

Civil Procedure II
Professor Blaze
Spring 2006

This fact pattern will form the basis for questions asked on the final examination. Some of the questions on the examination, however, may ask you to assume additional, different or altered facts for the purposes of posing particular procedural problems.

The final examination is open book. You may bring to the examination room, and use during the examination, any of the materials required for the course together with your class notes and any notes you made during your study of the course or fact pattern. You may not, however, bring or use commercial outlines or library books.

The following information and instructions are applicable to your study of the fact pattern in preparation for the examination:

1. Unless the fact pattern or a specific question on the examination specifies that something occurred on a particular day of the week, you are to assume that all calendar dates given in the fact pattern fell on a weekday, i.e., Monday through Friday, on which the respective courts were open for business.
2. This is a procedure examination, not an examination in torts, contracts, or any other substantive area. Accept for the purposes of the examination that substantive claims asserted are well-grounded in the law. For example, if you are considering whether someone has failed to state a claim, analyze it only in terms of the pleading requirements, not the correctness of the substantive legal claim. Similarly, accept as true any statements regarding the applicable law, e.g., "the statute of limitations has run," or the "defendants were properly served." In the latter case, for example, the statement forecloses any need to decide whether in fact service was proper.
3. You should not do any independent research into federal or state law, or even procedure. Your course materials cover everything on which you will be examined.
4. You are free to work together with other members of our civil procedure class, or not. You may not, however, discuss the fact pattern or the issues raised with other students or lawyers.
5. If you have questions concerning the fact pattern, submit them to me in writing or by e-mail. I will post responses or clarifications, if any, on the faculty bulletin board outside Room 242, on the bulletin board outside my office, and in the Records Office. I will also email any clarification to all students.

FACT PATTERN
CIV PRO II
Spring 2006

[1] Tom "Joey" Stahl yearned for excitement and adventure. Stahl had spent most of his life in the small farming community of Millbrook in southern Indiana, or so it seemed. Other than a few brief trips to Philadelphia, Pennsylvania to visit "family," Stahl had not been outside the state of Indiana in years. But then one day Tommy Gee and Sandy Randers stopped for coffee at the diner where Stahl worked and everything changed. Randers and Gee were returning from seeing the Cubs beat the Cardinals at Wrigley Field in Chicago. The Cubs won thanks to great pitching by Carlos Zambrano, but Derrick Lee had been hurt and likely would miss a month or two. Randers was the real Cub fan, but Gee loved baseball and had gone along.

[2] Randers had recently moved to Lexington, Kentucky from Knoxville due to a somewhat unanticipated job change. Gee had also live for a number of years in Knoxville but was in the process of moving to New Hampshire where he had taken a new job as a DJ at a small radio station in New London that specialized in "lite rock." He was lucky to get the job and owed a real debt of gratitude to his cousin, Kenny Gee, who had pushed the station to hire him. Tommy had rented an apartment, set up his office at the station, but was still traveling back and forth between New Hampshire and Tennessee until the rest of his family moved at the end of the school year. Gee and Randers had taken the Chicago road trip as part of a couple weeks of "guy vacation" before they really settled in to their new jobs.

[3] Tommy Gee was, as always, extremely talkative. Before long Stahl, Randers, and Gee were deep in conversation. They talked about football, movies, rock music, and even male pattern baldness. Then the discussion turned to a rafting trip Randers and planned the next week as the culmination of their vacation. They had arranged a two-day raft trip down the Ocoee River in southeastern Tennessee. Stahl was enthralled with the idea and a chance to get out of Indiana for at least a few days. He figured his cook, Billy Blaze, could handle the diner for a week or so. Blaze wasn't too bright but he worked hard and was fairly dependable. He even liked working the night shift.

[4] Due to his reputation for meticulous planning and administration, Tommy Gee handled all of the arrangements for the raft trip. He contacted Kumbaya Rafting, Inc., an outfitter incorporated in Tennessee with headquarters in Cleveland, Tennessee. Kumbaya Rafting offered raft trips on a number of rivers in East Tennessee, western North Carolina, and north Georgia.

[5] The trip was scheduled for May 3 and 4, 2003. Kumbaya Rafting agreed to provide a six-person raft, a boatman/guide, and all the necessary equipment and food. Sandy, Tommy, and now "Joey" Stahl, had to supply any alcoholic beverages they wanted on the trip. Tommy Gee had made a down payment of \$1000 with the remaining \$4000 due at the end of the trip (Kumbaya Rafting trips were not inexpensive). Kumbaya Rafting, Inc. was responsible for securing any necessary permits from the U.S. Forest Service for use of the Ocoee River though

Cherokee National Forest.

[6] Stahl caught a ride with Gee and Randers, and the three arrived back in Knoxville on May 2, 2003. The next day they drove to Cleveland, TN in Gee's Volvo, after stopping at Food City to pick up four cases of Red Stripe® beer. Once they go to Cleveland, they stopped to buy a bottle of Jack Daniels® and headed over to the Kumbaya Rafting office. At the office, they met their boatman/guide, Bert Reynolds. Reynolds was from Florida; he had been hired only two weeks ago to replace an employee, Lenny Base, who had been placed in drug rehab. During the rest of the year, Reynolds played banjo in a bluegrass band in bars around Tallahassee. This was Reynolds first trip to Tennessee (and his first job as a boatman – something he failed to disclose to Kumbaya Rafting, but then again, they never checked his references).

[7] The next morning the four men prepared to set out from near Ducktown, Tennessee, they ran into a young woman named Kate. Kate said she was lost and asked if she could tag along on the raft trip. Stahl was enchanted with Kate and convinced the others to let her join them. As they got the raft ready to launch, they learned that Kate was from somewhere in the Midwest and had been to Australia. Otherwise, she wouldn't reveal much about her life or her past, and they were unable to find out her last name.

[8] The first day on the river, May 3, 2003, was wonderfully uneventful – sun, Red Stripe, and just enough rapids to make it interesting. The raft, dubbed "Deliverance" by group, moved along slowly with the current and some oar work by Reynolds, who did not appear to be a particularly adept at steering the craft. On occasion the other four would paddle to help out.

[9] The next day, however, things did not go as well. At lunch the group prepared for a stretch of river that had a number of challenging rapids. Their preparation involved drinking beer and shots of Jack Daniels and slapping each other on the back. Even Reynolds joined in and actually won a chugging contest. As they caroused on the bank of the river music, including "Lawyers, Guns, and Money" and "Werewolves of London" by the late Warren Zevon, blared from the battery-operated boom box that Kate had brought along.

[10] After the little "party," the group set out into the stretch of big rapids. They were in such high spirits that Reynolds didn't bother to scout any of the rapids before charging right through the whitewater. As the raft went through one particularly big bit of whitewater, Reynolds rowed mightily to avoid a huge rock. Just as he pulled on the oars in his inebriated state, the right oar broke and the raft crashed into the rock after knocking over a kayaker that was going through the rapid at the same time.

[11] The next few minutes were a blur for the four passengers and Reynolds. A huge hole was torn in the raft by the rock and it began to sink. Kate hit her head on the rock and was swept away by the current. Unfortunately, she was the only one without a life preserver; there were only four on the raft.

[12] Tommy Gee was thrown into the river and was swept along until he crashed with the current into other rocks downstream. He suffered a compound fracture of his femur (thigh bone) and a concussion. Randers became wrapped in torn raft and was cut badly on the arm on face by the busted oar, which was still attached. Stahl nearly drowned and crushed three vertebra as he was pounded along the river bottom by the current.

[13] Reynolds managed to jump free of the raft just before the crash. When he pulled himself from the river several hundred yards downstream, he was relatively unhurt but still drunk.

[14] The kayaker, Jeff Hirsch from Knoxville, lost his kayak, a Nikon camera, his Blackberry, and a gold Rolex worth \$5000. Fortunately he escaped any physical injury.

[15] A few minutes later, a trout fisherman by the name of Richard Brautigan pulled Kate from the river. Because she was not breathing, he administered mouth-to-mouth resuscitation until she began to breath on her own.

[16] Fortunately, a U.S. Forest Service ranger named Sam Fortenbaugh (originally from Philadelphia) was observing that stretch of river and saw the whole debacle. He immediately called for a rescue helicopter by radio.

[17] The helicopter arrived with a Forest Service investigatory team, lead by Investigator Axel Foley, and paramedics. The helicopter then flew Kate, Gee, Randers, Stahl, Reynolds, and Hirsch to UT Medical Center in Knoxville for treatment.

[18] The Forest Service investigators recovered the raft and broken oar from a sandbar and interviewed Sam Fortenbaugh and Richard Brautigan. Both Brautigan and Fortenbaugh gave investigators a written statement. The team also contacted Kumbaya Rafting, Inc. to inform them about the disaster.

[19] The actual owner of Kumbaya Rafting, Bruce Purl, received the call. As soon as he heard the news he started sweating profusely, but quickly called his lawyer, Joe Jamail. Jamail said not to worry, he would take care of things.

[20] At the hospital, Forest Service personnel interviewed Gee, Stahl, Randers, and Reynolds. They all gave written statements to the investigators. Unfortunately, Kate was in a coma.

[21] Jamail arrived later that day and interviewed Bert, Sandy, and Tommy. Each reiterated the events as described above, except that Bert said he had only had one, maybe two, beers. Tom (or is it "Joey"?) Stahl, however, refused to talk to Jamail and threatened to show just how "bad" he could be. Jamail did not get statements, but dictated memos on the conversations on the way back to his office. Later that day his investigator secured a statement

from Sam Fortenbaugh.

[22] Bert Reynolds was released from the hospital the next day and immediately headed for the Florida Keys.

[23] Tommy and Sandy remained in the hospital for two weeks, running up bills of \$65,000 and \$82,0000 respectively. Tommy eventually fully recovered and has even returned to competing in marathons. Sandy, however, has facial scars that will require plastic surgery sometime in the future.

[24] Stahl had to stay in the hospital for nearly a month and ran up bills of nearly \$300,000. Fortunately a wealthy relative from Philly, Richie Cusak, took care of payment for all of his medical expenses. Stahl has recovered fairly well thanks to physical therapy and the support of his wife, a former high school cheerleader.

[25] Kate wasn't nearly so lucky. She came out of the coma but suffered severe brain damage. As a result, she wanders the streets of Knoxville mumbling about some far off island and a series of numbers.

[26] While everyone was still being treated in the hospital, the Forest Service continued to investigate as the agency was required to do under federal law. As part of that investigation, Kumbaya Rafting was required to prepare a report of the incident pursuant to the terms of their rafting permit. Purl and Jamail prepared and submitted the required report to the Forest Service. The Forest Service concluded the investigation and filed its own final report in June of 2003.

[27] After the Forest Service experts examined the raft and broken oar (their findings were included in the agency's final report), the raft and oar were returned to Kumbaya Rafting. Purl had a friend, Jim Jameson, who was a metallurgical engineer, examine the broken oar which was made of aluminum. The metallurgical engineer concluded that the metal was defective, "and could have broken at any time." The oar had been manufactured by Oars R Best, Inc., a North Carolina corporation with headquarters in Franklin, NC. In return for a written report, Purl gave Jameson \$100 bucks and a basketball signed by Buzz Peterson. Jameson subsequently moved to Alaska.

[28] Jamail, with Purl's help, also had the raft examined by an expert, Cliff Klaven. According to Klaven's report, the raft material was improperly designed; the material was too thin to withstand any significant contact with a rough surface (like a rock). Purl had purchased the raft from a distributor in Arkansas that was now out of business. A call to a former employee of the distributor, however, revealed that the raft was made by Larry L. Bean. Bean lived on Petit Jean Mountain outside of Little Rock and made rafts, kayaks, and canoes as a hobby. The defunct distributor had actually purchased the raft from a sporting goods shop in Little Rock where all of Bean's products were sold. The former employee of the distributor had never met Bean and only knew of him by reputation.

[29] After his release from the hospital, Tommy Gee returned first to Knoxville and then to New Hampshire. Before heading for New Hampshire, he contacted Harper Lee, a well-known Knoxville lawyer. The conversation took place in Lee's office. Lee took down all of the information and agreed to handle the case for 33% of any settlement or jury award.

[30] After retaining Lee, Gee called Randers and told him about his plans. Randers agreed to talk with Lee. Randers ultimately retained Lee to represent him and gave Lee his version of the events. A call by Lee to Kate's parents (they had no last name either), was never returned.

[31] Based on what Gee and Randers had told him, Lee told an associate, John Dorian (a former doctor who got fed up with medicine and went to law school), to draft a complaint. Dorian reviewed Lee's memos about his conversations with Gee and Randers and called the Tennessee Secretary of State to get the official name and address of Kumbaya Rafting. The complaint read:

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE

TOMMY GEE and SANDY)	
RANDERS,)	
)	
Plaintiffs,)	
)	COMPLAINT
)	
v.)	Jury Trial Demanded
)	
KUMBAYA RAFTING, INC., a)	
Tennessee Corporation, and BERT)	
REYNOLDS,)	
)	
Defendants.)	
_____)	

Plaintiffs allege:

[32] 1. Plaintiff Tommy Gee is a resident of the state of New Hampshire and plaintiff Sandy Randers is a resident of the state of Kentucky. Defendant Kumbaya Rafting, Inc. is a Tennessee corporation with its principal place of business in Tennessee. Upon information and belief, defendant Bert Reynolds is a resident of Tennessee.

[33] 2. This court has jurisdiction pursuant to 28 U.S.C. § 1332.

[34] 3. At all times relevant to this complaint, defendant Bert Reynolds was acting within the scope of his employment by defendant Kumbaya Rafting, Inc.

[35] 4. On or about May 4, 2003, plaintiffs were rafting on the Ocoee River in Tennessee within the boundary of Cherokee National Forest. The raft and equipment were owned by defendant Kumbaya Rafting, Inc. and operated by defendant Kumbaya Rafting, Inc., and its employee, defendant Bert Reynolds.

[36] 5. Due to the negligent operation of the raft and equipment by the defendants, plaintiffs sustained serious injury, pain and suffering, incurred medical expenses, and may incur future medical expenses.

[37] WHEREFORE, each plaintiff demands judgment in an amount to be proven at trial but in an amount exceeding the jurisdictional amount of \$75,000, plus interest, costs, and such other relief as the court deems just.

HARPER LEE AND ASSOCIATES
Attorneys for Plaintiffs

By _____
Harper Lee

[38] On April 17, 2004, Lee filed the complaint and had the clerk issue two summons.

[39] On May 4, 2004, the statute of limitation ran on plaintiffs' personal injury claims.

[40] On May 5, 2004, a summons and complaint was served on Purl personally at the office of Kumbaya Rafting in Cleveland, TN.

[41] On May 25, 2004, Jamail filed a motion to dismiss pursuant to Rule 12(b)(7). Specifically, Kumbaya alleged that Kate was an indispensable party under Rule 19. Jamail also filed a motion pursuant to Rule 20 asserting the Stahl should be joined as a plaintiff. Lee filed a timely response to both motions.

[42] Meanwhile, Lee obtained the address of Bert Reynolds in Key West, Florida where Bert now lived. Lee sent a copy of the complaint and summons via certified mail to that address on June 10, 2004. The mail was received and signed for by Bert's absent minded Uncle Gosper, who hid the papers for safekeeping. When Bert got home that night Gosper told him that some important legal papers had arrived. Unfortunately, Gosper could not recall where he had hidden them and Bert never has been able to locate the papers. (In fact, they remain hidden inside the album cover of Uncle Gosper's copy of "Just Another Band From LA" by the Mothers of Invention.)

[43] On June 30, 2004, the judge assigned to the case, Judge Finch, denied both the Rule 12(b)(7) motion and the motion pursuant to Rule 20 to join Stahl.

[44] Two weeks later, on July 14th, Jamail filed an answer on behalf of Kumbaya admitting the truth of the allegations in paragraphs 1, 2, and 4 of the complaint, but denying the allegations of paragraphs 3 and 5. The answer also alleged that venue was not proper and included a counterclaim for the balance of the \$4000 fee for the raft trip that remained unpaid.

[45] Simultaneously with the filing of the answer, Jamail filed a motion to dismiss the case for improper venue. Lee filed a timely response to the motion and filed his own motion to dismiss the counterclaim under 12(b)(1).

[46] After all the permitted responses and replies had been filed, Judge Finch denied both defendant's motion to dismiss for improper venue and plaintiffs' motion to dismiss the counterclaim. Lee filed a reply to the counterclaim ten days later.

[47] On August 7, 2004, the parties met to discuss disclosure and discovery as required by FRCP 26(f). The parties agreed on a schedule for formal discovery, focusing particularly on depositions, interrogatories, and requests for production of documents. With regard to required disclosures, the parties decided that initial disclosures would be exchanged on August 21, 2004, and all required disclosure regarding experts would be made by September 30, 2004. The parties formally submitted the plan incorporating these agreements to the court on August 14, 2004.

[48] As required, Lee made his disclosures on August 21, 2004. His disclosures included a list of witnesses to the rafting accident and a computation of damages. All medical records for Randers and Gee were attached. Jamail filed a written statement asserting that he did not yet have any responsive material or information and that all relevant information would be provided through the discovery process.

[49] On August 28th, after conferring by telephone with the parties, Judge Finch entered a scheduling order essentially codifying the discovery plan submitted by the parties.

[50] A month later, Jamail sought leave of the court to file third-party claims under Rule 14 for contribution against Larry Bean and Oars R Best, Inc. Judge Finch granted the motion with no objection by plaintiffs on October 15, 2004.

[51] On September 30, and before the judge ruled on the his Rule 14 motion, Jamail, as required under the discovery plan and scheduling order, disclosed the name of Cliff Klaven and submitted his expert report to plaintiffs.

[52] Both Bean and Oars R Best, Inc. were properly served with the third party complaint on October 24, 2004.

[53] Oars R Best, Inc. answered the third-party complaint on November 10, 2004 and asserted cross-claims for contribution against the other defendants. In addition, Oars R Best asserted a cross-claim for \$34,000 against Kumbaya Rafting for an unpaid bill for the purchase of oars.

[54] On November 15, 2004, Bean appeared through his counsel, Vincent Gambino, and filed a motion to dismiss under Rule 12(b)(2). After responses had been filed, and Bean had replied, Judge Finch denied the motion. Thereafter, Bean filed a timely answer.

[55] On January 25, 2005, plaintiffs filed affidavits for entry of default against Reynolds. After mailing notice of the hearing to Reynolds, a hearing was held on the default. Judge Finch entered a default judgment against Reynolds in the amount of \$300,000 for Gee, and \$550,000 for Randers.

[56] During the winter and spring of 2005, all parties engaged in discovery and all the relevant witnesses and parties were deposed, including Jeff Hirsch, the kayaker. In addition, plaintiffs filed a request for production on Kumbaya asking for 1) "a copy of any reports filed with the Forest Service;" 2) "copies of all statements or memoranda recording statements of any party or witnesses to the incident at issue;" and 3) "the names of all experts consulted by Kumbaya Rafting and the substance of any relevant facts and opinions possessed by the experts."

[57] Kumbaya responded to the request by stating that requests 1 and 2 were not subject to discovery under the work product doctrine. Kumbaya, however, did acknowledge that Gee, Randers, Reynolds, and Fortenbaugh had been interviewed. With regard to request 3, Kumbaya again disclosed the name of Cliff Klaven, summarized his findings, and acknowledged that he was going to testify at trial. Kumbaya also disclosed the name of Jim Jameson, but refused to provide any further information under the authority of Rule 26(b)(4).

[58] Lee moved to compel full and complete production of the material objected to by Kumbaya, including any statements or memos relating to the interviews of Gee, Randers, Reynolds, and Fortenbaugh. Judge Finch 1) denied the motion with regard to any statements or memos relating to the interviews of Gee, Randers, Reynolds and Fortenbaugh 2) ordered production of any report submitted to the Forest Service, and 3) denied any further discovery regarding Jameson. Judge Finch also denied plaintiff's request for costs and fees incurred in bringing the motion.

[59] Based the information obtained through discovery, on March 17, 2005, Lee moved to amend the complaint to add a claim of negligent hiring against Kumbaya. Jamail opposed the motion asserting that the statute of limitations had run. Judge Finch denied the motion to amend.

[60] About the same time and also based information obtained through discovery, Lee filed claims for negligence and products liability against both third-party defendants, Bean and Oar R Best, Inc.

[61] On March 27, 2005, Jeff Hirsch filed a motion to intervene in the action under Rules 24(a) and (b). After briefing and argument, Judge Finch granted the motion.

[62] After intervening, Hirsch's lawyer, Ed Stevens, deposed Tom Stahl. During the deposition, Stevens attempted to ask questions of Stahl regarding a conversation he had with Lee the day before the deposition. Lee responded, "I object big boy! And I instruct him not to answer." The attorneys immediately called the judge who denied Lee's oral request for a protective order.

[63] Bean moved for summary judgment on April 23, 2005, on the basis that plaintiffs could not prove that the raft was defective, relying solely on the answer he had filed to that effect. Plaintiffs responded in opposition to the motion but did not attach any affidavits. Judge Finch denied the motion.

[64] After the motion for summary judgment was denied, both Bean and Oars R Best settled with the plaintiffs.

[65] Judge Finch held a pretrial conference on May 1, 2005. Following the conference, the judge issued a final pretrial order that essentially restated all the issues contained in the pleadings together with the list of potential witnesses and exhibits exchanged through disclosure.

[66] Trial finally began on September 10, 2005. During trial Jamail attempted to introduce evidence that the plaintiffs were drunk and, therefore, also at fault. Lee argued that Jamail had not included contributory negligence or comparative fault as an affirmative defense in the pleadings. Jamail responded by moving to amend the answer. Judge Finch denied the motion.

[67] The jury returned a verdict in favor of plaintiffs in the amount of \$500,000 for Gee and \$875,000 for Randers. Judgment was entered on the verdict on September 15, 2005.

[68] Two days later, Kumbaya Rafting moved for judgment as a matter of law under Rule 50 and, in the alternative for a new trial. The basis of the motion for the new trial was that the judge should have permitted the defendants to present evidence of the plaintiffs' intoxication.

[69] The judge denied the motion for judgment as a matter of law but granted the motion for new trial. Two days later the parties settled.

[70] Bert Reynolds learned of the case in the summer of 2006. He read about the trial in an old newspaper while sitting in the Greyhound bus station in Knoxville while traveling to Bonnaroo. After reading of the trial, he called Jamail to find out about the case and learned that a default had been entered against him. He retained Bob Weir to handle the matter. Weir moved to set aside the default judgment pursuant to Rule 60(b)(1) and (4). The matter is still awaiting a decision by Judge Finch.

[71] After the trial Gee continued as a DJ for the New Hampshire radio station. He was later fired when he refused to play a new CD by Yanni. Randers returned to Kentucky and fulfilling a lifelong dream entered dental school at UK. Several months after the trial, Stahl left his diner in a black car accompanied by several men with thick Philadelphia accents and has not been seen since.

[72] Lee is still busy handling high end plaintiff's cases in Knoxville. Most recently, she took on several cases of severe food poisoning allegedly contracted at a Chili Cook-Off event at a local watering hole named Toddy's. The rancid chili was reportedly named "Just Blazing Away" or something like that.

[73] Joe Jamail has been less successful, having recently been disbarred for repeated incidents of unprofessional conduct.