

Test Booklet
INSTRUCTIONS

THERE ARE FIFTEEN PAGES TO THIS EXAM

1. There are two sections to this examination. The first section is short essay and consists of 30 questions. Each of the questions is worth 5 points --a total of 150 points for Section I. The second section of the examination is composed of three longer essay questions. Each of the questions is worth 25 points --a total of 75 points for Section II. There are a total of 225 points on this examination. The time for completing the examination is three hours.
2. This examination is "closed book."
3. Be sure to answer the specific questions that are asked. Information supplied relating to some unasked question will not increase your score and consumes your time needed to answer the asked questions.
4. If additional facts are necessary to resolve an issue, specify what additional facts you believe to be necessary and why they are significant. You may not make an assumption that changes or contradicts the stated facts. This material will not count in the number of lines that you are limited to.
5. Quality, not quantity, is desired. Think through and briefly outline your answers before you begin to write.
6. Write legibly. Be sure to formulate your answers in complete sentences and paragraphs with proper grammar. Failure to do so will result in an appropriately lower score.
7. Do not seek an interpretation of language in the questions from anyone. If you sense ambiguity or typographical error, correct the shortcoming by shaping the question in a reasonable way and by recording your editorial corrections in your answer.
8. ***Other than answers to Section II, all answers must be written in the appropriate spaces in this booklet. Only answers in this booklet will be graded.*** Do not exceed the designated space for each answer. Only one line of writing per printed line is allowed. Do not write outside of margins, on back, etc. Excess material will not be read and will not count towards your score.
9. If you are using Softest, your answer to the longer essay question must not exceed 150 words. Excess material will not be read and consequently any overage will not count towards your score. "Excess material" means words which appear at the physical end of the printed version of your

answer in excess of the allotted number of words. If you attempt to manipulate the word count to gain an unfair advantage such as by omitting spaces between words, your score will be significantly reduced by an amount to be determined on a case-by-case basis.

Under the Honor Code, when you turn in this examination, you affirm that you have neither given, received, nor obtained aid in connection with this examination, nor have you known of any one so doing. If you cannot make this affirmation, you shall note such fact on your examination and must immediately advise the Dean of the reason therefore.

EXAM NUMBER _____

Test Booklet

Section I

Short Answer

(each question is worth 5 points for a total of 150 points)

1. Can an unplead affirmative defense serve as the basis for a traditional motion for summary judgment when it is raised for the first time in the summary judgment motion? Briefly explain.

2. Does the *Craddock* standard apply to a motion for a new trial filed after judgment has been granted on a traditional summary judgment motion? Briefly explain.

3. Under Rule 167 when may an offer of settlement be made?

4. Briefly explain the differences, if any, between the right to trial by jury provided by the Texas Bill of Rights (Article I, Section 15 of the Texas Constitution) and the right to trial by jury provided by the Judiciary Article of the Texas Constitution (Article V, Section 10 of the Texas Constitution).

5. State the difference(s), if any, in the validity of orders entered by (1) a judge who continues to preside over a case when there has been an erroneous denial of a recusal motion and by (2) a judge who continues to preside over a case when that judge has been established to be constitutionally disqualified from hearing the matter.

6. When will a trial court's entry of a judgment on an incomplete verdict not be reversed on appeal.

7. In discussing the concept of "no evidence" the Texas Supreme Court has stated that "no evidence" refers to the following situations:

8. Briefly explain the equal inference rule.

9. List the different ways that a "no evidence" point of error can be preserved for appeal.

10. When and through what procedural devise(s) may an appellate court in Texas interfere with a trial judge's decision in granting a new trial?

11. The _____ standard is used to review a jury's negative finding of a question of fact for which the appellant carried the burden of proof at trial. The proper standard of review for an appellant's challenge of the factual sufficiency of the evidence supporting the jury's affirmative findings on fact questions for which the appellant did not have the burden of proof is the _____ standard.

12. Although the Texas Supreme Court has noted that there is no specific definition of privity that can generally be applied to all *res judicata* cases, the Supreme Court does recognized that a party can be in privity with another in the following ways:

13. Briefly explain when a timely filed request for findings of fact and conclusions of law will extended the time for perfecting an appeal in a non-jury case.

14. A trial court may properly disregard a jury finding on a question in the following situation(s):

15. Briefly explain the proper procedure for preserving error in a non-jury case concerning the legal sufficiency of the trial court's findings of fact.

16. In a non-jury case the trial court made a broad finding that the negligence of the defendant was a proximate cause of the incident in question. The defendant properly and timely perfected her appeal to the appellate court on the legal and factual sufficiency of this finding. Draft in substantial correct wording her two points of error. What will be the scope of review on each of the two points?

17. In a non-jury case the trial court made a broad finding that the negligence of the defendant was not a proximate cause of the incident in question. The plaintiff properly and timely perfected her appeal to the appellate court on the legal and factual sufficiency of this finding. Draft in substantially correct wording her two points of error.

18. Sam filed a motion to recuse the trial judge on grounds of personal bias. The judge agreed, recused himself, and requested that the presiding judge of the administrative judicial district assign another judge to hear the case. The presiding judge appointed another presently sitting district judge in the same county in which the case was pending to hear the case. Sam did not like the new judge and filed an objection to the assignment to prevent the assigned judge from hearing the case. The assigned judge overruled the objection and set the case for trial. Sam filed for a writ of mandamus in the court of appeals. The court of appeals denied Sam's mandamus. Sam now seeks a mandamus from the Texas Supreme Court. How should the Supreme Court rule? Briefly explain.

19. During *voir dire* examination of a case, the plaintiff moved to challenge one of the prospective jurors for cause as a result of his admitted bias against the plaintiff's case. The trial court refused to strike the juror for cause. What must the plaintiff do to preserve the alleged error of the judge's failure to excuse a juror for cause?

20. A plaintiff filed a traditional motion for summary judgment. The motion fully complied with the rules and had all the appropriate evidence attached in proper form. The defendant filed no response. The trial court granted the motion and entered a final judgment for the plaintiff. What issue(s), if any, may the defendant raise in the appellate court concerning the court's granting of the motion? Would your answer change if the defendant had filed a no evidence motion for summary judgment, the plaintiff had failed to respond and the trial court had granted the defendant's motion? Briefly explain.

21. Following a jury trial, the jury returned a verdict that included damages for the plaintiff of \$1,000,000. Following a timely filed motion for new trial the trial court, without stating a reason, order a remittitur of \$350,000. Can the court of appeals properly affirm the trial court's remittitur on the basis that the court of appeals can not say that the trial court's order of remittitur was manifestly unjust or was an abuse of discretion? Briefly explain.

22. An accident occurred involving a tractor and trailer owned by Wanda Petroleum Company and an automobile owned by Merrel Benson, now deceased, and his wife, Mrs. Lily Benson, which was being driven by Thurman

C. Porter. Separate suits to recover damages for personal injuries were filed against Wanda in district court by Mrs. Benson and by Mr. and Mrs. Porter. The trial jury in the Porter suit found Wanda and its driver free of negligence and found Porter guilty of acts of negligence which proximately caused the collision. A take nothing judgment was entered in favor of Wanda. What impact, if any, do the jury findings or the judgment in the Porter case have on Mrs. Benson's suit? Briefly explain.

23. It is necessary that the complete court reporter's record be prepared in order for a court of appeals to reverse a case on the basis of points of error addressing the legal or factual sufficiency of the evidence. Briefly comment on the accuracy of this statement.

24. Briefly discuss the purpose of cross points.

25. A point in a motion for new trial is a prerequisite to the following complaints on appeal: (Please list)

26. State all the ways a plaintiff can properly preserve error to an issue and accompanying instruction that are submitted by the trial court concerning a defendant's affirmative defense.

27. State all the ways a defendant can properly preserve error to the trial court's failure to submit an instruction that needs to accompany one of the plaintiff's questions.

28. What is an inferential rebuttal? Give three examples.

29. A trial court correctly enters a summary judgment in favor of the movant on her cause of action. The judgment includes the magic language to make the judgment final for appellate purposes. However, the effect of the judgment is to dispose of the non-movant's counterclaim which was not before the court at the

hearing on the summary judgment. What should an appellate court do on appeal with the case?

30. Following a jury trial, the losing party filed a motion for new trial asserting that the jury's answer to the liability question was support by no evidence. This motion was overruled by the trial court. Assuming that the case is timely and properly before the court of appeals, and further assuming that it agrees with the losing party that there is no evidence to support the liability finding, what order should the court of appeals enter? Briefly explain.

SECTION II.

(75 points-25 points for each numbered question)

1. Mrs. Lynn Smith, individually and as next friend for her two minor children, sued for injuries they sustained when their automobile collided with a patrol car driven by Harris County Deputy Sheriff Robert Spurgeon. At trial, the court submitted a broad-form damage questions predicated on a finding that the deputy sheriff was negligent. The damage question instructed the jury that it could consider various elements of damage but could only award a single amount for Mrs. Smith. Specifically the damage question (Question 3 of the court's charge) stated that when determining Mrs. Smith's damages, if any, the jury could consider:

- a. Physical pain and mental anguish.
- b. Loss of earning capacity.
- c. Physical impairment.
- d. Medical care.

3. Clayton Williams, Jr., Inc. (Williams) operated an oil and gas lease in LaSalle County. Odis Graham served as Williams' on-site representative. Williams contracted with Diamond M Onshore, Incorporated to drill a well on the lease. Diamond M in turn hired David Garza to work on a drilling crew as a floor hand. One of Garza's duties was to roll joints of drill pipe off a pipe rack onto a catwalk, where the pipe was then hoisted up a ramp to the rig floor for connection to drill pipe already in the well. Early one morning, while moving several pipes onto the catwalk, Garza suddenly slipped as he stepped down off the pipe rack. As he fell to the ground a few feet below, Garza landed on his back on one of several drill pipe thread protectors [A thread protector is a cap that screws onto the end of a drill pipe to protect the threads during transport] that had been left on the ground during the previous shift. As a result of this injury, Garza was partially paralyzed. Garza and his wife, Rosielinda, sued Williams and Graham for negligence based upon a premises liability theory and gross negligence. Garza and his wife sought both actual and exemplary damages. The trial court rendered judgment on a jury verdict for the plaintiffs for \$2,028,354 in actual damages, plus \$21,800 in exemplary damages from Graham and \$500,000 in exemplary damages from Williams. The trial court submitted a single simple negligence question about Williams and Graham's alleged negligence. The court's charge defined the terms negligence and proximate cause, but provided no further instructions of definitions applicable to the single negligence questions. Under the trial court's charge, the jury found that Graham was Williams' employee and that Graham and Williams were negligent and proximately caused Garza's injuries. Williams and Graham appealed claiming that the jury's negligence finding did not support the judgment against them because the charge omitted elements necessary to impose liability under a premise liability theory. How should the appellate court rule? Fully explain.
