

EXAMINATION NUMBER

5909

SECTION 1

SHORT ESSAY-100-RAW POINTS-TEN POINTS APIECE FOR EACH OF THE  
ANSWERS TO QUESTIONS 1-10

THE FOLLOWING SECTION IS COMPOSED OF TEN STATEMENTS. YOU ARE REQUIRED TO STATE WHETHER YOU AGREE OR DISAGREE WITH EACH OF THE TEN STATEMENTS. THEN YOU ARE REQUIRED TO CONCISELY EXPLAIN THE REASON(S) FOR YOUR ANSWER IN THE SPACE PROVIDED. NO CREDIT WILL GIVEN FOR THAT PORTION OF YOUR ANSWER WHICH CONSISTS OF MERELY STATING WHETHER YOU AGREE OR DISAGREE. CREDIT WILL ONLY BE GIVEN FOR THE EXPLANATION AND ANALYSIS GIVEN IN SUPPORT OF YOUR AGREEMENT OR DISAGREEMENT.

1. The omission of any allegation regarding the precise amount in controversy from plaintiff's petition deprives a court of subject matter jurisdiction.

Disagree. Although plaintiff's must generally be specific in their pleadings, all that the rules require is a statement in the pleadings that the claim for damages is within the jurisdictional limits of the court. Although the rules specifically require this statement, there is case law in Texas which states that this statement does not need to be included. If plaintiff does not include this statement regarding amount in controversy, it is presumed that what plaintiff is seeking is within the court's jurisdiction. Only if the plaintiff expressly seeks an amount in the pleadings which is outside the jurisdictional limits will jurisdiction not attach. Plaintiff must plead his way out of court.

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2. Under the Texas Venue Statute filing of a case in a county of mandatory venue is the proper venue of the suit, if no permissive venue provision applies.

Disagree. A county of mandatory venue will always be a proper venue. Only if no mandatory venue statute applies, will venue be proper in a county of permissive venue. And even if plaintiff files in a county of permissive venue when ~~there~~ there is a county of mandatory venue, if the defendant does not file a motion to transfer venue, he will have waived his ability to transfer to the mandatory venue county. So, in this sense, venue will be proper in a county of permissive venue even if a mandatory venue statute applies. If the plaintiff files a case in a county of mandatory venue, the def. will not be able to transfer venue. Mandatory will always beat out permissive or general.

3. The failure of a court to grant a valid objection to an opponent's use of a peremptory challenge to exclude a juror on account of race is fundamental error.

Disagree. If error is fundamental, that error will be preserved without an objection. The most common one is a lack of smq. A fundamental error is a harmful error. If a party uses a peremptory challenge to strike a juror on account of race, the other side needs to object to preserve error. If the objection is overruled, then it will be error under the Batson line of cases. However, it may not be harmful error. In most cases, if this occurs, a party will be able to show harm ~~to~~ claiming his right to trial by a fair & impartial jury was violated. But it is not harmful as a matter of law.

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So, the burden of showing + proving harm in these cases is not very difficult to cross. In almost all cases, it will be harmful error.

4. A judge may reinstate a case dismissed for lack of prosecution after the expiration of his plenary jurisdiction over the case, if the failure of the party or the attorney to contest the dismissal was not intentional, but was due to an accident or mistake.

Disagree. A dismissal for lack of prosecution is a final order which starts the clock in regard to the trial court's plenary power. A court's plenary power will expire 30 days after the rendition of a final judgment. After a court's plenary power expires, the only way that particular court can get power ~~is~~ over the case is by bill of review or judgment nunc pro tunc. In this particular example, a bill of review probably wouldn't work b/c party would have to show fraud or accident on the other side. A party can extend a court's plenary power by filing a motion to reinstate within 30 days of dismissal. If this is done, and that party can show accident or mistake, then rule 165a(3) states that a court shall reinstate the case. But once plenary power expires, only way is by Bill of Review.

5. The work product privilege is of continuing duration in that it continues to apply to such work product materials prepared in terminated litigation regardless of whether such materials were prepared in anticipation of any litigation.

Disagree. Once material is classified as an attorney's work product, it becomes privileged from discovery. This privilege also ~~can~~ survives the expiration of the particular litigation in which it was prepared. However, if in the first litigation, the materials were not produced in anticipation

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of litigation, then they may not be attorney-work product. Having never been classified as attorney-work product, the material would not be privileged in the subsequent litigation. One must focus in on when the materials were produced. If produced in anticipation (of any litigation), then it is work product and will be privileged in a subsequent suit, even if totally unrelated.

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6. A default judgment can be entered against a nonresident defendant following service pursuant to Rule 108 of the Texas Rules of Civil Procedure.

Agree. ~~A~~ A nonresident could suffer a default judgment if properly served under rule 108. However, for the default judgment to survive, a court must also have personal jurisdiction over that defendant. In order for the default judgment to be valid, the def. would have to have minimum contacts w/ TX and the exercise of jurisdiction must comply w/ notion of fair play and substantial justice. The mere giving of proper notice through service of citation does not, by itself, give a court personal jurisdiction over a nonresident as it does w/ a resident of TX. However, should a court render a D.J. against a def. in this example w/ no minimum contacts, then he must do something to sit D.J. aside.

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7. One can preserve error to the omission of a question relied upon by the opposing party in the charge by tendering the question in substantially correct form.

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Agree. The omission of a question relied on by the other party can be preserved either by: (1) an objection, or (2) requesting the question in substantially correct form. In cases like these, it would probably be safer just to object specifically. This would avoid the need to comply w/ the often hyper-technical rules governing a submission in substantially correct form. If one preserves error by a request, and the request is not in substantially correct form, error will not be preserved. What constitutes substantially correct form is not ~~clear~~ <sup>clear in TX</sup>. One case says it must be affirmatively incorrect to result in a non-preservation of error. One rule just says that the court must have notice of what is wanted.

8. All judgments entered without notice are void and can be set aside by direct attack at any time.

Agree. Under Peralta, the U.S. Supreme Court held that notice was required under due process. If a party does not have notice, he can attack it by direct attack: (1) motion for New Trial (equitable) (2) B.O.R. (3) writ of error. The U.S. ~~su~~ Sup. Court held in Peralta that a party suffering a DJ w/out notice would not be required to show a meritorious defense as is required in an equitable motion for new trial and a bill of review. So, a Def, who can prove no notice b/c of no service will be able to void a DJ through a direct attack. In an equitable mvt and B.O.R. the def. can also go outside record to show no notice. In a writ of error bound by record, so if record shows proper citation, must attack by B.O.R. or mvt.

9. When reviewing a no evidence point of error regarding an answer to a jury question, an appellate court is limited to reviewing only the evidence tending to support the jury's verdict and must disregard all evidence to the contrary.

Agree. The appellate court will look to determine whether ~~there~~ there is any evidence at all to support a jury's verdict. The evidence will be viewed in a way most favorable to the party against whom a directed verdict was rendered. If the court determines that there was enough evidence to justify the submission of the question to the jury, then it will re-instate the jury's (rendered) verdict. The appellate court may only ~~rev~~ and remand if the party who got the D.V. raises a factual insufficiency point by cross-point. Then the trial court will decide if a new trial must be granted or if it will render judgment on verdict

10. An appellate court can issue a mandamus to compel a trial court to set aside an order granting a new trial.

Agree. However, the ability to do this is very limited. It can be done in only two situations. The first one is if a court grants a new trial when its plenary power has expired. The other is when a new ~~trial~~ trial is granted because of conflicting jury answers and the answers really do not conflict. If an appeals court can reconcile the apparent conflicting answers, mandamus will be proper. Trial courts have broad discretion in granting new trial and only in these 2 situations will an appeals court step in.

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Mar 3  
Apr 3  
May 3.  
May 11

SECTION 2

FOUR SHORT ESSAYS-120 RAW POINTS-THIRTY POINTS APIECE

READ THE QUESTIONS CAREFULLY; PLAN YOUR ANSWER; AND ANSWER THE QUESTION(S) ASKED. IF YOU FEEL IT IS NECESSARY TO ASSUME CERTAIN FACTS, PLEASE STATE WHAT FACTS YOU ARE ASSUMING.

1. Joe South filed suit as an alleged creditor against the estate of Northern Gentleman. On January 28, 1994, following a hearing, the trial court held (but did not sign an order) that South could not recover from the estate because he had not presented a properly authenticated claim under the Texas Probate Code. South filed a motion for new trial on February 7, 1994, and the trial court held a hearing on that motion on March 3, 1994. At that hearing the trial court finally signed the judgment denying South's claim with prejudice and also signed an order denying South's motion for new trial. On April 1, 1994, South filed a motion to modify the judgment to reflect that the judgment was entered without prejudice to South's refiling the suit. The trial court held a hearing on May 11, 1994 and on May 17, 1994, the trial court signed an order modifying its earlier judgment to reflect that the case was dismissed without prejudice. Did the trial court have the power to modify its judgment? Discuss.

*SWORN account?*  
*Final order?*  
*Modification or entering?*  
*since pro tunc proper.*

We must decide whether the court still had plenary power over the case on May 17, 1994. If it did not, then South would probably have to use a direct attack to get judgment changed to "without prejudice." If plenary power had expired as of May 17, 1994, the court could not enter a judgment nunc pro tunc b/c the judge made a mistake in the rendition of the judgment when he signed the order (as opposed to a clerical error). So, the only way the May 17 modification was proper was if the court still had plenary power. The initial judgment signed Mar. 3, 1994 started the clock running w/ regard to court's plenary power b/c it was signed on that day. At that point, court retains plenary power for 30 days or until April 3, 1994. South filed a motion to modify on April 1,

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and this had the effect of extending plenary power past April 3. Now plenary power was valid for 75 days after Mar. 3, 1994. So, court had until May 18, 1994 to make a decision on motion or it would be overruled by operation of law. The modification of May 17, 1994 was valid b/c it was w/in plenary power.

2. Sam Spade filed suit against Joe Yankee to recover damages following an automobile collision. Spade alleged that Yankee was talking on his cellular phone at the time of the accident and as a result negligently ran into Spade's car stopped at a red light. Following a trial of the case, the jury returned a verdict favorable to Spade and the trial court rendered judgment for Spade on the verdict. Yankee filed a motion for new trial alleging that there was no evidence to support the jury's answer to the question inquiring as to his negligence. <sup>Spade v. Yankee</sup> The motion was overruled by operation of law and Yankee perfected his appeal. The court of appeals ~~reversed and rendered~~ judgment for Yankee holding that there was no evidence to support the jury's finding of Yankee's negligence. <sup>→ appellate predicate for rendition?</sup> What should Spade do now to get his case before the Supreme Court? What would be the legal basis of Spade's complaint? What should the Supreme Court do if it hears the case?

Spade needs to file a writ of error or petition for review w/ the appellate court to get case in front of Supreme Court. Spade has an excellent legal argument that the appellate court erred by reversing and rendering. The appeals court should have reversed and remanded b/c Yankee did not lay the appellate predicate for a rendition. All Yankee wanted in the trial court was a new trial and he should get no more than this. It was error for the appeal court to render judgment in his favor. If Yankee would have moved

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for a directed verdict in the trial court, then the appeals court could have reversed and rendered judgment in his favor. But since Yankee's lawyer made a mistake in the trial court, he is only entitled to a new trial, when he really should ~~be~~<sup>get</sup> a judgment in his favor. The Supreme Court should affirm the appeals court's reversal and reverse the rendition. Case should be sent back to trial Ct. for ~~new~~ new trial.

3. Southern Pipeline sued Freezing Leasing Company for breach of contract alleging that Freeze had breach its covenant to provide adequate repair service on Southern's pipeline. As a result of the alleged shoddy work, Southern's pipeline had exploded and wiped out the town of Pothole, Texas. Freeze defended the suit alleging that its work had been done in a good and workmenlike manner. Two years later, the trial court on its own motion dismissed the case with prejudice for lack of prosecution. The clerk of the court did not send Southern any notice that the case was going to be dismissed if Southern did not object, nor did the clerk send notice to Southern that the case had in fact been dismissed. Southern Pipeline did not file a motion for new trial, attempt to have the trial court reinstate the case, or file a bill of review. Instead, two years later it filed a new suit in another court which it alleged the identical action that had previously been dismissed with prejudice. Its position was that the first judgment was void in that the court had no jurisdictional power to enter a dismissal with prejudice when dismissing a case for lack of prosecution. Explain Southern's position. Is Southern's position valid? Discuss.

error

per denial

S.O.C.

Wrong!  
it did.

Southern is correct in that the trial court erred in dismissing with prejudice for lack of prosecution. A dismissal w/ prejudice should only occur after a trial on merits, and there was none here.

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The trial court's dismissal was a final order and Southern needed to do something to get rid of it. The fact that Southern did not get the proper notices from the clerk will not help as the time for a MIST has long since passed. This error by the trial court was not a jurisdictional error which would render the judgment void. This is a "Class 2" case in which the court's jurisdictional power gave it the power to render an erroneous judgment. The judgment is voidable, but not void. Southern would need to attack via direct attack, the only way (after 2 years) is by B.O.R. (which claims) Southern will have to claim official mistake and no negligence on their part. ie. no mistov wait error b/c no notice.

4. Southern Mist sued Jerry Grant in 1990, seeking damages resulting from a boating accident. Grant, although duly served, failed to file an answer. A default judgment was entered in 1991. Two years later Grant filed a bill of review proceeding in the same court which had granted the default judgment, asking that the trial court vacate its prior judgment and render a judgment that Mist take nothing ~~by her suit~~. Following trial the trial court vacated its prior judgment, and ordered a new trial on the merits of Mist's lawsuit. Mist appealed to the court of appeals. What should the court of appeals do with her appeal? Why? Discuss in detail.

- ① Fraud, official mistake
- ② No error on G's part
- ③ Meritorious defense.

It appears that Mist will want to argue that the court erred in granting the Bill of Review and that it made procedural mistakes. To get a Bill of Review, Grant must show his failure to answer was a result of <sup>①</sup> fraud, accident, etc. on Mist's part or was official mistake <sup>②</sup> No error or negligence on Grant's part and <sup>③</sup> a meritorious defense. Under Peralta if Grant could show

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no notice, then he would not be required to show a meritorious defense. However, the example states that service was proper so it appears he will have a hard time showing no notice. Otherwise, Grant will have to show other elements to be entitled to a B.O.R. If he had notice, he will probably have had trouble proving fraud or official mistake. Mist should have the appeals court determine whether he proved each element needed for B.O.R. Even before the trial court began the Bill of Review proceedings, Grant would be required to show a prima facie meritorious defense. If he could not do this, trial court should deny Bill of Review. Even if he was able to show elements, it appears the court erred procedurally → A bill of review is really 2 trials. First, the B.O.R. If he wins on this trial on merits, this was not done. Grant also didn't ask for new trial, so was it error for court to give him a new trial? Appellate Ct. should reverse for procedural error!

HAVE A WONDERFUL SUMMER!

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