ST. MARY'S UNIVERSITY SCHOOL OF LAW

PROCEDURE ~~II~~ III, LW6~~354~~ 455 FINAL EXAMINATION
PROFESSOR RICHARD FLINT ~~SUMMER, 1992~~ Spring 1994

ANSWER BOOKLET

1. This examination consists of eleven (11) pages, including this page as the first and two section described more particular below.
2. You will have three (3) hours in which to complete the examination.
3. St. Mary's Law School prohibits the disclosure of information that might aid a professor in identifying the author of an examination. Any attempt by a student to identify himself or herself in an examination is a violation of this policy and of the Code of Student Conduct.
4. A student should not remove a copy of the examination from the room during the exam time.
5. This is a open book examination [you may only bring your rule book to the exam].
6. There are two sections of this examination. The first section contains eight statements. You are asked to either agree or disagree with each one. You are then required to support your reason by logical analysis. Each one of these is worth ten points [for a total of 80 points for Part I]. The second section of the examination contains four short essay questions. Each short essay question is worth thirty points [for a total of 120 points for Part II]. Thus, there are a total of 200 possible raw score points. The organization and conciseness of your answers will be graded, so think before you write. All answers must be written in the appropriate spaces in this booklet. Do not write on the back of any pages and do not go beyond the space allotted for the answer. MATERIAL EXCEEDING THE DESIGNATED SPACE WILL NOT BE CONSIDERED IN DETERMINING YOUR GRADE UNLESS AN EQUIVALENT AMOUNT OF MATERIAL IN THE DESIGNATED SPACE IS MARKED OUT. POINTS WILL ALSO BE SUBTRACTED FOR THE USE OF MORE THAN THE DESIGNATED SPACE.

ONLY THIS EXAMINATION BOOKLET NEEDS TO BE TURNED IN AT THE END OF THE EXAMINATION PERIOD. ANY BLUEBOOKS THAT YOU USED AS SCRATCH PAPER MAY BE TAKEN WITH YOU OR THROWN AWAY.

7. After reading the oath, place your examination number in the space below. If you are prevented by the oath from placing your exam number in the space below, notify the student proctor of your reason when you turn in the examination.

I HAVE NEITHER GIVEN NOT RECEIVED UNAUTHORIZED AID IN TAKING THIS EXAMINATION, NOR HAVE I SEEN ANYONE ELSE DO SO.

EXAMINATION NUMBER _____

EXAMINATION NUMBER 3190

SECTION 1

IDENTIFICATION-100 RAW POINTS-TEN POINTS APIECE

Identify each of the following terms or phrases. Provide enough information in your identification that an individual unfamiliar with the subject of Texas civil procedure would have a basic understanding of the meaning, use, or purpose of each term or phrase in a Texas trial or appellate procedural context.

1. Judgment nil dicit

SAID NOTHING - A POST ANSWER DEFAULT IN WHICH AN ANSWER WAS FILED BUT THE PARTY DID NOT MAKE AN APPEARANCE, LIKE ANY DEFAULT, POTENTIALLY CHALLENGED WITH A WRIT OF ERROR

2. Legally insufficient evidence

LESS THAN A SCINTILLA OF EVID. IS SUBMITTED WHICH HAS PROBATIVE VALUE (PROVES OR DISPROVES ELEMENT OF CAUSE. GROUND FOR MOTION FOR SUMMARY JUDGMENT, DIRECTED VERDICT, JNOV, MOTION FOR NEW TRIAL, MOTION TO DISREGARD JURY FINDING, MOTION FOR JUDGMENT NOTWITHSTANDING VERDICT, SUBJECT TO REVERSAL ON APPEAL. SUCH QUESTION SHOULD NOT BE SUBMITTED TO A JURY

3. Fatal conflict in jury answers

WHERE YOU PUT YOUR HAND OVER ONE QUESTION AND THERE IS ONE VERDICT AND YOU MOVE YOUR HAND OVER ANOTHER AND THERE IS ANOTHER VERDICT. GROUNDS FOR MOTION FOR NEW TRIAL. ALSO FUNDAMENTAL ERROR IF JURY VERDICT IS ACCEPTED JUDGMENT IS BASED ON IT.

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4. Mother hubbard clause

USED IN THIS CONTEXT IN FINALITY OF ORDERS FOR APPEAL PURPOSES. THE RIGE V. ROSS TELLS US THAT IF AN ORDER APPEARS FINAL ON ITS FACE THEN IT SHOULD BE FINAL FOR PURPOSES OF APPEAL. MOTHER HUBBARD CLAUSE SAYS ALL RELIEF NOT EXPRESSLY GRANTED IS DENIED. 10

5. Curable jury argument

ATTORNEYS SAY SOMETHING NOT SUPPORTED BY EVIDENCE, BUT NOT INCURABLE LIKE STATEMENTS ABOUT RACE, RELIGION, GENDER. OTHER SIDE MUST OBJECT OR LOSE POINT; IF SUSTAINED COURT GIVES A LIMITING INSTRUCTION AND ERROR IS DEEMED NOT HARMFUL, FORFEITED. STD ON REVIEW IS WHETHER ARGUMENT PROBABLY LED TO THE RENDITION OF AN IMPROPER JUDGEMENT 10

6. Post answer Default judgment

PARTY ANSWERS BUT FOR SOME REASON DOES NOT APPEAR AT TRIAL. SHALL ATTORNEYS PROTECTIONS OTHER DEFAULTS ARE, POTENTIAL WAIVER OF ERROR, AVAILABILITY OF MOTIONS FOR NEW TRIAL. 10

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7. Deemed findings in nonjury cases

ANY FINDINGS NOT MADE IN A NONJURY CASE IS DEEMED BY APPELLATE COURTS TO SUPPORT THE JUDGMENT UNDER THE PRESUMPTION THAT THERE WAS EVIDENCE PRESENTED AT TRIAL TO SUPPORT THE ~~JUDGMENT~~ FINDINGS. CAN ONLY BE REBUTTED IF THERE WAS NO EVIDENCE TO SUPPORT AN ESSENTIAL FINDING. 5

8. Informal Bill of Exception

USED IN TRIAL COURT TO PRESERVE ERROR. AFTER OBJECTION IS OVERRULED ATTORNEY ADMONISHES TO THE CT REPORTER THE EVIDENCE THAT WOULD HAVE BEEN PRESENTED IN EITHER NARRATIVE OR Q&A FORM (NOTICE OF THE OFFERING PARTY OR TRIAL JUDGE, IN QUESTION) & EVIDENCE FORM. THIS PUTS EVIDENCE INTO RECORD TO PRESERVE ERROR ON APPEAL 10

9. Order nunc pro tunc

AN ORDER CORRECTING A CLERICAL ERROR IN A JUDGMENT. A CLERICAL ERROR IS SOMETHING LIKE MISSPELLING A WORD OR MISPLACING A COMMA. THIS IS POSSIBLE AFTER MORE THAN 30 DAYS OF SIGNING OF THE JUDGMENT. HOWEVER PUTTING DOWN A INCORRECT CAUSE NUMBER MAY NOT BE "CLERICAL". 10

10. Proof of jury misconduct

HARD TO ESTABLISH. ONLY EVIDENCE OF "OUTSIDE INFLUENCE" MAY BE CONSIDERED. MUST BE PLACED IN A MOTION FOR NEW TRIAL OR IT IS WAIVED (BLACKWHITE NOT) RECORD 10

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9-21-90 TIME NOTHING MUST

SECTION 2

SHORT ESSAY-120 RAW POINTS-TWENTY POINTS APIECE

Read the questions carefully; plan your answer; and answer the questions asked.

1. In a negligence action arising out of a collision between a station wagon and a parked tractor trailer, a take nothing judgement against the plaintiffs, relatives of several individuals killed in the accident, was signed on September 21, 1990. Plaintiffs timely filed a motion for new trial. The trial court granted the motion for new trial on December 4, 1990, the 74th day after the date of judgment. On the 75th day, December 5, 1990, the trial court set aside its order granting the motion for new trial and overruled the motion. Plaintiffs appealed complaining that the trial court acted without authority when it vacated its order for a new trial. What should the appellate court do? Why? Assume that on December 4, 1990, the 74th day after the date of judgment that the trial court had overruled the motion for new trial. Would the court have had the authority to grant a new trial on December 6, 1990, the seventy sixth day following the entry of the judgment?

THE COURT OF APPEALS SHOULD AFFIRM THE ACTION OF THE TRIAL COURT BECAUSE THE COURT HAS DISCRETION TO VACATE AN ORDER GRANTING A NEW TRIAL UNTIL THE END OF DAY 75 WHEN THE MOTION IS OVERRULED BY OPERATION OF LAW. AS THE CASE THAT WAS DISCUSSED SHOWED THE RULES ONLY SAY THAT CLOCK STOPS RUNNING ONLY WHEN MOTIONS ARE DENIED, NOT AFTER THEY ARE GRANTED.

IN THE SECOND SITUATION, THE TRIAL JUDGE CAN GRANT A NEW TRIAL ON DAY 76 BECAUSE BY DENYING THE MOTION FOR NEW TRIAL, THE JUDGE HAS EXTENDED THE ORDINARY POWER OF THE COURT FOR ANOTHER 30 DAYS, SO IN THIS CASE THE TRIAL COURT COULD GRANT A NEW TRIAL UP UNTIL DAY 106.

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2. National Union Insurance Company was a workers' compensation defendant in a lawsuit brought by Joe South, an injured worker. After losing the case at the trial court, National Union timely perfected its appeal to the Court of Appeals. National Union was unable to file its Statement of Facts timely, but was able to file an extension of time within the fifteen day grace period. In its motion for extension of time it said that it had not timely filed the statement of facts because it had miscalculated the number of days within which it had time to file. The motion was denied. As the attorney for National Union, what should you do now? Discuss.

FIRST I SHOULD FIND A NEW PARALEGAL. AND SOMETHING SHOULD DEFINITELY BE DONE TO FIND OUT FILING OF THE STATEMENT OF FACTS BECAUSE WITHOUT IT IT IS HARD TO LOOK AN APPEAL. YOU COULD DO NOTHING, LOSE ON APPEAL, THEN APPEAL TO THE SUPREME COURT ON THE LEGAL QUESTION OF WHETHER THE COURT ERRED IN NOT ALLOWING THE STATEMENT OF FACTS TO BE FILED.

ANOTHER AVENUE IS TO TRY TO MANDAMUS THE CLERK TO ACCEPT THE STATEMENT OF FACTS. A MANDAMUS MIGHT ISSUE BECAUSE THE TEST FOR DENIAL LACK OF A REASONABLE EXCUSE WHICH HAS COME TO MEAN CONSCIOUS INDIFFERENCE OR INTENTIONAL DELAY. SINCE THERE WAS A REASONABLE EXCUSE THE COURT OF APPEALS ABUSED ITS DISCRETION AND MANDAMUS IS PROPER.

B →

P SG, JC, HP
G

3. Northern National Bank filed suit against Southern Gas, Joe Cajun, and Howard Pelican on a promissory note executed by Southern and guaranteed by Cajun and Pelican. The pleadings of Northern sought a judgment for the principal amount of the note, interest, and attorneys' fees. In 1991, the trial court granted the Bank's summary judgment against the three defendants on all matters except attorneys' fees. In early 1992 the trial court held a hearing on attorneys fees. No order was entered on the attorneys' fee issue following the hearing, however, after the hearing the court did enter a nunc pro tunc order changing [as a result of a clerical error] the amount of the judgment on the principal sum due under the note and reciting that "this Judgement shall be final and enforceable." Cajun and Pelican timely perfected their appeal. What order should the Court of Appeals enter? Why?

THE COURT OF APPEALS SHOULD REVERSE AND REMAND TO THE TRIAL COURT. THE TRIAL COURT ERRED IN NOT RULING ON THE QUESTION OF ATTORNEY'S FEES. BUT IN ADDITION, THE TRIAL JUDGE ERRED IN USING A NUNC PRO TUNC ORDER WHEN THE CHANGE IS MATERIAL TO THE JUDGEMENT AND NOT MERELY A CLERICAL ERROR. IF THE INITIAL ORDER WAS FINAL AS TO EVERYTHING GRANTED IN IT, THE TRIAL COURT HAD NO POWER TO MATERIALLY CHANGE SUCH AN ORDER SOMETIME AFTER JUDGEMENT. AND IF IT WAS NOT FINAL, THE TRIAL JUDGE STILL DOES NOT HAVE THE DISCRETION TO CREATE ITS OWN DAMAGES ON A NOTE; THE EVIDENCE DETERMINES THAT AND THERE WAS NO NEW EVIDENCE PRESENTED ON THE NOTE, ONLY ON ATTORNEY'S FEES. ATTORNEY'S FEES ARE A SEPARATE ITEM OF DAMAGES AND SHOULD BE RULED SEPARATELY. THE TRIAL JUDGE SHOULD BE REVERSED

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TO FIND WHETHER OR NOT THE BANK WAS ENTITLED TO ATTORNEY FEES. BUT WHEN THE AWARD IS MADE FINDINGS OF FACT SHOULD BE REQUEST TO PRESERVE ERROR.

4. State whether you agree or disagree with the following statement. Discuss.[ten points apiece]

a. To receive a more favorable judgment from the Texas Supreme Court than the judgment obtained from the court of appeals, the party must prosecute a cross-appeal by way of bill of review.

I DISAGREE. THE BILL OF REVIEW IS USED TO CORRECT A JUDGEMENT OF THE TRIAL COURT AND IS AN ORIGINAL PROCEEDING AT THE TRIAL COURT LEVEL. THE METHOD FOR REVIEW TO THE SUPREME COURT IS A MOTION FOR REHEARING TO THE COURT OF APPEALS. IF DENIED, THEN YOU FILE A WRIT OF ERROR WITH THE SUPREME COURT. IN IT YOU ESTABLISH JURISDICTION (WHICH IS DISCRETIONARY) THEN YOU MAKE YOUR ARGUMENT THAT THE COURT OF APPEALS ERRED BY USING THE WRONG STANDARD OR MISAPPLYING THE RIGHT STANDARD.

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b. An interlocutory review of an order of the court of appeals is an appropriate remedy when the court of appeals grants an extension of time to file a statement of facts.

I DISAGREE. AN INTERLOCUTORY APPEAL IS A REMEDY THAT HAS FEW APPLICATIONS IN OUR JURISPRUDENCE. IT IS DESIGNED FOR OCCASIONS WHERE SOME TYPE OF IRREPARABLE OR GRAVE INJURY WILL RESULT FROM A COURTS ACTION. WHEN AN EXTENSION OF TIME IS GRANTED, IT GIVES BOTH PARTIES AN OPPORTUNITY FOR FURTHER PREPARATION AND IS GENERALLY CONSIDERED HARMLESS. THEREFORE THERE IS NO REAL REASON TO ALLOW INTERLOCUTORY APPEALS EVEN WHEN TIME AN EXTENSION OF TIME IS GRANTED.

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5. Tex Smith brought this action against New York Jones for specific performance of an alleged contract. The gist of the complaint was that under a letter agreement New York had agreed to compensate Tex for his geological work that led to New York's acquiring producing mineral properties. New York filed a general denial. Later New York filed a motion for summary judgment claiming that the affirmative defense of no consideration barred Tex's cause of action. In its motion New York asserted that its motion was supported by various discovery responses. Tex filed a response to the motion for summary judgment denying that the discovery conclusively established a lack of consideration. The trial court granting the motion for summary judgment. Assuming that the evidence conclusively established that there was no consideration for the agreement, what procedural argument can be made by Tex to aid it in the appellate court? Discuss the probability of success on appeal.

THE ARGUMENT THAT I WOULD MAKE IS THAT THE MOTION FOR SUMMARY JUDGMENT SHOULD NOT BE AFFIRMED BECAUSE THERE IS NO MENTION OF THE AFFIRMATIVE DEFENSE IN NEW YORK'S ANSWER AND FOR A JUDGMENT TO BE UPHELD THERE MUST BE BOTH PLEADINGS AND EVIDENCE.

I DO NOT THINK, HOWEVER, THAT THIS ARGUMENT WOULD MEET WITH MUCH SUCCESS. I SAY THIS BECAUSE IN CLEAR CREEK IT WAS ESTABLISHED THAT A SUMMARY JUDGMENT LOSER COULD NOT "LAY BEHIND THE LOG" AND WAIT TO ARGUE NEW POINTS ON APPEAL. THE ONLY THING THAT CAN BE CONSIDERED IN THIS APPEAL IS WHETHER THE EVIDENCE WAS CONCLUSIVE AND TEX LOSES ON THAT GROUND. UNLESS NEW YORK DO NOT REFERENCE OR INCLUDE THE RELEVANT HEARINGS, BRIEFS ONLY THE MOTION & THE RESPONSE ARE CONSIDERED.

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6. In each of the following situations, please state how an attorney representing the party indicated should preserve error:

a. failure of the plainitff's damage issue to limit the jury's consideration to the correct recovery as permitted by law;

The defendant's attorney should OBJECT TO THE ISSUE, IF OVERRULED HE SHOULD SUBMIT A DEFINITION OR INSTRUCTION IN SUBSTANTIALLY CORRECT WORDING 3

b. failure of the plaintiff to submit an issue on one element of her cause of action; 3

The defendant's attorney should OBJECT

c. court's submission of a defective instruction to a plaintiff's issue;

The defendant's attorney should OBJECT 0

d. court's submission of a defective definition of negligence;

The plaintiff's attorney should OBJECT AND TENDER A DEFINITION IN SUBSTANTIALLY CORRECT WORDING 3

e. court's refusal to submit an inferential rebuttal issue

The plaintiff's attorney should ~~ENTER~~ AN INSTRUCTION IN SUBSTANTIALLY CORRECT WORDING (INFERENTIAL REBUTTAL ISSUES ARE FORBIDDEN BY THE RULES). IF IT IS THE Δ's ISSUE (LIKE SOLE CAUSE), IT SHOULD DO NOTHING AND MAKE THE DEFENDANT SUBMIT THE INSTRUCTION. 3

f. a complaint that an answer of the jury is supported by no evidence.

The attorney who wishes to appeal should MOVE FOR A JUDGEMENT NOTWITHSTANDING THE VERDICT (SHOULD HAVE OBJECTED TO THE SUBMISSION OF THE ISSUE IN THE FIRST PLACE.) 2