery technologies produce minimal overheating risks, absent manufacturing defects. After a long texting session with Marlboro Man one evening, Susan leaves her eSlate on the kitchen counter to recharge and goes to bed. During the night, the eSlate overheats and sets the kitchen on fire. Fortunately Susan escapes, but her house burns down.

She retains you, a member of the Montana bar, to file suit against Slippery Banana. You file suit in the Montana (state) District Court for the 22nd Judicial District, covering Big Horn County, for negligent product design. Your litigation budget is quite limited, and you are unable to do much discovery. Your initial theory of liability is *res ipsa loquitur*. The Montana courts have adopted the Restatement (Second) of Torts definition of *res ipsa*, but have held that it does not apply in products liability cases. Assume that the Restatement (Third) of Torts: Products Liability accurately states Montana law on products liability generally.

- A. (30 minutes) What facts would you plead and what arguments would you make to establish personal jurisdiction? What counterarguments would you anticipate? What is your probability of success and why?
- B. (10 minutes) Can you establish venue? Why or why not?

- C. (25 minutes) The Montana courts have interpreted the Montana summary judgment rule to be the same as Fed.R.Civ.P. 56. Slippery Banana moves for summary judgment against the plaintiff, after discovery is closed. The defendant has admitted that the eSlate set the kitchen on fire, but it denies negligent design. Susan has placed into the record an affidavit from the manager of the local Apple store that an iPad has never been known to catch on fire. What are your prospects for surviving summary judgment? Why?
- D. (25 minutes) Assume that discovery has not closed, but that you anticipate that Slippery Banana will file a motion for summary judgment when it does. Recalling that the litigation budget is quite limited, what is the one most-cost effective form of discovery that you can undertake, most likely to increase your chances of avoiding summary judgment against you? Assume that the discovery record already includes the items specified in subquestion (C), and that you are willing to abandon your reliance on *res ipsa loquitur*. Be specific not only as to form, but also as to the information you would seek, and what you reasonably hope the response will be. Assume that the Montana discovery rules are nearly verbatim the same as their counterparts in the Federal Rules of Civil Procedure and that they are numbered the same. (They are.)

APPENDIX

Montana.R.Civ.P., Rule 4B

Title 25. Civil Procedure

Chapter 20. Rules of Civil Procedure

II. Commencement of Action--Service of Process, Pleadings, Motions, and Orders

Rule 4. Persons Subject to Jurisdiction--Process--Service

Rule 4B. Jurisdiction of persons

(1) Subject to jurisdiction. All persons found within the state of Montana are subject to the jurisdiction of the courts of this state. In addition, any person is subject to the jurisdiction of the courts of this state as to any claim for relief arising from the doing personally, through an employee, or through an agent, of any of the following acts:

- (a) the transaction of any business within this state;
- (b) the commission of any act which results in accrual within this state of a tort action;
- (c) the ownership, use or possession of any property, or of any interest therein, situated within this state;
- (d) contracting to insure any person, property or risk located within this state at the time of contracting;
- (e) entering into a contract for services to be rendered or for materials to be furnished in this state by such person; or
- (f) acting as director, manager, trustee, or other officer of any corporation organized under the laws of, or having its principal place of business within this state, or as personal representative of any estate within this state.

(2) Acquisition of jurisdiction. Jurisdiction may be acquired by our courts over any person through service of process as herein provided; or by the voluntary appearance in an action by any person either personally, or through an attorney, or through any other authorized officer, agent or employee.

Montana CA 25-2-122

West's Montana Code Annotated

Title 25. Civil Procedure

Chapter 2. Venue

Part 1. Proper Place of Trial--Venue

25-2-122. Torts

(1) Except as provided in subsections (2) through (4), the proper place of trial for a tort action is:

(a) the county in which the defendants or any of them reside at the commencement of the action; or

(b) the county in which the tort was committed. If the tort is interrelated with and dependent upon a claim for breach of contract, the tort was committed, for the purpose of determining the proper place of trial, in the county in which the contract was to be performed.

(2) Except as provided in subsection (4), if the defendant is a corporation incorporated in a state other than Montana, the proper place of trial for a tort action is:

(a) the county in which the tort was committed;

(b) the county in which the plaintiff resides; or

(c) the county in which the corporation's resident agent is located, as required by law.

(3) Except as provided in subsection (4), if the defendant is a resident of a state other than Montana, the proper place of trial for a tort action is:

(a) the county in which the tort was committed; or

(b) the county in which the plaintiff resides.

(4) If the defendant is a railroad, as defined in 69-14-101, and the plaintiff is a Montana resident, the proper place of trial of a claim subject to the federal Employers' Liability Act, 45 U.S.C. 51, et seq., is any county in which the railroad does business.

Restatement (Second) of Torts

§ 328D. Res Ipsa Loquitur

(1) It may be inferred that harm suffered by the plaintiff is caused by negligence of the defendant when

(a) the event is of a kind which ordinarily does not occur in the absence of negligence;

(b) other responsible causes, including the conduct of the plaintiff and third persons, are sufficiently eliminated by the evidence; and

(c) the indicated negligence is within the scope of the defendant's duty to the plaintiff.

(2) It is the function of the court to determine whether the inference may reasonably be drawn by the jury, or whether it must necessarily be drawn.

(3) It is the function of the jury to determine whether the inference is to be drawn in any case where different conclusions may reasonably be reached.

Restatement (Third) of Torts: Products Liability

§ 2. Categories Of Product Defect

A product is defective when, at the time of sale or distribution, it contains a manufacturing defect, is defective in design, or is defective because of inadequate instructions or warnings. A product:

* * *

(b) 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 or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe;

Comment d. Design defects: general considerations. . . . [A] product asserted to have a defective design meets the manufacturer's design specifications but raises the question whether the specifications themselves create unreasonable risks. Answering that question requires reference to a standard outside the specifications. Subsection (b) adopts a reasonableness ("risk-utility balancing") test as the standard for judging the defectiveness of product designs. More specifically, the test is whether a reasonable alternative design would, at reasonable cost, have reduced the foreseeable risks of harm posed by the product and, if so, whether the omission of the alternative design . . . rendered the product not reasonably safe. . . . Under prevailing rules concerning allocation of burden of proof, the plaintiff must prove that such a reasonable alternative was, or reasonably could have been, available at time of sale or distribution.

Assessment of a product design in most instances requires a comparison between an alternative design and the product design that caused the injury, undertaken from the viewpoint of a reasonable person. That approach is also used in administering the traditional reasonableness standard in negligence. . . .The policy reasons that support use of a reasonable-person perspective in connection with the general negligence standard also support its use in the products liability context.