

*Answer attached*

CIVIL PROCEDURE  
Mr. Martin  
October 19, 2007

Social security no. \_\_\_\_\_

MIDTERM EXAMINATION

This is an open book examination. You may use any materials which you have brought with you whether prepared by you or by others. The three questions will be given equal weight and you should spend equal amounts of time on each. The Federal Rules of Civil Procedure apply to all questions. Please write legibly and leave a margin on the left-hand side of the page. Use only your social security number to identify your blue book. If you use more than one blue book, identify each one ("No. 1 of 2," "No. 2 of 2," etc.), be sure that your social security number is on each one, and insert all others into the first one.

Your assignment for the class on Monday, October 22, is to re-read the book A Civil Action in the light of your newly-acquired knowledge of pleadings, joinder, discovery, Rule 11, and summary judgment. Study also the passages on directed verdict, JNOV and new trial. There are additional assignments in connection with A Civil Action on a separate handout which you should collect before you leave at the end of the examination.

Because at least one student must take this examination on a deferred basis, you must fill in your social security number in the space above and turn in this white examination paper when you leave. This is a temporary measure for examination security only, and the examination paper will be returned to you.

ALL BLUE BOOKS MUST BE RETURNED AT THE CLOSE OF THE EXAMINATION. LABEL ANY SCRAP BLUE BOOK "SCRAP."

### QUESTION ONE

Read Rule 15(a). Then answer each of the following questions "ALLOW" or "DENY" with a brief explanation. Your one-word answer, "ALLOW" or "DENY," counts as forty per cent (40%) of each question. Your brief explanation counts as sixty per cent (60%) of each question.

NOTE: a "motion to strike" is a demand or request that the Court reject or "strike" from the record an opposing party's motion, pleading, or other filing, on the grounds that the motion, pleading or filing does not conform to applicable rules of the Court.

FACTS: Kate Sallybrass is a mineralogist. She noticed that the most recent publicly issued financial statement of a company called Noble & Base Co. ("N&B") listed, as an asset, a large inventory of a metal called Coynium. This asset was listed at its acquisition cost of \$100,000. The sole source of Coynium is ore from mines in far-off Velvelistan. Kate knew that Coynium was in short supply worldwide because Velvelistanian terrorists were blowing up the mines, and that the current market value of N&B's Coynium was in excess of \$1,000,000.

There is no current public quotation of the price of N&B stock. The book value of N&B stock, according to the statement, is \$5 per share. Its actual value, if the Coyonium inventory were correctly valued, would be \$30 per share.

Knowing these facts, Kate offered to purchase from Clewless Bismite the 1000 shares of stock in N&B that Clewless owned, at \$6 per share. Clewless sold the shares to Kate at \$6. Kate later resold the shares at \$30.

Question 1. Clewless sues Kate for misrepresentation claiming that Kate failed to disclose the true value of the shares which she purchased. Before Kate responds, Clewless files an amended complaint adding a claim under the Consumer Protection Act and a demand for triple damages pursuant to that statute. Kate files a motion to strike the amended complaint. Should the judge allow or deny Kate's motion to strike the amended complaint? Why?

Question 2. Assume that Clewless has not filed the amended complaint as in Question 1. She causes Kate to be properly served with the original complaint and a summons. Kate responds with a motion to dismiss for failure to state a claim on which relief can be granted pursuant to Rule 12(b)(6). Her memorandum in support of this motion explains that, in the absence of a fiduciary relation, a buyer of shares of stock (or anything else) is under no duty to

disclose facts, known to the buyer but not known to the seller, which might affect the price. Clewless, after reading this memorandum, files an amended complaint in which she alleges for the first time that a fiduciary relationship existed between her and Kate at the time of the sale. Kate files a motion to strike the amended complaint. Should the judge allow or deny Kate's motion to strike the amended complaint? Why?

Question 3. For this question, assume that Clewless filed her original complaint and did not file an amended complaint. Service of her original complaint was made on Kate on May 15. Kate files an answer to the complaint and serves the answer on Clewless on June 3. On June 22 Kate files an amended answer in which some facts, admitted in her original answer, are now denied. Clewless now files a motion to strike the amended answer. Should the judge allow or deny Clewless's motion to strike Kate's amended answer? Why?

Question 4. Assume the same facts as in Question 3 except that Kate waited until July 3 to file the amended answer in which some facts, admitted in her original answer, are denied. Clewless now files a motion to strike the amended answer. Should the judge allow or deny Clewless's motion to strike the amended answer?

Question 5. Regardless of your actual answer to Question 4, assume that the judge in question 4 allowed Clewless's motion to strike Kate's amended answer. Kate now files a motion for leave to amend her answer. Accompanying the motion is her proposed amended answer in which some facts, admitted in her original answer, are now denied. Should the judge allow or deny Kate's motion for leave to amend her answer? Why?

QUESTION TWO

Emily, by her father, sued Hospital and other defendants for the death of Emily's mother in childbirth and for Emily's permanent disability. During the second stage of labor Emily's mother suffered a massive rupture of the uterine wall. The ensuing loss of blood led to Emily's mother's death and to fetal asphyxia which resulted in Emily's mental impairment and quadriplegia.

As part of his pre-filing investigation, Emily's lawyer ("Lawyer") retained Dr. Fogg, known for his courtroom expertise in obstetrical malpractice. Dr. Fogg gave a written opinion that all defendants had acted in accordance with sound medical practice and that the death and injuries were "an unfortunate medical result."

Lawyer next retained Dr. Storm, an obstetrician, who opined in writing that the defendants had failed adequately to monitor the mother and fetus and that this failure was the proximate cause of

the death and injuries. Dr. Storm has no courtroom experience and lawyer hasn't decided whether or not to use him as a witness.

Seeking a better expert witness, Lawyer telephoned his own doctor, Dr. Snowe, and after discussing the case asked Dr. Snowe for a referral. Dr. Snowe obliged by furnishing the name of Dr. Hale but added, "From what you tell me this lawsuit is an act of extortion against some pretty good people who did everything possible to save the mother and baby."

Lawyer has sent the medical records to Dr. Hale who has not responded.

All of the above events took place prior to Lawyer filing a complaint. Lawyer now files the complaint.

Federal Rule 26(a)(1), "Initial Disclosures," provides as follows:

Except [in cases not related to this question] a party must, without awaiting a discovery request, provide to other parties:

(a) The name and, if known, the address and telephone number of each individual likely to have discoverable information that the disclosing party may use to support its claims or defenses, unless solely for impeachment, identifying the subjects of the information.

In his initial disclosure, Lawyer provided the name, address and telephone number of Dr. Storm only.

Hospital filed and served the following interrogatories:

1. Have you contacted any persons or persons, whether they are going to testify or not, in regard to the care and treatment rendered by the defendants in this case?

2. If the answer to Interrogatory No. 1 is "Yes," set forth the names of such persons and their present business addresses.

In response to these interrogatories, must Lawyer disclose the name and address of (a) Dr. Fogg, (b) Dr. Storm, (c) Dr. Snowe, (d) Dr. Hale? Why or why not?

### QUESTION THREE

Review Celotex Corp. v. Catrett, casebook p. 435. Then answer each of the following questions.

1. What was the fight about? Everyone agreed that, in order to recover, Mrs. Catrett had to show that her husband had been exposed to asbestos manufactured by Celotex. Everyone agreed that Celotex could defeat recovery by showing that Mr. Catrett had not been exposed to asbestos manufactured by it. So what were the parties disagreeing about?

2. One of the issues in Celotex is whether asbestosis (as opposed to some other disease process) caused Mr. Catrett's death. Mrs. Catrett alleges in her complaint that it did; Celotex denies this in its answer. Suppose that Celotex moves for summary judgment on this issue of causation. Reviewing all discovery

documents, Celotex points out that no medically qualified expert has opined that asbestosis caused Mr. Catrett's death. In response, Mrs. Catrett produces the affidavit of a pathologist who recites his professional qualifications, describes the examination he has made of the relevant tissue samples, and comes to the conclusion that the laboratory findings are "consistent with Mr. Catrett having died as a result of asbestosis." Explain why the Court should deny Celotex's motion for summary judgment.

3. Now suppose that it is Mrs. Catrett, not Celotex, who moves for summary judgment on the issue of causation. In support of this motion she produces the same affidavit. In response, Celotex produces no affidavit or other evidence contradicting Mrs. Catrrett's expert. Explain why the Court should deny Mrs. Catrett's motion for summary judgment. Why does the same affidavit lead to different results in the two situations?

END OF EXAMINATION

CIVIL PROCEDURE  
Mr. Martin  
November 9, 2007

MIDTERM EXAMINATION  
COMPLETE ANSWERS

QUESTION ONE

1. DENY. Plaintiff may amend her complaint once without leave of court at any time before an answer is served. Rule 15(a), first half of first sentence.

2. DENY. Plaintiff may still amend her complaint because an answer (called "responsive pleading" in Rule 15[a], first half of first sentence) has not been served. A motion to dismiss is not a pleading; Rule 7(a).

3. DENY. Kate (defendant) may amend her answer without leave of court at any time within twenty days of serving her original answer. Rule 15(a), second half of first sentence. Kate amended nineteen days after serving her original answer.

4. ALLOW. Kate waited too long. She will have to move the Court for leave to amend.

5. ALLOW. "Leave [to amend] shall be freely given when ~~justice so requires.~~" ~~Rule 15(a), second sentence.~~ At this early point in litigation there is no reason to deny leave to amend.

QUESTION TWO

What is sought is not the opinions of the experts but their identities. The federal rules do not cover the question whether the identities of non-testifying experts must be disclosed as part of the up-front disclosure required by Rule 26(a) or in response to a discovery request. It is therefore necessary to look to other rules, or to the caselaw, for analogies.

Rule 26(b)(4)(B) can be cited by analogy in favor of not disclosing the identities of experts who have been consulted but are not expected to testify. Rule 26(b)(4)(B) would require a showing of "exceptional circumstances" which do not exist here.

Rules 26(a)(1)(A) and 26(b)(1) could be cited by analogy in favor of disclosing the identities of non-testifying experts. However, both of these rules speak of persons having "discoverable" information. By negative implication, therefore, the identities of persons need not be disclosed if those persons have no discoverable information.

A good case can be made that Lawyer's decision to decline to identify an expert that Lawyer has consulted, but does not plan to use as a witness, is protected by the work product doctrine and therefore those identities are not "discoverable." See Hickman v. Taylor, casebook p. 332, and Rule 26(b)(3). This case gains force from its endorsement in Pizza Time Theatre and other cases cited in notes 4 and 5 at casebook, p. 408-409. It's unfair to allow Hospital to build its case on Lawyer's search efforts.

Distinguish:

Dr. Fogg: retained or specially employed for trial preparation but not expected to be called as a witness; he has no "discoverable" information; see Shell Oil, casebook p. 401.

Dr. Storm: retained or specially employed for trial preparation; "may" or may not be called as a witness; his name already disclosed.

Dr. Snowe: not retained or specially employed; has no percipient information and no basis for an expert opinion. The 1970 Advisory Committee note following Rule 26 says that discovery against such an "informally consulted" expert is precluded by Rule 26(b)(4)(B).

Dr. Hale: has not been retained or specially employed at this time; he hasn't even been "consulted." He has produced no "documents" or "tangible things;" see Rule 26(b)(3).

### QUESTION THREE

1. The parties were disagreeing about what Celotex Corp. had to do to seek the summary judgment. Does Celotex have to "prove the negative," i.e., show that Mr. Catrett was never exposed to Celotex's asbestos, or is it enough for Celotex to show that Mrs. Catrett can't prove that Mr. Catrett was ever exposed to Celotex's asbestos?

2. The Court should deny Celotex's motion for summary judgment because Mrs. Catrett has carried her burden of showing that there will be a genuine issue of material fact for trial. She did this by presenting the affidavit of the pathologist.

3. The Court should deny Mrs. Catrett's motion for summary judgment because the factfinder need not necessarily believe the pathologist's evidence; also because the issue of whether or not Mr. Catrett was ever exposed to Celotex's asbestos is still a genuine issue of material fact for trial. The result is different in scenario 3 from scenario 2 because the parties will have different burdens at trial. Mrs. Catrett, the plaintiff, will have the burden of persuasion.