MONTEREY COLLEGE OF LAW

Civil Procedure

Final Examination

Spring 2019

Prof. J. Martin

INSTRUCTIONS:

There are three (3) questions in this examination.
You will be given three (3) hours to complete the examination.

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Question One

ADAM, from California, and BOB, from Texas, engage in a joint venture involving a Ferrari race car that is intended to compete at the Laguna Seca Racetrack, and the enterprise involves a tremendous input of expertise and financing. The car is partly financed by a $500,000 loan from CARMEL BANK that holds the Arizona title to the vehicle as part security for the enterprise. Both men contribute $100,000 each and labor for months in order to prepare the car for the Spring Races.

As the month of May nears, so do the racing events and the men begin to argue about whom will drive the vehicle, as well as driving techniques, and whether the car will be taken on the race circuit throughout several states. Within a month of the first race of the year, each man claims 80% ownership and disparages the quality of the other's input. Each of the men wants to be the primary driver of the vehicle but ADAM is clearly the better driver and he fears BOB will crash the car.

ADAM speaks to the local Vice President of CARMEL BANK, informs him of the above facts, and complains about his partner in the enterprise. "But don't worry," says ADAM, "I am filing a claim that will legally establish my 80% ownership. When I'm the boss, I will drive and we will win."

That afternoon, the Vice President of CARMEL BANK expresses concern to his board about the information described above.

1. Discuss whether CARMEL BANK may file an Interpleader action.

2. Discuss whether CARMEL BANK may file an action as an Intervenor.

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Question Two

DORKO is a Florida corporation that manufactures and sells fittings for luxury marine vessels, including yacht kitchens, closets, and bathrooms. One item offered for sale is the DORKO-100, a toilet solely for boats and one that is built with very high quality of materials and workmanship. PAUL owns a 50-foot sailboat, the "Flynn", and he pays retail price for the installation of that model toilet in 2018.

One afternoon on Monterey Bay, PAUL is sailing the Flynn and he goes below to use the toilet. As the yacht moves on the ocean, the toilet breaks because of a defect in the item and PAUL is pitched onto the floor where he is seriously physically injured. PAUL proceeds to file a claim against DORKO in products liability, alleging defective design.

PAUL's claim is filed in California alleging diversity and his counsel proceeds with discovery in the following fashion:

1. PAUL asks for "all plans and specifications dealing with all marine fittings that DORKO sold in 2018".
2. PAUL asks for "the number of times that the CEO of DORKO has personally relied on the DORKO-100 while at sea".
3. PAUL serves a set of Interrogatories and #9 asks "If you contend that Plaintiff's conduct was contributorily negligent regarding the incident on (date of PAUL's accident), state all facts on which you base your contention, including legal authority for those contentions."

DORKO's investigators believe that PAUL may be physically impaired. Accordingly, DORKO wants to proceed in the following fashion:

1. DORKO desires to learn more about his physical condition, so they may be able to prove misuse of their product.
2. DORKO desires to learn the contents of a communication between PAUL and his attorney concerning the seaworthiness of the Flynn.

Discuss: 1. PAUL's discovery efforts and whether they are likely to be successful.
2. DORKO's interest in learning about PAUL's physical condition and his communication with his attorney.

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Question Three

LARRY is a lawyer who represents Acme Garage Door Company, a manufacturer of garage doors for houses and condominiums. PAUL is a Plaintiff's lawyer who represents PETE, Plaintiff in an action filed in federal court against LARRY's client, Acme.

In his Complaint, PETE alleges that while he was exiting the garage of a house under construction and where an Acme door was installed, the door suddenly descended and struck him on the head, thereby causing injury. PETE's Complaint is based on Strict Products Liability which requires the existence of a defect which is the cause of Plaintiff's injury.

An independent expert visited the accident site and conducted tests on the Acme door, the door-mounting apparatus, and the motor that raises and lowers the door. That expert found no defects in the Acme door. The general contractor who was constructing the house also conducted tests and found no anomoly or defect regarding the Acme door. PETE's attorney, PAUL, has offered no expert information about defects in the Acme door.

PETE was deposed by LARRY on behalf of Acme Garage Door Company and, under oath, PETE stated that he was at the construction site to install some insulation on basement pipes. PETE stated when he exited through the open garage door, he was hit on the head by the door. He has no explanation for how the accident happened, nor does PETE recall the particulars (what he was carrying, etc.) of the accident. PETE can only say that he was injured.

LARRY would like to terminate the litigation against Acme as quickly as possible. A previous 12(b)(6) motion by LARRY was denied. Advise LARRY on another method of terminating the claim against Acme Garage Door Company prior to trial.

DISCUSS: The method you suggest and its procedure. Include in your discussion the importance of burdens, and the importance of a "defect" in any Products Liability action.

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Question One -- Model Answer

1. CARMEL BANK utilizing Interpleader -- Rule 22
   A. Interpleader is a form of Joinder utilized by one who senses potential liability/responsibility owed to more than one claimant, but who does not know which of the several claimants will be successful.
   B. The Bank is on notice of a controversy between competing claimants and that the controversy may involve different courts as the car might be "campaigned" (taken on a racing tour) in different parts of the country.
      (1) A court action in another district may involve different rules and multiple liability. There is sufficient motivation to resolve the controversy now.
      (2) The car is titled in Arizona, ADAM is from California, and BOB is from Texas, so that more than one jurisdiction could become involved.
   C. The Bank would seek to force the two claimants, ADAM and BOB, to proceed in one lawsuit. The Bank, presently holding title, would be the "Stakeholder".
      (1) The procedure would involve CARMEL BANK placing title to the property with the court and initiating an action.
      (2) CARMEL BANK could then seek an Injunction forbidding other suits against it by ADAM or BOB, thereby saving resources.
      (3) Upon adjudication, the title would go to the appropriate claimant.

2. CARMEL BANK utilizing Intervention -- Rule 24
   A. Intervention is a form of Joinder that allows one outside a lawsuit to make themselves a party to an existing action.
      (1) CARMEL BANK would state an interest in the lawsuit -- ADAM's claim -- and a need to protect that interest, namely, the large loan.
   B. If an Intervention of Right, per Rule 24(a)(2), CARMEL BANK would show a possibility of detriment and the need to protect a significantly protectable interest -- the loan.
      (2) Secondly, CARMEL BANK would state that neither ADAM or BOB would be protective of bank interests, rather each is motivated by self-interest.
      (3) Third, CARMEL BANK will want to intervene in timely fashion, rather than wait long after ADAM's initial claim.
         a. While there is no set time to intervene, the car and its whereabouts will be dynamic soon. The bank would want to act quickly.
   C. If denied Intervention by right, the court would likely permit Intervention, per Rule 24(b), as CARMEL BANK shares a claim that involves common questions of law or fact.
      (1) Allowing CARMEL BANK to participate would not delay ADAM's claim, nor prejudice any party, while it would preserve resources.

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Question Two -- Model Answer

PAUL vs. DORKO Discovery Efforts by PAUL

1. While the basic goal of Discovery is to place both parties on equal footing -- and towards that end to presume discoverability -- there are some limits to Discovery that include Proportionality.
   A. The discovery request in question asks for "all" information about "all" marine fittings and that overbroad language asks for a vast amount of materials, many of which are not useful to this litigation. For example, information about DORKO kitchen fittings would not be instructive regarding the DORKO-100 toilet.
      (1) The discovery request might be re-written to ask for fittings with similar functionality and interchangeability. That request would be proportional to the need. If the language of the request is not amended, it will likely not be allowed.

2. Another limit to Discovery is Relevancy which is governed by Rule 26(b).
   A. The discovery request in question asks for information about the personal experiences of the DORKO Chief Executive Officer and that immediately raises issues about the relevancy of the request.
   B. The original Rule 26 required relevancy to the subject matter but the interpretation of "relevant" was loose.
      (1) The original rule allowed discovery when it might lead to a matter that could bear on an issue in the case, not limited by the issues within the pleadings, so that sort of interpretation of relevancy might allow the present request.
   C. The Rule still provides that the information need not be admissible, but the request for personal information about the CEO continues to raise concern and this request will likely not be allowed for that reason.

3. Another limit to Discovery is scrutiny of "Contention Interrogatories".
   A. Contention Interrogatories are questions that ask whether a party makes a particular legal contention, and often asks for the factual and legal bases for those contentions. It is a technique that is criticized for coming close to asking about thoughts of adverse counsel.
   B. The discovery request in question appears to have breadth, but it is not overly broad as the request is limited to a particular theory about a single party, and specific events. Further, it does not seem to ask adverse counsel to share work product or otherwise privileged matter.
      (1) This request will likely be allowed.

PAULvs. DORKO Discovery Efforts by DORKO

1. PAUL has put the state of his health in issue and claimed that the DORKO-100 caused him harm. In those situations, Rule 35 allows for a party to have its own medical professionals examine an adverse party.

A. Medical exams will not be allowed to vex or harass an adverse, nor will they be ordered due to mere conclusory allegations. The facts state that PAUL was injured while using the DORKO-100 and that should be sufficient to qualify for examination of PAUL.

2. Another important limitation of Discovery is that it extends only to Unprivileged matters.
   A. "Privilege" refers to the protection afforded to communications/matters that are within certain relationships. Typically, those communications/matters are made with an expectation of confidentiality, essential to the relationship, and are private.
      (1) The discovery inquiry being considered is about a communication between PAUL and his attorney. The well-recognized attorney-client privilege would most often forbid the discovery of those communications.
      (2) The social policy behind that privilege is to encourage absolute honesty between attorney and client.
   B. While the proponent of the privilege has the burden of establishing its existence, that could easily be done by PAUL who would state that he is the attorney's client, that the attorney and he were discussing a matter to do with the litigation, and that the communication(s) were opinions on law or the attorney's services. Lastly, PAUL would not want to indicate any waiver of that privilege.
      (1) That being done, any request for attorney-client communications would very likely be denied.

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Question Three -- Model Answer

SUMMARY JUDGMENT

A Motion for Summary Judgment is a method of asserting, usually by a Defendant, that there is no triable or genuine dispute as to any material fact and that the moving party is entitled to judgment as a matter of law.

The moving party -- in this case, Acme Garage Door Company -- has the burden of affirmatively demonstrating the absence of a triable issue and that it is entitled to judgment. Because Acme is a Defendant and does not have the Burden of Proof at a trial, Acme may demonstrate that proof is unlikely to be forthcoming at trial.

Without completely repeating the facts as given, Acme's attorney will recite that expert investigations have failed to show a defect in the Acme product, nor does Plaintiff himself have a colorable theory of liability that describes a "defect" -- a required element in Plaintiff's case based on Strict Products Liability. In those ways, Acme will have demonstrated that proof of a defect is unlikely to be forthcoming and there is the absence of a triable issue.

Once Acme has described that absence of a triable or genuine dispute as to the existence of a defect in Acme's product, it is the Plaintiff's burden to show the existence of that issue. The mere fact that Plaintiff was hit in the head does not furnish evidence that it was caused by a defect in Defendant's product. Plaintiff must point to an actual defect in Defendant's product that caused Plaintiff's harm.

In this case, the Plaintiff has not put forth any evidence of a defect, nor that the defect caused harm to Plaintiff. Defendant is entitled to ask for judgment as a matter of law for the entire claim and Summary Judgment should be granted.

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WOW - THIS IS ORGANIZED VERY NICELY - YOUR WRITING/ANALYSIS IS EXCELLENT :)

1)

1. Interpleader Action

a. RULE INTERPLEADER A plaintiff, also known as a stakeholder ("S") in an interpleader action, may interplead parties that are liable for a res. Under a rule interpleader action, S must show that the defendants or claimants are in dispute regarding the ownership of the res. S may file such an action with a court that satisfies subject matter jurisdiction, personal jurisdiction and at a proper venue. A common transaction or occurrence is not a requirement of this rule. Under the rule interpleader action, S need not deposit the res with the court for the pending litigation. S may remain as an active litigant in the matter or exit upon interpleading the parties. In the latter case, the parties would be left to litigate the issues of the case regarding the res. The main purpose would be to determine which claimant is liable to the intervenor or which claimant owns the res in dispute. These cases commonly pertain to insurance companies seeking to distribute claim monies.

Here, Carmel Bank ("CB") is seeking to establish who is liable for payments on the Ferrari. As CB holds title for the car, ownership should not yet be an issue until the parties have completely paid off their loan with CB. CB would be acting to preempt Adam's claim against Bob. That being said, CB is not involved in their dispute until they either stop paying their loan or there lacks sufficient paperwork on CB's end as to the liability/responsibilities held by CB, Adam or Bob. So far, CB was simply included in a "bickering" between two partners in an enterprise. This would not be a matter that requires CB to interplead the two parties as neither Adam nor Bob are asking that CB give either of them complete ownership.

b. STATUTORY INTERPLEADER (see general rule of rule interpleader) The difference between statutory interpleader and rule interpleader is the former permits S to interplead

parties for whom personal jurisdiction is nationwide, diversity actions may be satisfied by a claim of $500 or more with only two claimants of diverse citizenship from either side, and venue can be where ever one claimant resides. Thus, it does not follow the normal FRCP. A caveat is that S must deposit the res with the court upon which interest may accrue and distributed to whichever claimant prevails. A party is entitled to a statutory interpleader action where a statute provides for the cause of action as warranting these special rules. As there is no statute outlined in the fact pattern, this rule would not apply.

2. intervenor Action

Assuming this case was brought in Fed Ct as a diversity case and applications were timely made . . .

a. PERMISSIBLE INTERVENOR An absentee ("A") may intervene into a pending suit where (1) they have a common question as to fact or law; and (2) it would not unduly burden or prejudice the case. Subject matter jurisdiction requires that there is a common nucleus of operative fact. Personal jurisdiction is not a problem because A's entrance into the suit is voluntary. A's application to the court must be timely to be considered.

Here, assuming that Adam sues Bob in California and CB attempts to file as an intervenor in the action, CB must establish that under (1) they too do not know who is liable for the car payments, who owns the car, etc. CB most likely has ample documentation of the loan and who owns what. Unless there is a new law that would influence the ownership of the ferrari, CB would most likely not have a common question of fact or law. Under (2) the intervention could destroy diversity or confuse the issues. Destroying diversity would cause an automatic denial of CB's application. CB would need to show that they would not unduly burden or prejudice the case if diversity was not an issue.

2)

Discovery

Parties are entitled to discovery of all materials that are not privileged, proportional, and reasonably calculated to lead to admissible evidence. In the quest for admissible evidence the parties have several valuable tools available to them such as: form interrogatories, special interrogatories, oral and written depositions, requests for production of documents, request for admissions, and physical medical examinations and psychiatric examinations. Generally, the courts prefer that the parties work out their discovery issues among themselves, but will grant motions to compel and sanctions if good cause is shown.

Here, P alleges that his his injuries are a direct result of D's product failing to operate as expected. After filing a complaint in civil court for products liability by design defect, the parties begin the discovery process.

P's Discovery

Request for Production of Documents (RPD)

The propounding party may request any documents, writings and other things within the care custody and control of the responding party that are not privileged, and are reasonably calculated to lead to discoverable evidence. The RPDs are served by the propounding party on the responding party and are generally not filed with the court. The responding party has time to respond to each and every request and must do so by stating any relevant objection so as to preserve it for trial and then whether they will comply in

whole or in part. Here, P has asked for "all plans and specifications dealing with all marine fittings that DORKO sold in 2018"

The issue here is that the propounding party has asked for documents that are not relevant to his cause of action or the facts of the case. The request is vague, ambiguous, overly broad, virtually unlimited in scope and unduly burdensome for the responding party. The propounding party should have narrowly tailored his discovery request to seek plans and specifications for DORKO-100 toilets and the relevant hardware.

It is likely that D will object, but they should produce all relevant documents requested within their care custody and control or deal with the consequences (below).

Requests for Admissions

Another valuable tool available to the propounding party is the request for admissions which seeks affirmative responses to matters of law. However, I'm not really sure what the question is aiming at and so the opposing party should make a relevancy objection here. What the CEO of DORKO does in the bathroom of his super-yacht is between him and the porcelain gods and nobody else. This question is harassment.

Interrogatories

Interrogatories will either be "Form" or "Special". Form interrogatories are just that, forms, forms that allow the propounding party to, "check the box." Special interrogatories are those that are specifically designed to come from the voice of the propounding party and are narrowly tailored to glean specific information. Here, the special interrogatory is asking for a legal conclusion--likely to support a motion for summary judgment later--in order to see if the responding party has a valid defense.

However, a question like this should be objected to as it may be privileged work-product

doctrine or attorney client privilege. The question also calls for speculation and legal conclusion.

Attorney Client Privilege and Work Product Doctrine

The attorney client privilege protects communications between an attorney and his client and will often cover matters of legal theory and the like in the same way that work product doctrine protects all things created in preparation of litigation by the attorney or reasonably necessary staff within the law office. The client (DORKO) probably did not or could not have known what facts specifically related to his case where P's negligence is involved because that would require legal analysis within the attorney's domain. As such, the responding party could produce a privilege log to satisfy this request if necessary.

Meet and Confer

The propounding party is not going to get very far with these RPDs, RFAs or Interrogatories. That said, when the responding party serves their responses, they will have some time to meet and confer in order to sort out the relevant issues and work on a solution before seeking help from the court. Therein, the attorneys will likely brow beat each other, make concessions and hopefully walk away with some insight into how the other party has structured their argument and hopefully a set of DORKO-100 plans, drawings and schematics of all relevant hardware.

Motion to Compel

If the responding party fails to comply with the meet and confer and modified or amended requests and their objections are unreasonable, then the propounding party can bring a motion to compel to the court. This would force the responding party to produce all relevant responsive material to the propounding party forthwith and would likely result

in sanctions as well. However, here, P's requests are almost all entirely objectionable and it would be unlikely the judge would find good cause to violate the attorney-client privilege.

Restraining Order

In fact, D could feel unduly harassed by P's requests to such a degree that he seeks a restraining order barring the responding party from making further requests between the parties and asking the court to narrowly tailor the scope of the discovery. This would be very bad for P, but honestly it is unlikely as the facts do not tend to be so grave as to create a dire situation warranting such action on the part of D.

Conclusion

Meet and confer, sort through the discovery issues and meet the deadlines imposed by the court so as not to incur the wraith and ire of the presiding judge. The RPDs should be amended to narrowly tailor the scope of P's requests and the Interrogatories should avoid asking for speculation and legal conclusion on the part of the opposing party.

D's Discovery

Right to Physical Exam and Relevant Medical Records

The Defendant is responding to a products liability design defect claim with bodily injury, a tort. Here, D would be entitled to gather experts to testify and would have 90 days to do so. Those experts would likely be able to review all relevant medical history of P produced through RPDs in order to show some level of injury or disability existed prior to the

incident. D would also be entitled to an independent medical examination of P to see if his body habitus or morbid obesity caused the DORKO-100 to crumble like a stale cornbread muffin. However, as an eggshell plaintiff, you take them in the condition you find them.

Attorney Client Privilege

The attorney client privilege protects communications between an attorney and his client and will often cover matters of legal theory and the like in the same way that work product doctrine protects all things created in preparation of litigation by the attorney or reasonably necessary staff within the law office. Here, D is specifically requesting a privileged communication between the attorney and his client, P, that is also within the work-product doctrine as it was likely generated in anticipation of this litigation.

Conclusion

See above re Meet and Confer, Motion to Compel and Restraining Orders. Here, so long as things don't get out of hand, I believe the physical exam comes in and P will need to comply with that. The privileged communication is absolutely not coming in. D should request and and all documents of and relating to the Flynn's construction, maintenance, and repair for a period of production that is not virtually unlimited. He should then produce expert witnesses to attest to the seaworthiness of the Flynn, the physical impairment of P and anything else that will aid him in his defense.

END OF EXAM

THIS PAPER IS NOT LONG BUT IT IS TO THE POINT & SUFFICIENTLY CONCLUSIVE

GOOD WORK!

3)

Summary Judgment FRCP 56

When the moving party can show through clear and convincing evidence that no reasonable dispute as to a material fact exists, the moving party is entitled to judgment as a matter of law. The policy reasons behind this are that the courts do not want to waste the time and attention of the people to put on a case that shouldn't be tried. The moving party seeking the judgment has the initial burden in proving that a jury could not faithfully try the issues because as a matter of law there are no facts in dispute as to claim or defense, and that on its face the claim or defense fails. A motion for summary judgment can come before the courts up to 30 days after discovery has concluded.

Moving Party

In Larry (D)'s motion for summary judgment, he must prove that P has failed to assert facts sufficient for a jury finding on one or all of the elements of the cause of action. Here, the cause of action is strict product liability by defect. D can go behind the pleadings and support his motion with verified affidavits from first hand knowledge, expert testimony, and all other relevant admissible evidence available at the present time to move the courts. The judge must determine whether the trier of fact (jury) will have sufficient facts in dispute to decide one way or the other as to each element of the cause of action. Here, a defect must be present. D has brought an independent expert to the site who conducted an investigation and found **no defect**. The GC who built the house also found **no anomaly**. Thus far, P's own attorney has failed to assert an expert that is going to say anything to the contrary (although he has 90 days to produce that expert from the start of discovery). Finally, P cannot seem to recall how the accident happened or anything relevant to the facts and circumstances. Thus, there is no dispute as to the

material fact that **no defect** is present. If the moving party is successful in persuading the courts, the non-moving party must prove to the contrary.

Non-Moving Party

If D is successful, the burden shifts to the non-moving party, P, to prove that under the evidence viewed in a light most favorable to the non-moving party, that a dispute does exist as to a material fact or that no defense exists for the claim as stated. Here, poor P has no experts, he hasn't produced fact one to support his claim, and he has a bump on the head. Unfortunately, although he has put up a valiant effort--no effort whatsoever--the judge should grant the motion for summary judgment as a matter of law and dismiss the case without prejudice.

Leave to Amend

Within 30 days of judgment, if P can regain consciousness, he may circle the wagons and request a leave to amend his complaint. If he is successful and with good cause can show that he can remedy his complaint and put together a cogent argument, the courts may allow him to do so.

Res Judicata

When a case has been adjudicated, there are policy reasons in place to prevent the re-litigation of claims. D is going to say, wait a second, I was successful in my summary judgment claim and this case should not be re-litigated because it was concluded as a matter of law. However, because the constitution guarantees our 7th amendment right to a jury trial, he may be hard pressed to enforce his dismissal without prejudice against the leave to amend.

Conclusion

For the foregoing reasons, in light of evidence most favorable to the Plaintiff, summary judgment should be granted as a matter of law.

END OF EXAM