EXAMINATION NUMBER 133

69.

UNIVERSITY OF DAYTON
SCHOOL OF LAW

Final Examination - Civil Procedure

Professor Richard Perna

Friday, 9:00-12:00

INSTRUCTIONS

This examination consists of three (3) questions. Some of the questions have more than one part. Be sure to answer all parts of each question.

The examination is designed to be completed in three hours. However, you will have an extra 1/2 hour, if you need it. The examination will begin at 9:00 a.m. and you must stop writing at 12:30.

Make sure to READ and THINK carefully about each question before beginning to write. Remember, you are being graded on the quality of your answer, not on quantity.

The questions are not equal in value or in the amount of time you should spend answering each one. Based on the value of each question, the following is a breakdown of the time you should spend on each:

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|---|---|
| Question I. | - 50 minutes |
| Question II. | - 1 hr. and 20 minutes |
| Question III. | - 50 minutes |
| Total | 3 hours |

MATERIALS

You may bring your casebook supplement with annotations into the examination. No other materials are allowed in the examination room.

REMEMBER: DON'T PANIC! READ CAREFULLY AND THINK!!

GOOD LUCK!

Question I.

On April 15, 1982, John Doe, a resident of Atlanta, Georgia, purchased a new boat trailer for his 17 foot Chris Craft pleasure boat. Doe purchased the boat trailer from G. D. Adams Company, a corporation incorporated in Georgia with its principal place of business in Atlanta. The boat trailer and cable were manufactured by Tennessee Trailers, inc., a corporation incorporated in Tennessee with its principal place of business in Nashville.

On returning home from the season's maiden voyage on May 15, 1982, Doe was seriously injured while removing the boat from the lake. As he was loading his boat onto the new boat-trailer, the steel cable used to secure the boat to the trailer snapped hitting Doe in the left eye. As a result of the accident, Doe was left blinded in the left eye and suffered other permanent injury to his head and neck. Doe's medical expenses resulting from treatment for his injuries exceeded $75,000. On August 1, 1983, Doe filed suit in the U.S. District Court for the Northern District of Georgia (located in Atlanta) against Tennessee Trailers and G. D. Adams for damages resulting from injuries received from the snapped cable. In his complaint, Doe proceeds against Tennessee in tort for the negligent manufacture and assembly of the steel cable and trailer, and in contract for breach of express and implied warranties. Doe proceeds against G.D. Adams in contract only for breach of express and implied warranties.

Prior to answering, defendant Tennessee Trailers filed a motion to dismiss pursuant to Federal Rule Civil Procedure 12(B)(1) for lack of subject matter jurisdiction. Plaintiff Doe responded by filing a motion to amend his complaint to strike G.D. Adams Co. as a defendant from the original complaint. Tennessee Trailers responded by renewing its motion to dismiss arguing that G.D. Adams was an indispensible party pursuant to Federal Rule of Civil Procedure 19.

YOU ARE SITTING BY DESIGNATION AS A FEDERAL DISTRICT COURT JUDGE TO HEAR THIS CASE. HOW WOULD YOU RESOLVE THE ISSUES RAISED BY THE MOTIONS FILED BY PLAINTIFF AND DEFENDANT? REGARDLESS OF YOUR CONCLUSIONS, BE SURE TO DISCUSS THE DISPOSITION OF ALL THE MOTIONS.

In answering, you should assume the following, which may or may not be relevant:

> Georgia state law requires that there be privity of contract in all actions for breach of express and implied warranties. The Georgia Supreme Court has interpreted this substantive provision of Georgia contract law to require that the retailer (or seller) as well as the manufacturer of an allegedly defective product be a party in all actions for breach of express or implied waranties. Stewart v. Gainesville Glass Co., 233 Ga. 578 (1975); Ellis v. Rich's Inc., 233 Ga. 573 (1975); Everstine Products, Inc. v. Schmitt, 130 Fa. 34, (1973).

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Question II.

On November 1, 1980, Carol Craig and her fiance John Kenyan, both 18 years of age became engaged to be married. They decided to celebrate their engagement with a night "out on the town". The evening began at about 9:00 p.m. when John left his home in Hudson, Wisconsin to pick up Carol at her home in Minneapolis, Minnesota. They decided to return to Hudson to spend the evening at Jake's Tavern, a favorite haunt of Carol's. Hudson is located on the Minnesota-Wisconsin border approximately 15 miles from the twin cities. Jake's Tavern is on the main street of Hudson, a short distance from interstate highway 94, which connects the metropolitan area of Minneapolis with Hudson, Wisconsin. At this time, Wisconsin law permitted the sale of beer or malt liquor to persons 18 years of age or older, while Minnesota did not. After a long and enjoyable evening of merriment (both Carol and John consumed a great amount of beer), the couple started home at approximately 3:00 a.m. on November 2. With John driving, the couple was on their way to Carol's apartment in Minnesota when their vehicle collided head-on with another operated by Mr. Ned Thompkins, a New York resident who was in Minnesota on business. The accident took place across the Minnesota border in Minnesota only a few miles from Minneapolis. Only Carol Craig sustained personal injuries but both cars were damaged in the crash. Three days after the accident, Carol Craig called off the marriage with John Kenyan because she blamed him for the accident. She felt he was an "unreliable" person no longer worthy of her hand.

Eight months after the accident Carol Craig sued Ned Thompkins for $100,000 in a Minnesota state court for her personal injuries arising out of the November 2 accident. Thompkins appeared in Minnesota without contesting service of process or personal jurisdiction. He filed an answer denying liability for Craig's personal injury and pursuant to the Minnesota rules of civil procedure properly joined Kenyan as a third party defendant. Thompkins third-party complaint contained two claims against Kenyan - the first for indemnity and the second for damages to his Mercedes-Benz 450SL in the amount of $21,000.

Kenyan filed an answer to Thompkins third party complaint denying that he was liable to indemnify and further denying that he was responsible for any damage to Thompkins' car. As part of his answer, Kenyan counterclaimed against Thompkins for damage to his Volkswagon in the amount of $5,800. The answer also contained a cross claim against Carol Craig for $2,500. Kenyan alleged that Craig failed to pay a $2,500 loan he made to her a year before their engagement and accident. Craig then filed an answer to Kenyan's cross claim denying liability and asserting that the $2,500 was a gift which she was not obligated to repay.

Subsequently, the two defendants, Thompkins and Kenyan, filed a joint petition to remove the case to the Federal District court for the Southern District of Minnesota which is located in downtown Minneapolis.

A. WHICH, IF ANY, OF THE ABOVE CLAIMS SHOULD BE REMOVED TO FEDERAL COURT?

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Without having any affect on how you answer the first part of this question, you should assume that none of the case was removed to federal district court and that the entire case stayed in the Minnesota state court. During discovery, Thompkins for the first time discovers that Kenyan had been drinking excessively at Jake's Tavern immediately prior to the accident. Further discovery showed that the Minnesota Highway Patrol was of the opinion that of the young people who drink and have traffic problems in the vicinity of the accident in this case, 75% have been drinking at Jake's Tavern. It was also discovered and uncontroverted that Jake's Tavern advertised extensively on a local Hudson, Wisconsin radio station, WHUD. The listening range of WHUD extended for 25 miles around in all directions from Hudson. Although they advertised extensively in Hudson newspapers, Jake's did no advertising in any Minnesota newspapers. A recent survey of Jake's patrons revealed that about 8-13% were from Minnesota.

As a result of this information, Thompkins filed a motion to join Jake's Tavern as a defendant asking for indemnity and damages as a result of injuries to his car. Jake's Tavern appeared only to file a motion to dismiss alleging lack of personal jurisdiction. The trial judge granted the motion and denied Thompkin's motion to join Jake's as a defendant. Addressing only the question of lack of personal jurisdiction over Jake's, answer the following:

B. AS AN APPEALS COURT SITTING IN REVIEW OF THE DISTRICT COURT'S DECISION, HOW WOULD YOU RULE ON THE JURISDICTIONAL QUESTION RAISED BELOW? AS PART OF YOUR ANSWER, NOTE ANY ADDITIONAL FACTS, IF ANY, THAT YOU THINK WOULD BE RELEVANT TO YOUR ANALYSIS.

In answering you should assume that Minnesota enacted the following statute which may or may not be relevant:

> Every foreign corporation, every individual not a resident of this state or his executor or administrator, and every partnership or association, composed of any person or persons, not such residents, that shall have the necessary minimum contacts with the state of Minnesota, shall be subject to the jurisdiction of the state of Minnesota, and the courts of this state shall hold such foreign corporations and such nonresident individuals or their executors or administrators, and such partnerships or associations amenable to suit in Minnesota in any case not contrary to the provisions of the Constitution or laws of the United States.

You should also assume that Jake's Tavern is a "foreign corporation" in the context of the above Minnesota statute.

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## Question III

In March of 1983, Union Local 911, of the Int'l Brotherhood of Bus Drivers began a campaign to organize the bus drivers of Green Bus Lines, Inc., a local New York City bus company. The organizing drive was spearheaded by Tommy Tootone, Local 911's chief organizer. Obviously, management of Green Lines was not overjoyed by the organizing effort and viewed Tootone as a troublemaker and potential problem.

On April 12, 1983, an incident took place between Tootone and Gus Johnson, President and Chairman of the Board of Green, and Jim Jones, Green's General Manager. The incident took place at Green's executive offices in New York City. Police were called and Tootone was arrested for assault and disturbing the peace. At the time of the arrest, a routine search of Tootone's coat turned up a half-ounce of high quality cocaine. Tootone denied ownership of the cocaine and swore that the whole incident was a set up by Johnson and Jones to thwart the union's organizing efforts. Despite his protestations, Tootone was charged by the Manhattan District Attorney's office with assault, disturbing the peace and possession of drugs with intent to distribute.

On May 1, 1983, Tootone instituted an action against Johnson and Jones in Federal District Court for the Western District of Connecticut (located in Fairfield County) pursuant to 42 U.S.C. § 1988, alleging that Johnson and Jones conspired to have him falsely arrested in order to thwart his organizing efforts.

Defendants answered on May 15, 1983 by denying the allegations of Tootone's complaint, and moving to transfer the action to the U.S. District Court for the Southern District of New York (located in Manhattan, New York City).

A. YOU ARE SITTING BY DESIGNATION AS DISTRICT COURT JUDGE. HOW SHOULD YOU RULE ON DEFENDANT'S MOTION TO TRANSFER THE ACTION?

In answering, the following may or may not be relevant:

1. Both defendants are residents of Fairfield County, Connecticut, a suburb of New York City, located some 55 miles from the center of Manhattan Both commute daily to the offices of Green, Inc. located in Manhattan.

2. Tootone is also a resident of Connecticut - he commutes daily from his home in Fairfield, County to the office of Local 911 also located in Manhattan.

3. Tootone's action is brought pursuant to 42 U.S.C. § 1988 - the federal statute which creates a civil cause of action against persons who conspire to violate civil rights of another.

N.B. In answering, you should assume that Tootone has pled a valid cause of action pursuant to 42 U.S.C. § 1988.

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Without affecting your answer to the first part of this question, assume that the case has been transferred to the U.S. District Court for the Southern District of New York located in Manhattan. The case was officially transferred to the New York court on August 15, 1983. On September 30, 1983, the criminal case against Tootone was heard in New York City criminal court and the jury found Tootone guilty on all counts. Following the guilty verdict, Johnson and Jones called their attorney, Senior Partner, to inform him that they now wished to file a claim against Tootone for "intentional infliction of emotional distress." As a result of the criminal verdict against Tootone, Johnson and Jones feel strongly that Tootone's civil lawsuit for conspiracy is clearly frivolous and that Tootone should pay for the continued anguish conspiracy lawsuit has and is causing them.

Partner, the busy fellow everyone knows him to be, writes the following memo to his "junior" partner:

> I need your immediate help. Johnson and Jones want to file a claim against Tootone for intentional infliction of emotional distress. Is there any way that the claim can be made a part of the pending civil suit in the District Court for the Southern District of New York? In answering my question, assume two things - first, that there is a valid cause of action based on state law for intentional infliction of emotional distress and second, that the applicable state statute of limitations for that cause of action is 6 months and began to run on May 1, 1983, the day Tootone filed his federal court action. As of today, the statute of limitations has run.
>
> P.S. We have just started discovery and no trial date has yet been set in the case.

B. ASSUME YOU ARE PARTNER'S "JUNIOR PARTNER." CAN THE STATE CLAIM OF JOHNSON AND JONES NOW BE MADE A PART OF THE TOOTONE V. JOHNSON AND JONES ACTION?

END OF EXAMINATION