

Examination Number 672  
64

UNIVERSITY OF DAYTON  
SCHOOL OF LAW

Final Examinat

CIVIL PROCEDURE

Professor Perna

1:00 p.m. - 3:30 p.m.

INSTRUCTIONS

This examination consists of two questions - Question 1 and Question 2. Question 1 is divided into six subparts (I thru VI), each requiring a short narrative answer to be written in your blue book. Be sure to answer every subpart and to answer the specific question or questions in each subpart. Your answers to Question 1 should be concise, thoughtful and focused! Remember, you are being graded on the quality of your answer, not the quantity.

Question 2 is an essay to be answered in your blue book. Address yourself only to the specific questions asked.

The examination is designed to be completed in two hours. However, you will have an extra 1/2 hour, if you need it. The examination will begin at 1:00 p.m. and you must stop writing at 3:30 p.m.

Question 1 and Question 2 are approximately equal in value so you should spend 1/2 of your time answering each one. Make sure to budget your time before you begin to write your answers.

**STOP!! MAKE SURE TO READ AND THINK CAREFULLY ABOUT EACH QUESTION BEFORE BEGINNING TO WRITE. QUALITY NOT QUANTITY!!**

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!!

-JN 1

Nancy B. is a 25 year old single woman who lives in the fictional state of Aimes. On September 1, 1983, Nancy underwent an abortion at a municipal hospital located in the neighboring fictional state of Bart. Subsequent to the abortion, Nancy suffered a number of complications which ultimately led to a hysterectomy. As a result of the complications and hysterectomy, Nancy will be unable to bear any children for the rest of her life.

Nancy consulted five attorneys after her release from the hospital searching for one who would represent her in a malpractice action against the hospital and the doctor who performed surgery. At the suggestion of a close friend, Nancy prepared a written statement summarizing the facts of the case as she knew them. At her initial meeting with each of the attorneys she gave them a copy of her previously prepared memorandum for their records.

In February 1984, Nancy finally selected attorney Timothy Smith to represent her in a malpractice action against the municipal hospital and the operating physician.

On April 5, 1984, suit was brought against the hospital and doctor (a resident of the State of Bart) alleging that the hysterectomy was made necessary by the negligent treatment she received subsequent to her abortion. The complaint was filed in the United States District Court for the Eastern District of Bart and demands \$1,000,000 in damages for negligent treatment and Nancy's resulting sterility, severe mental anguish and depression.

On April 12, 1984, the municipal hospital and the doctor filed an answer denying the allegations of the complaint and further denying that the treatment given to Nancy was negligent. During the course of discovery the following problems arose which require resolution. In answering the following questions remember that the case is brought in Federal Court and that the Federal Rules of Civil Procedure apply.

I

Within a week after filing their answer, the defendants filed their first set of interrogatories seeking a variety of information from the plaintiff. Defendants specifically requested that the plaintiff furnish them with the name of the putative father of the aborted fetus and the names of all men the plaintiff dated in the last five years. Nancy's lawyer objects to giving this information on the basis of relevance and you have been asked to resolve the dispute.

- a) What arguments can be made for and against discoverability?
- b) How would you decide if you were the judge in this case and why?

II

Pursuant to the applicable Federal Rule of Procedure, the defendant noticed and took Nancy's deposition. During the course of the deposition, Nancy admitted that she spoke with a number of attorneys about her case subsequent to the hysterectomy, one of whom was attorney John Jones. Defendants' lawyer asked the following question to which Nancy's present lawyer (Smith) objected: "Nancy, when you met with attorney John Jones, what did you say to him about your desire to someday have children?"

- a) How would you rule on Nancy's attorney's objection and why?

III

During the course of the same deposition, defendants' lawyers learned that Nancy prepared a written statement summarizing the facts of the case prior to meeting with her attorneys. It was also disclosed that Nancy no longer has a copy of this summary and that the only remaining copies are those retained in the files of the attorneys Nancy consulted about her case. Defendants have properly requested that plaintiff produce a copy of the memorandum pursuant to the applicable Federal Rule of Procedure, but plaintiffs have objected.

- a) Is the memorandum discoverable and why?

IV

During the course of his investigation and prior to filing suit, Nancy's present attorney (Smith) hired an independent private investigator to interview hospital employees who might have knowledge of Nancy's case. Subsequent to the interviews, the investigator prepared a memorandum summarizing the witnesses' statements. The memorandum was then forwarded directly to attorney Smith and retained by him. Defendants have requested a copy of the memorandum prepared by the investigator.

- a) Is the memorandum discoverable and why?

V

Prior to the initiation of Nancy's law suit and as part of normal internal review procedures, Nancy's case was reviewed by a hospital review committee (which consisted of four staff doctors) and a report submitted to the hospital's chief-of-staff. The report was retained by him in his hospital files. Nancy's lawyer now seeks a copy of the report from the hospital pursuant to the applicable Federal Rule of Civil Procedure.

- a) What arguments can be made for and against discoverability?
- b) How would you decide if you were the judge in this case and why?

VI

Prior to instituting suit, Nancy's present attorney (Smith) consulted with his brother, a well known doctor in Aimes. As a favor to his brother, Dr. Smith reviewed the medical files of Nancy's case to determine whether the hospital and doctor who performed the surgery were negligent. Dr. Smith's view was that there was not clear negligence and he told his brother this orally in a phone conversation. Dr. Smith was not paid and has had and will have no further involvement in the case.

- a) Can defendant discover the opinion of Dr. Smith? Explain.

IN ANSWERING THE PRECEDING QUESTIONS, THE FOLLOWING STATUTES OF THE STATE OF BART (THE PARTIES STIPULATE THAT THE SUBSTANTIVE LAW OF BART GOVERNS THE ACTION) MAY OR MAY NOT BE RELEVANT:

§2801.2 Privileged Communications

Communications between the following persons shall be privileged:

- a) attorney-client;
- b) physician-patient.

§2904.1 "Client" defined

As used in §2801.2(a) of the Revised Statutes:

"Client" means a person, firm, partnership, corporation, or other association that, directly or through any representative, consults an attorney for the purpose of retaining the attorney or securing legal advice from him (her) in his (her) professional capacity.

QUESTION 2

Adams Fashions, Inc., is a Philadelphia producer of ladies garments. In 1981, Adams purchased approximately 20,000 yards of fabric from Baba Fabrics Corp., a New York manufacturer of cloth. This unfinished manufactured cloth was printed and finished by Cook Printworks, Company, a Rhode Island Corporation. Upon completion of the printing and finishing process, Cook sent the fabric back to Baba Corp. for sale. The goods were delivered by Baba to Adams, but problems arose when Adams attempted to sell the cloth to make dresses. Adams claimed its difficulties were caused by defects in the material. Baba asserted that the problems could be alleviated by altering Adams' incorrect sewing techniques. Eventually, Adams refused to pay for the goods.

On May 20, 1983, Baba sued Adams in a Pennsylvania State Court for breach of the written purchase contract. Baba alleged in its complaint that Adams breached the contract by failing to pay an \$18,000 balance on the purchase price of the cloth. Adams answered the Complaint and defended by alleging that no money was owing because the material was defective. In response to Adams' claim that the cloth was defective, Baba alleged 1) that any problems encountered by Adams were caused by poor sewing techniques and not by any defect in the material and 2) that regardless of the quality of the material, Adams could not assert the quality of the goods as a defense to nonpayment because they failed to comply with the contractual provision which required notice to Baba of any defects.

The case was tried without a jury. The court, without opinion, found in favor of Baba and awarded \$18,000 in damages. No appeal was taken from this judgment.

Subsequent to the decision of the Pennsylvania court, Adams filed a diversity action in the Federal District Court of New York alleging that Adams was damaged as a result of the defect in the material caused by Cook Corp's printing and finishing. Cook filed an answer denying liability and asserting that the goods were not defective. Within two months, Cook moved for summary judgment alleging that Adams could not relitigate the question of the quality of the material already decided by the prior Pennsylvania Baba v. Adams decision. In support of its motion, ~~Adams~~ Cook relied upon the pleadings and the Court's Judgment in Baba v. Adams. A copy of that order and judgment can be found at page 7 of this examination.

In response to Cook's motion for summary judgment, Adams raised two arguments. First, Adams argued that summary judgment was inappropriate because there were issues of material fact. Specifically, Adams alleged that the issue concerning the quality of the material was not fully litigated in Baba v. Adams and that this was an issue of material fact which precluded judgment. Adams relied on an affidavit from their in-house counsel who represented them at the trial of Baba v. Adams in

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which she alleges that the issue concerning the quality of the fabric was "not fully litigated" in the Baba v. Adams case. Second, Adams argued that even if there were no issue of material fact, summary judgment should not be granted as a matter of law because Adams should not be precluded from litigating the question of the quality of the material in Adams v. Cook.

After oral argument, the district court granted the defendant's motion for summary judgment. Judgment was entered for defendant and against plaintiff and the case was dismissed.

Adams has appealed the district court's grant of defendant's motion for summary judgment. You are sitting by designation as a circuit court judge to hear the appeal. Adams has alleged two alternative grounds for appeal. First, Adams argues that the court below erred in granting summary judgment because the question of what was actually decided in Baba v. Adams was an issue of material fact. Second, Adams argues that the court below erred as a matter of law when it found that Baba v. Adams case precluded relitigation of the issue of the quality of the material.

How would you rule on Adams' appeal? In answering, be sure to address both of Adams' argument.

Examination continues next page

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IN THE COMMON PLEAS COURT FOR THE COUNTY OF  
PHILADELPHIA

BABA FABRICS CORPORATION  
9823 Madison Avenue  
New York, New York

Plaintiff

vs.

ADAMS FASHIONS CORPORATION  
1912 Pine Street  
Philadelphia, Pa.

Defendant

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No. 2543, May, 1983

Perna, J.

Judgment

AND NOW THIS 12TH DAY OF OCTOBER, 1983, upon consideration of the evidence and testimony of the parties this court finds in favor of plaintiff and against defendant in the amount of \$18,000. Judgment for \$18,000 is hereby entered for plaintiff.

OCTOBER 12, 1983

PERNA J.

End of examination