

Christensen

Monterey College of Law
Civil Procedure I - Section 1
Final Examination
Spring 2022
Prof. M. Christensen

Instructions:

Answer Three (3) Essay Questions

Total Time Alloted: Three (3) Hours

Civil Procedure II,
Spring 2022,
Final Exam

Question 1

Penny, a resident of State A, was driving through State B when her car collided with Dani's truck. Both Penny and Dani, a resident of State B, were injured. Penny brought a negligence suit against Dani in State B federal district court for \$90,000. In her complaint, Penny alleged that she was driving down a two-lane road when Dani, who was coming from the other direction, drifted into oncoming traffic and hit Penny, causing her injuries.

Dani timely filed an Answer to the Complaint, as well as a Counterclaim. The Counterclaim makes the following allegations:

- It was Penny who drifted into Dani's lane, causing the accident. Penny was driving in the wrong lane because she was under the influence of alcohol at the time of the accident. Dani seeks \$65,000 for her injuries.
- Coincidentally, Penny owes Dani \$2000 for a custom art piece that Penny had ordered from Dani at the State B Art Fair several months ago. Dani shipped the art to Penny before discovering that Penny's check bounced, and her subsequent letters to Penny demanding payment went unacknowledged.

A few days after Dani filed her Answer and Counterclaim, Toby moved to intervene. Toby's property, a vineyard, was next to the site of the collision. Toby seeks \$10,000 for the damage to his crop, against Penny and Dani as jointly and severally liable.

1. Can Dani bring each of her counterclaims in this case?
2. Is the Court likely to permit Toby to intervene?

Question 2

The *Penny v. Dani* case proceeded to Discovery.

PART 1: In her first set of Requests for Production of Documents, Dani requested “all of Penny’s medical records, from 5 years before the accident until present.” In her attorney’s responses and objections, Penny objected to this request as irrelevant, overbroad, and unduly burdensome. Over the course of several Meet and Confer phone calls, Penny’s lawyer refused to produce any of Penny’s medical records, other than the records pertaining to her injuries after the accident.

Dani’s attorney filed a motion to compel Penny’s medical records. How should the Court rule on the motion?

PART 2: In Penny’s deposition, the following line of questioning ensued:

D-counsel: Did you know your attorney personally before retaining her to represent you in this case?

Penny: I had met her before, yes.

D-Counsel: When did you meet her before?

Penny: Our spouses have a Bar Trivia team. I’ve met her a few times at Trivia Night, holiday parties, stuff like that.

D-Counsel: When was the first time you spoke with her after the accident?

Penny: I believe it was right after I was discharged from the hospital. I called her because the medical bills were so overwhelming. I wanted to know my rights. She offered to come over.

D-Counsel: And you wanted to see your friend?

Penny: That too, yeah. [Sniffles] I almost died in that accident.

D-Counsel: The accident was a terrifying experience, wasn’t it?

Penny: It still is. And she brought me some homemade soup which was really sweet.

D-Counsel: That’s a good friend!

Penny: She certainly is. But, the main reason I had reached out to her at that point was that I wanted to know what my legal options were.

D-Counsel: Was anyone else present when you met with her after the accident?

Penny: Not that I recall. My nephew may have come in the room once or twice to bring me my pills, water, stuff like that.

D-Counsel: Did you tell her you had been drinking the night of the accident?

P-Counsel: I object to that question on the basis of Attorney-Client Privilege. Penny, I instruct you not to answer that question.

How would a Court likely rule on this Objection?

Question 3

PART 1: After the close of discovery, Dani moved for Summary Judgment. How should the Court rule on the issue below?

Moving Party’s Undisputed Fact	Non-Moving Party’s Response	Moving Party’s Reply
<p>Penny’s drunk driving caused the accident.</p> <p><u>Evidence cited:</u></p> <p>Blood alcohol test conducted at the hospital upon arrival, showing that Penny had a blood alcohol level of 0.07% (0.01% below the legal limit).</p> <p>Declaration from the nurse who administered the test.</p>	<p>Penny’s driving was not impaired.</p> <p><u>Evidence cited:</u></p> <p>Penny’s deposition testimony.</p> <p>Declaration from Walter stating that he spoke with Penny when she purchased a bottle of water from his gas station, about 30 minutes before the accident, and that Penny seemed perfectly sober.</p>	<p><u>Objections:</u></p> <p>Penny’s deposition testimony is not credible, in light of the blood alcohol test results.</p> <p>Walter’s Declaration is not relevant to the issue of whether Penny was drunk driving 30 minutes after he saw her.</p>

PART 2: The Court denied the Motion for Summary Judgment. Specifically, the Court found a Genuine Dispute of Material Fact as to which car was driving in the wrong lane at the time of the crash. The case proceeded to a jury trial. Using a Special Verdict Form, the jury found that Penny was 60% responsible for the collision and that Dani was 40% responsible. Under State B law, and as explained in the jury instructions, a plaintiff’s contributory negligence greater than 50% shields the defendant from any liability. However, the jury wrote on the special verdict form that Penny was awarded \$40,000 in damages.

What can Dani’s attorney or the Court do to address this mistake?

MODEL ANSWER

1. Dani's Counterclaims, Rule 13
 - a. Dani's injuries in the same accident (\$65k)
 - i. Compulsory Counterclaim
 1. Yes same transaction or occurrence (issues of law and fact largely the same, substantially the same evidence, likely res judicata, etc.)
 2. No need to add another party over whom the Court would not have jurisdiction
 - a. Claim does not have original diversity SMJ, but there's diversity SMJ over Penny's claim, so supplemental SMJ over Dani's counterclaim is available
 3. Conclusion: Yes, this is likely a compulsory counterclaim. ii. Permissive Counterclaim: any claim not compulsory
 1. If this is not a compulsory counterclaim, permissive if the Court has jurisdiction
 2. Per above, supplemental SMJ is available
 3. Conclusion: If not compulsory, then likely permissive. b. Contract for purchase of custom art
 - i. Permissive Joinder of Claims, Rule 18: a party can bring as many claims as they have against another party, claims need not be related
 - ii. Court has discretion to decline supplemental jurisdiction, and may choose to not exercise supplemental jurisdiction because the evidence would be totally separate for this claim
 2. Toby's Intervention, Rule 24
 - a. Intervention as of Right
 - i. Outsider has interest. Here, Toby's vineyard was allegedly damaged in the accident between P and D.
 - ii. Disposing of the case without the outsider would impair their ability to protect their interest. Here this is unlikely. Toby could wait for the P v. D case to reduce to judgment, then sue the responsible party or parties
 - iii. Their interest is not already adequately represented. Here, P and D each seek to hold the other responsible for causing the accident. Therefore, since Toby doesn't care who pays him, both parties adequately represent his interest in recovering from whichever one of them caused the accident.
 - iv. Conclusion: intervention of right likely does not apply. b. Permissive Intervention:
 - i. Common Questions of Law or Fact. Toby's claim also centers on the issue of causation.
 - ii. Undue delay or prejudice to the original parties: Toby moved to intervene shortly after D answered and counterclaimed, so there's been little to no delay. Prejudice also seems unlikely as he merely seeks to collect from whoever caused the crash.
 - iii. Conclusion: court may be inclined to permit the intervention.

MODEL ANSWER

Part 1: Request for Penny's Medical Records

1. Issue is whether the medical records for 5 years leading up to the accident should be compelled.
2. Scope of discovery under 26(b)(1)
 - a. Nonprivileged: no issue here b.

Relevant:

- i. D alleges in her counterclaim that P was under the influence of alcohol, and that this caused her to drift into oncoming traffic and hit D. Medical records could show whether P had a drinking problem. However, without specifying certain categories of medical records, some medical records like OBGYN are probably not relevant.
- ii. The request is likely overbroad as to timeframe, also. c. Proportionality

Factors:

- i. Importance of issues: D's counterclaim is based on alcoholism allegation ii. Amount in controversy = likely proportionate to the minor expenses of producing medical records
- iii. D has no access to P's medical records
- iv. P does not require substantial resources to make this production
- v. Unduly burdensome on P to produce records for 5 years before accident. Burden outweighs the importance of those documents to the counterclaim.

3. Court would likely compel production of documents pertaining to drinking at/around the time of the accident but would narrow the request to a much shorter time period, and only certain categories of medical records.

Part 2: Privilege Objection in Depo

1. Issue: does the answer to the pending question trigger AC Privilege
2. ACP:
 - a. Communications made for purpose of legal services/advice
 - i. Counsel almost got P to describe the conversation as a reunion between friends, but P managed to state and then re-state that she invited attorney over for purpose of seeking legal advice.
 - b. Content of communication relates to legal services being rendered
 - i. Intoxication is at issue in D's counterclaim, so asking whether they discussed her alleged drinking the night of the accident relates to P's desire to discuss her potential legal claims/defenses
 - c. Communication in confidence
 - i. Nephew came and went but a Court likely wouldn't find that this harms AC privilege. The record does not show the nephew was involved or paying attention to the conversation.
3. Court would likely sustain the ACP objection

Civil Procedure II, Spring 2022, Final Exam Question 3

MODEL ANSWER

- I. MSJ
 - a. Moving Party (D) has burden of Production
 - i. Here, D tries the *Adickes* method of citing evidence that forecloses a fact P is asserting.
 - ii. D likely met burden of production
 - b. Burden shifts to P to show GDMF
 - i. P tries to dispute the blood alcohol test results with a witness declaration from someone who interacted with her 30 min before the collision, and with her own testimony
 - ii. Neither piece of evidence can dispute the results of the blood alcohol test, but they do dispute how P was functioning at the time
 - c. The Court must draw all reasonable inferences in favor of P
 - i. Court would likely infer here that P had been drinking, but that P had not lost control of her faculties and ability to drive properly, at least 30 min before the accident
 - d. Court must not weigh evidence or assess credibility
 - i. Court cannot find P's depo testimony as lacking credibility, and Court cannot weigh the blood alcohol results over P's evidence
 - e. In sum, although P does not have independent evidence of her state at the time of the collision, the combination of Walter's declaration from 30 minutes beforehand, her recollection under oath, and test results taken several minutes or hours later at the hospital, does not dictate an outcome as a matter of law. There is a GDMF as to whether P's drunk driving caused the accident.
- II. Relief from Judgment
 - a. P's attorney could move for a new trial based on inconsistent jury verdict. (R59, R61).
 - i. Must move w/in 28 days of entry of judgment
 - ii. Here the error is not harmless: D is shielded from liability if jury finds P >50% negligent.
 - b. *Duk v. MGM Grand*
 - i. Court could send Verdict 1 form back to the jury to keep working on it, and then accept the second verdict form
 - ii. Second (fixed) verdict form, even if %s are reassigned, should be accepted because the jury re-deliberated based on a clarified understanding of the instructions

1)

1. Dani (D's) 2 Counterclaims (CC)

(1) D's first CC for \$65,000 for her injuries in the same accident.

There are two types of CCs, Compulsory CCs and Permissive CCs.

Compulsory CCs:

20/20

yes!

Compulsory CCs must be brought right now, otherwise they will be barred from bringing the claim later. A Compulsory CC arises out of the same transaction, occurrence, or series as the Ps original claim, and it DOES NOT destroy diversity. A claim arises out of the same transaction, occurrence, or series if: there are the same question of law and fact, same evidence, same ball of wax, any logical relation, or res judicata would bar the CC later.

Here, D's CC against P arises out of the same occurrence because D is suing for injuries that resulted from the car accident they were both in. There is both same questions of law and fact because the court will determine who was responsible for the car accident. The court would also use the same evidence (intoxication/fault/liability) from the car accident for D's CC. There is a logical relation between D's CC as it arises out of the same accident P is suing her for. Res Judicata would also possibly bar D's CC if she tried to bring it later, since she only get one chance/bite at the apple. If D has any claims against P that resulted from this accident, where they are defenses or collecting for injuries, she must bring them now or be barred from bringing them later. Further, as discussed below, diversity is not destroyed because they are citizens of different states, but the amount D is counterclaiming for is less than \$75,000, so an analysis on supplemental JD is needed to see if the court would exercise it's discretion and allow D to bring this claim.

The court would hold this is a compulsory CC that needs to be brought right now.

Permissive CCs:

20 | 20

Permissive CCs can be brought at any time, they don't have to be brought right now, and the court has to have original jurisdiction (JD) over it. Permissive CCs are anything that are not compulsory.

However, if the court hold that this is not a compulsory counter claim then, it could possibly be a permissive counterclaim. The issue is the amount that D is suing for, so supplemental JD will be discussed below.

The court might hold this is a permissive CC.

Subject Matter Jurisdiction (SMJ)

The Federal Court has limited SMJ, meaning it could only hear certain types of cases, usually because the Constitution says so. The Federal Court has original jurisdiction of Diversity of Citizenship Cases or Federal Question Cases.

Federal Question

The claim must have a clearly stated federal issue in order for the federal court to exercise original JD over the claim.

Here, this is a car accident case, so this is not a federal question case.

Diversity of Citizenship

ALL PLAINTS (P's) must be completely diverse from all defendants (Ds) and the amount in controversy has to exceed \$75,000.

A Person's Domicile

A person can only have one domicile. They could affirmatively change their domicile in two ways, (1) by physically moving to another state; and (2) by forming the intent to move.

Here, the P is domiciled in State A.

Here the D is domiciled in State B.

There is complete diversity between the P and D.

Amount in Controversy

Here, the D is trying to add a counterclaim for \$65,000. This amount D is claiming does not exceed \$75,000 which is a problem as it does not satisfy the amount in controversy.

This does not satisfy the amount in controversy requirement.

Supplemental Jurisdiction (Supp JD)

Supp JD doesn't get a case into Federal Court, it gets a new claim into Federal Court with an existing case that's already properly in federal court under either diversity JD or federal question. A court could use its discretion to exercise supplemental jurisdiction if the claim shares a common nucleus of operative fact with the claim that is already properly in Federal Court. A claim shares a common nucleus of operative fact if it shares the same material facts that are in dispute with the claims that have proper original jurisdiction.

For D's CC#1, D is counterclaiming against P for personal injuries as a result of the car accident. This does share a common nucleus of operative fact and the court could use its discretion to exercise Supp JD over D's 1st CC. The same material facts of the car accident are being disputed, and since Diversity is met, the court could exercise Supp JD over the amount in controversy.

The court would likely exercise its discretion of Supplemental JD over D's CC#1 since it arises out of the same nucleus of operative fact.

(2) D's CC for \$2000 for a Custom Art Piece

00/20
Excellent

There are two types of CCs, Compulsory CCs and Permissive CCs.

Compulsory CCs:

Compulsory CCs must be brought right now, otherwise they will be barred from bringing the claim later. A Compulsory CC arises out of the same transaction, occurrence, or series as the Ps original claim, and it DOES NOT destroy diversity. A claim arises out of the same transaction, occurrence, or series if: there are the same question of law and fact, same evidence, same ball of wax, any logical relation, or res judicata would bar the CC later.

Here, D claims that P owes her \$2000 for a custom art piece that P ordered from an art festival several months ago. This is not a compulsory CC because it has nothing to do with the occurrence of the accident. This art piece does not share the same evidence with the car accident. There is also no logical relation to P owing D \$2000 for the art piece. However, as mentioned above diversity of citizenship is met, so it's up to the court's discretion if it wants to exercise Supp JD over D's 2nd CC. D could sue P at a later time

in State court for the \$2000 that P allegedly owes her for the piece of art. Res Judicata would not bar this 2nd CC from D if she decides to bring it later in State court.

The court would hold this is not a compulsory CC.

Permissive CCs:

Permissive CCs can be brought at any time, they don't have to be brought right now, and the court has to have original jurisdiction (JD) over it. Permissive CCs are anything that are not compulsory.

Here, since D is suing about a non-related art piece that P purchased from her at an art fair, this has nothing to do with the car accident P is suing her for. This is likely a permissive counterclaim because it doesn't arise out of the same car accident. There is no logical relation. Res judicata would not bar the counterclaim and D could bring this claim against P at a later time in state court. Since D's 2nd CC is for \$2000, the court would have to use its discretion to exercise supplemental JD over this 2nd CC.

The court would hold this is a permissive counterclaim, it but since the amount in controversy is not met, there has to be an analysis on whether the court would exercise Supp JD over this 2nd CC.

Subject Matter Jurisdiction (SMJ)

The Federal Court has limited SMJ, meaning it could only hear certain types of cases, usually because the Constitution says so. The Federal Court has original jurisdiction of Diversity of Citizenship Cases or Federal Question Cases.

Federal Question

The claim must have a clearly stated federal issue in order for the federal court to exercise original JD over the claim.

Here, this is a car accident case, so this is not a federal question case.

Diversity of Citizenship

All plaintiffs (Ps) must be completely diverse from all defendants (Ds) and the amount in controversy has to exceed \$75,000.

A Person's Domicile

A person can only have one domicile. They could affirmatively change their domicile in two ways, (1) by physically moving to another state; and (2) by forming the intent to move.

Here, the P is domiciled in State A.

Here the D is domiciled in State B.

There is complete diversity between the P and D.

Amount in Controversy

Here, the D is trying to add a counterclaim for \$2,000.

This does not satisfy the over \$75,000 amount in controversy requirement.

Supplemental Jurisdiction (Supp JD)

supp JD doesn't get a case into Federal Court, it gets a new claim into Federal Court with an existing case that's already properly in federal court under either diversity JD or federal question. A court could use its discretion to exercise supplemental jurisdiction if the claim shares a common nucleus of operative fact with the claim that is already properly in Federal Court. A claim shares a common nucleus of operative fact if it shares the same material facts that are in dispute with the claims that have proper original jurisdiction.

Since D's 2nd CC is about an art piece that P purchased from D several months ago, this does not share a common nucleus of operative fact with P's claim against the D. Nor does this share a common nucleus of operative fact with D's 1st CC. There is not the same evidence or same material facts at issue with this 2nd CC.

The court would not use its discretion to exercise Supp JD over D's 2nd CC.

reactivity

2. Toby (T) Intervention

There are two types of intervention: Intervention as of Right and Permissive Intervention.

Intervention as of Right

12/20

Intervention as of Right has 3 prongs: (1) the outsider has an interest in the subject of the action; (2) so disposing of the action without them could impair their ability to protect their interest; (3) the outsider's interest is not already adequately represented by the current parties--different motivations do not amount to inadequacy representation.

T's Interest/T's Ability to Protect His Interest

T is an outsider to the case between P and D, and he has an interest in the subject of the action. T's interest is that his vineyard/crop was damaged when P and D's cars collided. If the court did not allow T to intervene, this impairs his ability to protect his interest. If T is not allowed to intervene, and the court disposes of the action without him, he could be barred from trying to sue P and D later, depending on the specific findings of fact in the original case between P and D. T should be able to intervene as of right because his ability to protect his interest is at risk, depending on the findings. For example, if when P sues D (and D loses), then T could sue D and he could assert non-mutual offensive issue preclusion, using the judgment in action 1 as a sword to hold D liable and not let her get a second chance to defend herself. However, it all depends on the specific findings of facts that would possibly put T at risk of preclusion and not getting a chance to protect his interest.

Excellent! but as a non-party, T could

The court would find that T has an interest in the lawsuit.

not face preclusion (Taylor)

Adequate Representation of T

T is not adequately represented in the case, neither P nor D represent T's interest in collecting for damages to his crop/vineyard. Even though T's motive is different for wanting to intervene, he still does not have adequate representation in the action between P and D. P is suing to for negligence in a car accident, D is counterclaiming for her injuries, so T's interest are not already being represented.

but P + D are both litigating who caused, + T doesn't care who caused
 If the court finds T's ability to protect his interest will not be impaired, and that T could sue both of them later in state court, then the court would not allow him to intervene as of right. *yes!*

The court would likely find T could intervene as of right due to preclusion issues.

so long as someone is held responsible

Permissive Intervention

Permissive Intervention: anyone with a claim or defense that arises out of the same transaction or occurrence of the original claim may be permitted to intervene if there is no undue delay and it does not prejudice the parties. Additionally, the permissive intervenor CANNOT destroy diversity. 20/20

T has a claim against P and D, he is claiming damage to his crops and damage/vineyard resulting from the car accident. The crop damage arises out of the same occurrence as the original claim he is trying to intervene in. However, T's citizenship could be an issue, and will be discussed below.

Subject Matter Jurisdiction

(supra)

Diversity of Citizenship

(supra)

P is domiciled in State A.

D is domiciled in State B.

T is also Domiciled in State B.

Complete diversity is not satisfied because T and D are citizens fro State B, which destroys diversity.

Supplemental Jurisdiction

(supra)

T's claim arises out of a common nucleus of operative fact because he is trying to intervene to sue P and D for his crop damage as a result of the car accident. The original claim in federal court is the car accident itself, so the same evidence and same material facts are at issue regarding the car accident. However complete diversity is not satisfied.

The court would not exercise its discretion through Supp JD to let T permissively intervene because he destroys complete diversity.

90/100

4)

PART 1: How should the Court rule on Dani's motion to compel Penny's medical records?

Scope of Diversity:

excellent, would only add appl. to D's counterclaim re accident problem

During discovery, certain items are barred due to an attorney/client privilege, an attorney work product privilege, relevance, and proportionality, which includes party access, importance of issues, burden versus benefit, and amount in controversy.

Here, D requested all of P's medical records from five years before the accident until present. P objected to the request, declaring it irrelevant, overbroad, and unduly burdensome. P's attorneys only produced medical records pertaining to her injuries after the accident. A court would likely find P's medical records directly after and regarding injuries sustained in the accident as the most relevant. However, D and her counsel are reasonable to want P's previous records because P may have already had an issue unrelated to the accident or even an already sever issue that was merely exacerbated by the accident. For instance, if P had a former back injury and routinely saw a chiropractor or had other medical records when the original back injury occurred, this would be relevant to D's counsel to state that this would not be an injury caused by D and the accident, should D be found negligent. If anything, the accident only contributed, not caused, the back injury. P is also the one that brought her physical state and injuries into question.

On the other hand, depending on how extensive P's medical records were, it would be unreasonable for every record for five years to be produced. For example, P's dental records, rhinoplasty, and other procedures would not be relevant to the accident, as P stated. They would also be overbroad, and unduly burdensome to produce, outweighing any benefit. Records should be selected according to what injuries P is seeking remedies

refers to burdensome

+ D cannot access + likely not expensive to produce

101. If P is claiming the accident caused injuries to her neck and legs, then it would be more reasonable to request all medical records with the words "neck" and "legs" (or other medical synonyms). Medical records from the past five years could still be reasonable so long as they only included the relevant injuries such as the ones aforementioned. Then, the injuries sustained from the accident could be compared to the already injured areas, or be designated as completely new injuries resulting from the accident.

The court should allow D's attorney to compel P's medical records with the limitations outlined supra.

PART 2: How would a Court likely rule on the Objection on the basis of Attorney-Client Privilege?

Attorney-Client Privilege: 40/45

Communication between an attorney and client is considered confidential in civil cases so long as the attorney and client's relationship has a professional capacity, the communication is considered confidential, and the communication is resulting from the client specifically seeking legal assistance from the attorney.

Here P-Counsel (P-C) objects to D-Counsel's (D-C) question to P. P and P-C have an attorney-client relationship; however, P says that she knew P-C personally prior to the attorney-client relationship (assuming this is okay by Professional Responsibility Rules). D-C appears to be trying to further a notion that P and P-C did not have an attorney-client relationship at the time P-C visited P immediately after being discharged from the hospital; D-C likely wants the relationship to be merely friendly at that point. P told D-C that P-C and her knew each other from Trivia Night, holiday parties, and their spouses have a Bar Trivia team. Further, D-C specifically asks if P wanted to "see [her] friend," which is practically a leading question as P never used the word "friend" prior during the

2 =
- confidential
2 - communication
made for
purpose
of
legal
advice
- can so
e stated
to be
legal
advice

questioning shown. D-C follows this by stating, "that's a good friend," and P does not correct D-C either time.

However, P-C and P definitely entered into an attorney-client relationship at the time of questioning and trial. P contacted P-C specifically to know her rights (her legal rights), because she knew P-C was an attorney. The fact that P-C brought P soup is irrelevant as many attorney buy client's lunch. Further, P stated "*the main reason I had reached out to [P-C] at that point was that [she] wanted to know what [her] legal options were.*" Any other reason for meeting with P-C was incidental in this instance because the material reason for meeting was for legal services. P and P-C communicated for legal services in, an albeit more relaxed, but still professional capacity. good

Regarding confidentiality, D-C asks P if anyone else present during the meeting with P-C. P replies, "Not that I recall." She follows this by stating that her nephew "may have come in the room once or twice to bring pills or water. D-C will likely try to establish that this disrupted confidentiality. However, P doesn't recall if her nephew came in the room. Even if he had, it was merely to bring her water and medication, two crucial things a recovering individual requires for his or her health. Further, it is implied that the nephew was in and out, as the facts do not indicate that he lingered or participated in any conversation. While slightly less clear, the facts still indicate that P and P-C intended to keep their legal conversations confidential.

After weighing the facts, a Court would likely sustain the objection on the grounds provided by the valid Attorney-Client Privilege.

Excellent!

90/100

3)

#1 D'S MOTION FOR SUMMARY JUDGMENT

Summary Judgment (SJ):

-Any party could move for SJ until 30 days after the close of discovery.

1. The moving party has the burden of production that there is NO genuine dispute of a material fact (GDMP).

The could do this in two ways: (1) foreclosing on a fact that the non-moving party asserts; or (2) that there is no evidence of a fact that the non-moving party asserts.

The D is moving for SJ claiming that P's drunk driving caused the accident, not D, so the court should not allow the case to even go to trial. D is basing this assertion on evidence that P's blood alcohol test (BAC) indicated had an alcohol level of 0.07%, which is only 0.01% below the legal limit. Additionally, D has a declaration from the nurse that administered the test (presumably indicating that P was intoxicated when arriving at the hospital). D will assert this evidence shows there is no genuine dispute of a material fact. Here, the D has meet their burden of production by showing P caused the accident due to being intoxicated. D's evidence of the BAC test and the nurse's declaration forecloses the fact that P asserts she was not intoxicated at the time of the incident. P should object to the nurse's declaration because it is hearsay, it is an out of court statement offered to prove the truth of the matter asserted (that P was intoxicated.) If the nurses' declaration was made under oath at a trial, hearing or deposition (per the federal rules of evidence, it is not hearsay and could be used as impeachment and the truth of the matter asserted; but if this is a CA state court, then the nurses' declaration doesn't need to be under oath and it could also come in for impeachment and the truth of the matter asserted.)

yes!!

20/20

- Nurse's dec. probably focuses on explaining how she administered the test + protected the patient from tampering => not hearsay

The court would conclude that D met its burden of production showing there is no GDMF.

2. If the burden is met, then the burden shifts to the non-moving party to show that there IS a GDMF.

Both parties should make admissibility objections.

P is proving she was not driving while impaired by citing her testimony from the record and a declaration from Walter (W) that he spoke to Penny when she purchased water 30 minutes after the accident and she "seemed perfectly sober." D should object that W's declaration is hearsay because it is an out of court statement offered to prove the truth of the matter asserted (that P was not intoxicated at the time of the accident.) If the W's declaration was made under oath at a trial, hearing or deposition (per the federal rules of evidence, it is not hearsay and could be used as impeachment and the truth of the matter asserted; but if this is a CA state court, then the nurses' declaration doesn't need to be under oath and it could also come in for impeachment and the truth of the matter asserted.) D objects to P's deposition because the BAC test proves the opposite of her saying she wasn't impaired. D also objects to W's declaration because it is not relevant since he saw P 30 minutes after the accident, not at the time of the accident.

3. The court must draw all reasonable inferences in favor of the non-moving party.

If both parties make a cross motion for SJ, then the court will look at each parties brief independently as if the other brief didn't exist, and individually draw reasonable inferences to each brief. (It's a bit of a mind scramble, but it should be the same

finding for/against SJ because both parties base their brief off the same evidence on the record.)

15/15

Here, the court must draw all reasonable inferences in favor of P since she is the non-moving party. The court will reasonably infer that P could have not been impaired. The court will not draw reasonable inferences in favor of D since they are the moving party.

4. The court must NOT weigh evidence or assess credibility. *disputes whether she was driving impaired*

Here, D is asking the court to weigh the credibility of W's declaration by claiming the BAC test is proves contrary to her indicating she was not impaired while driving. The court will not weigh the credibility of Penny's deposition. The court will also not weigh D's proffered evidence of the BAC test in their favor.

yes - can't give the BAC test extra weight

The court should deny D's motion for summary judgment because there is clearly a genuine dispute of a material fact of whether P was impaired during the car accident. Both parties have proffered contrary evidence so it is necessary for the case to proceed to trial where the court could actually have a chance to weigh evidence and asses credibility of the witnesses.

#2 NEW TRIAL REQUEST

There are four main reasons to request a new trial (1) **Inconsistent Verdict**: During trial, the court should have sent the verdict form back for the jury to correct the mistake before entering the judgment; (2) **Jury Misconduct**: Improper Outside Influence, Extraneous Prejudicial Information, **Mistake in Verdict**; (3) **Verdict Against the Weight of the**

Evidence (4) Remittitur: New Trial unless the Plaintiff (P) agrees to reduce the amount of the award or Additur: New Trial unless the Defendant (D) agrees to increase/add to the amount of the award.

-Any party could request a new trial within 28 days of the entry of judgment.

Inconsistent Verdict

Here, the D's attorney would likely move for a new trial based on the inconsistent verdict from the jury. The jury filled out the special verdict form finding P was 60% responsible for the collision, and yet found D 40% liable and awarded P \$40,000. D's attorney will claim this is an inconsistent finding because the State B law jury instructions specifically explained that if a P's contributorily negligent greater than 50%, then that would completely shield the defendant from "any liability." Since the facts indicate that the jury found P was 60% contributory negligent, then they could not have awarded P a verdict with \$40,000. The D will claim that the court should have sent the verdict form back for the jury to correct the mistake before entering a judgment. The P will claim jury re-deliberation is proper and as long as the jury correct the mistake, then a new trial should not be granted to D.

good

As mentioned above, to avoid a new trial, the court should (during trial) send the jury back to deliberation with the special verdict form in order for the jury to fix/correct the mistake. Obviously the jury is not clear or doesn't understand the contributory negligence shield aspect, so they need to re-read the special verdict form, or the court need to explain to the jury that is it finds the P is greater than 50% contributory negligent, than D is not liable to pay any damages to P.

Dick v. MGM

The court can send the jury back to correct the mistake on the verdict form in order to avoid a new trial.

Jury Misconduct: Mistake in Verdict

Nrel.

The D will claim there is a mistake in the verdict, as mentioned above, since the jury found P 60% contributory negligent in the accident, then D would be shielded from liability. D will claim there is jury misconduct since there is a mistake in the verdict form. If the court does not fix the mistake, then the D will motion for a new trial.

The court would hold there is not jury misconduct as long as the jury corrects the mistake.

misconduct is more like intentional brainiac
Nes

Verdict Against the Weight of the Evidence

D will assert since the jury is claiming that P is 60% negligent, then they evidence D proffered showed that D should not be liable for P's injuries. D will assert that the verdict of awarding P \$40,000 goes against the weight of the evidence if the jury believes P was driving in the wrong lane at the time of the crash. P will claim that the jury misunderstood the jury instructions and since it awarded P damages, then clearly the weight of the evidence was in D's favor.

The court would send the jury back to deliberate in order to reassess the evidence and correct a mistake, properly filling out the special verdict form.

I think a "against weight of evidence" would instead be a JML

motion,

END OF EXAM

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