

**Civil Procedure Fall 2007
Final Exam
Professor Kimberly Kirkland**

Instructions—please read carefully.

PLEASE USE THE EXAM NUMBER THAT IS ON FILE WITH THE REGISTRAR'S OFFICE

Due at 4:00 p.m. in the Registrar's office, December 17th, 2007.

1. Format:

- Your answer must be typed. Type on only one side of each page.
- You are limited to a **total** of seven typewritten pages for your answer of both questions. I anticipate that most students will spend half their allotted space on question one and half on question two.
- Your answer should be **double-spaced**. Use 8 1/2" x 11". Use 1 1/2 inch left margins. All other margins should be 1 inch. Use **12 point (or larger) Times New Roman font**.
- Put your **exam number** on the top of each typewritten page you turn in. Place a page number on the bottom of each page you turn in. The page numbers and exam numbers may be handwritten.

2. Honor Code Issues:

- You are NOT permitted to **discuss your exam answer, or questions you have about the exam, with anyone other than the Registrar until all students have completed the exam.**
- You may use an outline you prepared, your textbook, and your rulebook to help you answer the questions. You may use any commercial study aids that you find useful to help you to understand the material. You shall not do any legal research to help you answer questions. Do not read or consult any judicial opinions other than the excerpts of opinions in your textbook or the cases I have assigned. This is a test of your analytic skills; it is not a test of your ability to find cases or narratives setting forth analysis performed by others.
- Although you may refer to commercial outlines if you feel they help you understand the material, they are not authority for your answers. In other words, if you are stating the rule or test that applies in a given situation, you need to cite the Federal Rule of Civil Procedure, the statute and/or the assigned judicial opinion that addresses that rule or test. Gilbert's, Emmanuel's and the like are not sources of law. If you quote material you did not author in your exam answer,

you must use quotation marks to identify the language as non-original and you must cite the source. You may cite cases from the text book using one of the parties names (e.g. Conley) (you don't need to provide a page cite) and you may cite the Federal Rules of Civil Procedure as follows: FRCP 15 or R15.

- You are NOT permitted to ask me any questions during the exam period.

3. Test Taking Pointers:

- Think before you begin writing. Organize your answer and thoughts before you begin writing.
- If your answer to an issue eliminates other issues clearly raised by the hypothetical, assume that the other issues will arise and discuss what would happen if the court addressed those issues. For example, if you conclude the complaint will be dismissed on statute of limitations grounds but the facts clearly raise an issue about whether the joinder of two parties as plaintiffs was appropriate, discuss the joinder issue even if you believe "in real life" the court would not reach that issue because the complaint would be dismissed on statute of limitations grounds.
- Explain your conclusions. That is, with respect to each issue raised in the exam, make sure you do "a" and "b" below. Do "c" and "d" where appropriate.
 - a) Identify the applicable law (FRCP and/ or case law).
 - b) Apply the applicable law to the facts given in the hypothetical, discussing any factual nuances that create uncertainty in applying the rules.
 - c) If there is applicable case law on point, analogize and or distinguish the facts of the precedent if it will help you decide a "gray" area raised by the hypothetical.
 - d) Identify the policies underlying the relevant procedural rules and doctrine where necessary (probably only where you encounter a "gray" area)
- 4. Some of the names used in the question below are names of living individuals and real entities and actual popular culture phenomena. The scenarios that follow are purely fictional. Use only the facts I give you in answering the questions asked.
- 5. Failure to follow any of these instructions may result in loss of points.

Question One

Part A

You are a judge in the United States District Court for the Southern District of Louisiana. Please write an opinion deciding the defendant's motion to dismiss under FRCP 12(b)(2) for lack of personal jurisdiction in Manning v Landsman, described below.

Peyton Manning, a professional football player, has sued Chris Landsman for misappropriation of his right of publicity. Landsman, who lives in Boston Massachusetts and intends to remain there indefinitely, runs several fantasy football leagues.

Fantasy football

Fantasy football is a fantasy sports game in which participants (called "owners") are arranged into a league. Each owner drafts, or acquires via auction, a team of real-life American football players and then acquires points based on those players' real-life statistical performance on the field. In a typical fantasy football league, the fantasy teams are composed of players from a real life football league, such as the National Football League (the "NFL"), the premier real (as opposed to fantasy) professional football league in the United States. In some fantasy leagues the winner is the owner of the team with the most total points at the end of the season. In others, the competition is arranged in a head-to-head format (which mirrors the actual NFL) in which each team plays against a single opponent each week. In a head to head league the winner is the owner whose team wins the fantasy playoffs.

Landsman's fantasy football leagues

As a college student and avid football fan, Landsman invited a number of his friends to play in his fantasy football league. Each owner pays a set fee to play for the season and that money is collected in the "pot." Before the start of the real NFL football season, the owners in Landsman's league gather for a "draft" where they select the players for their teams. The owners draw numbers that determine the order in which they will select players for their teams. They select players for their fantasy teams from the rosters of real NFL teams. Based on their research about the performance and skills of the real NFL players, the fantasy football owners aim to fill their team rosters with the NFL players who are most likely to earn them points. Once the NFL season begins, the fantasy football season begins. Each week, before actual NFL games begin the owners choose the NFL players who will be their "starters"¹ for the game. As the NFL football season progresses the fantasy football owners are awarded points according to the performance of the real NFL football players they selected for their fantasy teams in the fantasy football draft. During the season, owners may agree among themselves to trade the NFL players on their fantasy team rosters. The owner with the most points at the end of the season or who wins the playoffs in the head to head league wins the "pot," the money

¹ The starters are the players whose performance can score points for the player owner's team that week.

collected from each player at the beginning of the season minus an administration fee for Landsman.

Landsman has run his fantasy football league for 4 years. His league has become very popular because he puts on great draft parties and, more importantly, because he provides an attractive and effective website for his owners. On his website Landsman tracks up to the minute statistics of the NFL players on the fantasy teams and the relative standings of the owners. In addition to naming their starters and negotiating trades through the website, the owners can communicate with one another and with Landsman through Landsman's blog on the website. Each week Landsman's blog features a commentary on a different NFL player. When he features a player on the blog, he summarizes the player's performance and statistics for the week, makes predictions about the player's future performance and then comments about the player's contribution to the performance of the relevant fantasy team's owner. To participate in the league through the website, an owner must use a password. That said, outsiders may access the website and read the blog without a password.

Landsman usually holds the draft parties at his apartment in Boston. In the first several years all of the owners were classmates from Boston University where Landsman was in college. In recent years, friends of the original owners from other parts of the country have asked to play and Landsman now runs three leagues of 8 to 16 teams each. The owners all travel to Boston for the draft party for their league. Once the draft is complete the owners participate in their respective leagues using Landsman's website as their primary means of communication with Landsman and their fellow owners. Much of the communication on the website is the owner's "talk trash"² to one another about their teams' relative merits.

Owners in Landsman's leagues live in Massachusetts, Rhode Island, Connecticut, New York, Vermont, Florida, Ohio, and California. In addition, several years ago, two people joined the league after learning about it for the first time through the website. One of these new participants is from Washington State and the other is from New Jersey. Both contacted Landsman by email at an address he provides on the website. Landsman asked both to call him at home, which they did. He interviewed them at length to ensure they would get along well with the other owners in the league and then allowed them to join one of his leagues the following year. Each owner pays \$2,000.00 to participate in a league. Last year Landsman held his draft parties in Las Vegas, Nevada. Each owner paid Landsman an additional \$3000.00 to attend the draft party.

² "Trash-talk" is a form of boast or insult commonly heard in competitive situations (such as sports events). It is often used to intimidate the opposition, but can also be used in a humorous spirit. Trash-talk is often characterized by hyperbolic, figurative language, e.g., "Your team can't run! You run like honey on ice!" Puns and other wordplay are commonly used. However, citing information about a rival's weaknesses would not be characterized as trash-talk, but could be described as a "discussion topic" (which might foster a trash-talk situation). Wikipedia.org.

Peyton Manning

Peyton Manning is the quarterback for the Indianapolis Colts, a real NFL team in Indiana. He lives in Indianapolis and intends to remain there indefinitely. He has a vacation home in New Orleans where he grew up. As a college player, Manning played for the University of Tennessee in Knoxville, Tennessee. He has fans in Indiana, Tennessee and Louisiana. Manning learned about Landsman's fantasy football league when a teammate of his on the Colts, Marvin Harrison, told him he'd googled the "Colts" after a particularly tough loss and came across Landsman's blog, which berated Manning's performance and his failure to live up to expectations. Manning accessed the website from his home in Indianapolis. He was angered by Landsman's statements that Manning is "a post season choker" and "a second rate quarterback whose hype consistently exceeds his performance only because he's the darling of Madison Avenue." Manning was also disturbed about how often and prominently his name appeared on Landsman's website, on lists of player rankings and comparisons and on the fantasy team "rosters." Manning contacted his closest childhood friend, now a lawyer in New Orleans, Louisiana, and asked him to find some way to sue Landsman.

Manning sued Landsman in the United States District court for the District of Louisiana alleging an invasion of privacy in the form of a misappropriation of Manning's right of publicity. He alleges that the website has injured his reputation with his fans across the country and claims damages totaling \$150,000.

Question 1, Part A

You are the judge presiding in the case. Decide Landsman's motion to dismiss under FRCP 12(b)(2). **Do not address any other legal issues you see at this time.**

The Law:

In Louisiana a plaintiff alleging the tort of Misappropriation of the Right of Publicity of Another must prove the following elements:

- (1) the defendant's use of the plaintiff's identity;
- (2) the appropriation of plaintiff's name or likeness to defendant's advantage, commercially or otherwise;
- (3) lack of consent; and
- (4) resulting injury.

Louisiana's long arm statute:

I. JURISDICTION. Any person who is not an inhabitant of this state and who, in person or through an agent, transacts any business within this state, commits a tortious or infringing act within this state, or has the ownership, use, or possession of any real or personal property situated in this state submits himself, or his personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from or growing out of the acts enumerated above.

The Louisiana Rules of Civil Procedure are identical to the FRCP.

Question 1, Part B

Assume the facts and law stated in Part A. However, assume no lawsuit has been filed and, therefore, no 12(b)(2) motion has been filed.

You are the lawyer representing Manning. You have been approached by Melissa McArthur, one of the fantasy football owners in Landsman's league about joining as a plaintiff in a lawsuit against Landsman. McArthur, the only woman participating in Landsman's leagues, alleges that she was the rightful winner of the \$30,000 pot in her league last year. However, Landsman, in violation of league rules, failed to give McArthur credit for a number of Manning's plays during the season. (Manning was one of the players McArthur drafted for her fantasy team that year.) As a result, Landsman who was an owner of a fantasy team in the same league beat McArthur by one point in the final tally. Landsman declared himself the winner and took all the winnings. Landsman blogged about the Manning-plays in question on his website and a number of those plays led to the comments about Manning being overrated.

Assume you have researched the facts and law and concluded that Manning can state a claim against Landsman for misappropriation of Manning's right of publicity.

Based on your research you have also concluded that McArthur can state a claim against Landsman for civil conversion. McArthur has also told you she wants to assert a claim against Landsman for negligence. Two years ago she visited Landsman for the weekend in Boston and fell on the steps outside Landsman's house. She broke her arm and had to pay medical expenses totaling \$5,000. (Landsman and McArthur were college suitemates and were close friends until the falling out over fantasy football.) Assume you have researched the relevant facts and law and concluded that McArthur can state a claim for premises liability against Landsman. McArthur lives in Hartford, Connecticut and intends to remain there indefinitely.

You want to keep this case in state court because you know the courts well and are comfortable litigating there. Further, cases are moving much more quickly in state court than in federal court. The addition of McArthur as a plaintiff might possibly reduce

negative fantasy football fan reaction to Manning's lawsuit, but Manning certainly doesn't need help paying your expenses. Your primary procedural goal at this stage is to keep the case out of federal court. What suit will you file, where will you file and why?

Applicable law

Civil Conversion- To prevail in a claim for civil conversion a plaintiff must prove the following:

1. Assets were entrusted to the defendant under circumstances creating a contractual obligation to pay according to the contract;
2. The defendant performed an affirmative act of dominion and control over the goods in breach of the contract; and
3. The defendant's breach proximately caused a loss or injury sufficient to constitute conversion.

Negligence- To prevail in a claim of negligence a plaintiff must prove the following a plaintiff must prove the following:

1. Duty
2. Breach
3. Causation
4. Injury
5. Damage

Question 2

Donnely v Saks Fifth Avenue

This federal lawsuit arises out of a dispute over \$178.00 between a customer and the management of a retail store. Clare Donnely sued Saks Fifth Avenue ("Saks"), a department store in Concord, New Hampshire, for a malicious prosecution. The suit arises out of the circumstances that befell Donnely after she purchased a pair of "Seven for All Mankind" brand blue jeans for one hundred and seventy-eight dollars at Saks. Saks is incorporated in Delaware and its principle place of business is New Jersey. Clare Donnely lives in Concord, New Hampshire and intends to remain there indefinitely. Donnely claims damages to her reputation totaling \$150,000.

The testimony introduced at the trial was as follows:

Testimony of Clare Donnely:

Ms. Donnely testified that the day after she purchased the jeans, she discovered that the jeans were defective and returned them to the store. She requested that Saks give her a new pair or that they refund her the purchase price, which she had paid by personal

check. Saks refused. Clare Donnely further testified that she left the store with the jeans and then did two things: she stopped payment on her check and went and had the zipper replaced at the local tailors at a cost of \$12.00. A week later, with the repair bill in hand, she then returned to the store and demanded that the store pay her back for the cost of the repair. Clare testified that the customer-returns employee, Isabel Duffey, refused. Instead she orally demanded that Ms. Donnely pay \$198.00 representing the original purchase price and the bank service handling charge for the stopped check. Ms. Donnely testified that she refused to honor this demand for payment in rather colorful language. The next day, the store's assistant manager, Douglas A. Stauffer, filed a criminal complaint against Davis, charging her with a violation of the bad check statute.

Ms. Donnely testified that after the criminal complaint was filed, she returned to the store and offered to pay the one hundred and seventy-eight dollars; the offer was refused. Ms. Donnely went to see the store manager, Robert Boyd, who told Ms. Donnely that he had authorized the complaint because "you attempted fraud on my store." He also stated that he would not drop the complaint because "then the store would have to pay court costs and we want to make an example of you so that people don't try to stop checks on us and keep the goods." Ms. Donnely testified that these remarks were made in the presence of Ms. Donnely, her 12 year old son and other customers who lived in and around Concord.

Ms. Donnely testified that she then wrote to the corporate president, Max Becker, at Saks's head office in New Jersey, explaining the history of the transaction and asking him to intervene and order his subordinates to drop the criminal complaint. She also told him that she was concerned about the defamation to her character and good standing in the community as she was the local PTO³ president and an elder in her church. His letter in response, which was admitted into evidence, acknowledged that he was informed as to the facts of the transaction and that he supported the actions of his employees at the Concord store in filing the criminal charges against Donnely.

Doug Stauffer testified that he had begun filing criminal complaints against customers who wrote bad checks several months earlier because the store had suffered significant losses in the previous year as a result of customers writing bad checks. In addition, on cross examination Mr. Stauffer acknowledged that he kept records of those customers who had returned goods or complained about the quality of goods more than twice in the last year. He said he kept the list because he thought there were certain customers who were "born complainers and are more trouble than they're worth." Stauffer further acknowledged that Ms. Donnely's name was on his list. However, he claimed that he did not look at the list at the time he made the decision to file criminal charges against Ms. Donnely and that he made his decision to file based on the jeans incident alone.

³ A PTO is a parent Teacher Organization, a group of parents and teacher who work together to raise money for extra curricular activities at their local schools.

Exhibits admitted at trial indicate Ms. Donnelly was tried and acquitted of the bad check charge and later voluntarily paid the Concord store \$166.00 “in full satisfaction and settlement of her debt.” This represented the cost of the jeans minus the cost of the zipper repair. Exhibits also demonstrated that the local newspaper ran two stories about Donnelly’s trial on the bad check charge; the first at the outset of the case and the second after Donnelly was acquitted.

Question 2, Part A

Your Assignment:

At the close of evidence during the trial of the malicious prosecution case the defendant filed a motion for directed verdict. You are the judge assigned to the case. Decide Saks’s motion for directed verdict and give your reasons. Do not address any other legal issues you may see.

The Law:

The case is filed in federal court and the Federal Rules of Civil Procedure apply.

Mailicious Prosecution- The elements of the relevant New Hampshire law on malicious prosecution are:

- (1) The termination in the complainant’s favor of the criminal proceedings;
- (2) Want of probable cause for the criminal proceedings;
- (3) Malice; and
- (4) Harm to the plaintiff’s reputation.

Probable Cause- Probable cause has been defined as “a reasonable ground of suspicion supported by circumstances sufficiently strong in themselves as to make a cautious person believe that the person accused is guilty beyond a reasonable doubt of the charged offense.”

Malice- Malice has been defined as “the intentional doing of a wrongful act without just cause or excuse, with an intent to inflict an injury or under circumstances that the law will imply an evil intent.”

Bad check offense- New Hampshire’ criminal Bad Check statute provides:

- (a) Offense defined. A person commits an offense if s/he issues or passes a check or similar order for the payment of money, knowing that it will not be honored by the drawee.
- (b) Presumption. For the purposes of this section as well as in any prosecution for theft committed by means of a bad check, an issuer is presumed to know that the check or order (other than a post dated check or order) would not be paid, if (1) the issuer had no account with the drawee at the time the check or order was issued; or (2) payment was refused by the drawee for lack of funds, upon presentation within thirty days after issue, and the issuer failed to make good within ten days after receiving notice of that refusal.
- (c) Grading. An offense under this section is a misdemeanor of the second degree if the amount of the check or order exceeds \$200.00; otherwise it is a summary offense.

Question 2, Part B

Now assume you represent Donnely. Further assume you have not yet brought suit in the case but you plan to bring suit for malicious prosecution in federal court. Ms Donnely tells you she bought a dress at Saks for a black tie event the same day she bought the jeans. She paid \$600.00 for the dress. She bought it in the eveningwear section of the store and paid with a separate check. The first time she wore the dress, the strap broke and the hem fell out. She suffered humiliation and had to pay for repairs. She wants to sue Saks for breach of contract. Assume that you have done the legal and factual research and concluded that you can state a claim for breach of contract against Saks. However, further assume that you have some concern about bringing the breach of contract claim because you think it might make a jury less sympathetic to Ms. Donnely's malicious prosecution claim.

Your assignment:

Decide whether you will bring this claim along with the malicious prosecution claim and explain your reasoning.

The Law:

Breach of Contract:

A contract exists (offer, acceptance and consideration)

One of the parties to the contract breaches the contract

The other party suffers damages.

Good luck with this and Contracts. Have a great and relaxing break and I'll look forward to seeing you in the halls next semester!