

Checklist of Points to be Covered for Complete Answers
FSM Bar Examination, March 1, 2001

[Citations to statutes, rules, and the like are included in brackets as an aid to those reviewing the exam; a test taker is not expected to memorize and repeat the numbers so long as the legal principles are cited and discussed.]

GENERAL
(70 points)

- I. (17 points)
 - A. (10 points) standard for summary judgment — summary judgment will be granted only if the court, viewing the facts in the light most favorable to the non-moving party, finds there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law
 1. Jones' affidavit 1st para. admits signing the loan agreement and does not contest the amounts in John Smith's affidavit for the loan principal and the amount repaid; since no genuine disputed facts, court can grant partial summary judgment as to Jones's liability for the unpaid loan amount — \$3,750
 2. Jones's assertion in para. 2 of his aff. does not put any of the material facts as to liability in dispute — ability to pay is not relevant to question of whether liable to pay
 3. Jones's aff. para. 3 does show a genuine issue of material fact whether there was any oral agreement or later modification that Jones would pay any interest on the loan — his response can only be read as; summary judgment cannot be granted for the interest
 - B. (7 points)
 1. parol evidence rule bars evidence of a contemporaneous or prior oral agreement that contradicts or alters the terms of the written agreement, [FSM Dev. Bank v. Bruton, 7 FSM Intrm. 246, 250 (Chk. 1995)], especially if it is a term that would ordinarily be expected to be included in the written contract
 2. because parol evidence rule bars admission of any evidence that there was a prior oral agreement to pay interest, plaintiff Smith still not entitled to summary judgment for interest
 3. BUT defendant Jones may be entitled to summary judgment against plaintiff on his claim for interest because when a party's motion for summary judgment has been denied as a matter of law and it appears the nonmoving party is entitled to judgment as a matter of law, the court may grant summary judgment to the nonmoving party in the absence of a cross motion for summary judgment if the original movant has had an adequate opportunity to show that there is a genuine issue and that his nonmoving opponent is not entitled to judgment as a matter of law. [Truk Continental Hotel, Inc. v. Chuuk, 6 FSM Intrm. 310, 311 (Chk. 1994)]
- II. (17 points)
 - A. (4 points) state court denial probably correct

1. Nepal Corp.'s claim it's not liable for Bhutan's negligence (that is, plaintiff fails to state a claim upon which relief may be granted — standard, must show that there is no set of facts that could be proved which would make defendant liable) not grounds for dismissal at this stage because Sikkim may be able to prove liability under respondeat superior (although facts suggest that Bhutan may have been on a "frolic" and not acting within the scope of his employment thus absolving Nepal Corp. of respondeat superior liability), or under Nepal Corp.'s own negligence in failing to see that bulldozer was properly secured on flatbed truck, which may be resolved in later discovery or trial
 2. Nepal Corp.'s lack of jurisdiction claim appears to be based on its foreign citizenship and the FSM Supreme Court's diversity jurisdiction; but state courts have concurrent jurisdiction in diversity cases; so state court denial proper
- B. (5 points) probably correctly denied; diversity jurisdiction exists and
1. assuming it was done within 60 days after Nepal Corp. was served with the state court complaint and summons [FSM GCO 1992-2, § II(B)] removal effected properly by filing a verified petition to remove in the FSM Supreme Court and serving a copy of the petition on the other parties and also filing it with the state court [FSM GCO 1992-2, § II(D)]
 2. only possible issue whether Nepal Corp. waived its right for case to be heard in FSM Supreme Court by participating in state court action by filing initial motion to dismiss; probably not because preliminary motions before answer generally not considered such a waiver or indication of intent to litigate in state court [*see, e.g., Mendiola v. Berman (I)*, 6 FSM Intrm. 427, 428 (Pon. 1994) (when party petitions for removal after denial of its motion to dismiss brought in state court and the motion to dismiss was filed in lieu of answering the complaint and was not argued by the parties, such action will be considered a defense to suit on procedural grounds rather than a consent to state court adjudication of the merits such that waiver of the right to remove may not be implied)]
- C. (5 points) once moving party has presented a *prima facie* case of entitlement to summary judgment supported by admissible evidence (such as affidavit here containing Bhutan's statement which is admission of party-opponent & thus admissible), the non-moving party may not rely on unsubstantiated denials of liability (such as its answer) to carry its burden of showing genuine issues of material fact, but must present some competent evidence that would be admissible at trial which demonstrates that there is a genuine issue of fact, and that there is enough evidence supporting its position to justify a decision upholding its claim by a reasonable trier of fact; court therefore correctly granted summary judgment on liability because defendants only relied on their answer
- D. (3 points) dismissal correct as appeal is not from final judgment because damages not determined; not type of case where exceptions to final judgment rule allowed [*see* FSM App. R. 4(a)(1)(B),(C)&(D) — injunctions, receivers, and rights in admiralty]; and no trial court permission for interlocutory appeal sought and granted [*see* FSM App. R. 5(a)]
- III. (14 points)
- A. welder's claims
1. breach of contract cause of action against vessel and its owner, giving rise to maritime lien

- against vessel because contract was for repair to ship
 - 2. FSM Supreme Court has exclusive jurisdiction over admiralty and maritime cases
 - 3. can proceed *in rem* against vessel by having vessel arrested (vessel may then post bond to cover amount of claim or vessel's worth, whichever's less, so it can leave)
 - 4. and *in personam* against owner (by service on agent present in Chuuk)
- B. Keep on Truking's claims
 - 1. breach of contract cause of action against vessel and its owner, giving rise to maritime lien against vessel because supplies were "necessaries" for vessel to continue voyage and therefore a maritime contract
 - 2. FSM Supreme Court has exclusive jurisdiction over admiralty and maritime cases
 - 3. can proceed *in rem* against vessel by having vessel arrested (vessel may then post bond to cover amount of claim or vessel's worth, whichever's less, so it can leave)
 - 4. and *in personam* against owner (by service on agent present in Chuuk)
- C. Ono's claims
 - 1. against the vessel and its owner — a seaman's action against a vessel for injuries or illness while a seaman (often called "maintenance and cure") is an admiralty case and FSM Supreme Court has exclusive admiralty jurisdiction so Ono may seek to enforce a maritime lien on ship *in rem*
 - 2. battery suit against Abe — may have to proceed in Chuuk State Supreme Court as there is no diversity jurisdiction because both parties are foreigners
- D. consolidate all three plaintiffs' claims against vessel so all can be taken care by arresting ship once

IV. (10 points)

- A. case in FSM Supreme Court on diversity jurisdiction; judicial guidance clause applies — court decisions must be consistent with Constitution and Micronesian custom and tradition
- B. in state law matters FSM Supreme Court must follow state law as found by highest state court, but the state court case relied upon is only a trial division case so therefore is not binding or controlling, but only persuasive authority
- C. does custom apply? argue
 - 1. banks and checks didn't exist under custom
 - 2. banking regulation is power Constitution gives to national government
 - 3. bank aware that Warsaw has complained before when it allowed Helsinki to cash her checks
 - 4. money not intended for household's use but lineage's use and Helsinki is not part of Warsaw's lineage
- D. remove the cases to FSM Supreme Court from Chuuk

V. (12 points)

- A. pretrial motion for all discovery to which defendant is entitled
- B. motion to suppress marijuana arguments that warrant not issued on probable cause
 - 1. Helsinki had expectation of privacy in own home

2. search warrant invalid because based on inadmissible hearsay (spousal privilege?)
 3. reliability of Warsaw's information
 - 4.
- C. Police not allowing Helsinki to reenter house
1. was he under arrest because he was detained? or was he free to go anywhere except into own home?
 2. was search result of illegal arrest?
- D. likely outcome motions denied because warrant supported by probable cause and police restraint necessary to prevent destruction of contraband evidence (but Helsinki can still raise as defense possibility marijuana was Warsaw's not his & that's how she knew where it was)

EVIDENCE
(20 points)

VI. (4 points)

- A. will object on ground of hearsay, define hearsay as out of court statement that is being offered to prove the truth of the matter asserted therein [FSM Evid. R. 801(c)]; general rule hearsay inadmissible unless falls within one of the exceptions to the hearsay rule [FSM Evid. R. 802]; prosecutor can try to admit Warsaw's statement as not being hearsay because its admission is not sought to prove the truth of the matter asserted therein but as the reason for the officer's subsequent actions
- B. what Helsinki did or said afterward
1. objection will again be hearsay for what Helsinki said; admissible because it is an admission of a party-opponent, by definition non-hearsay [FSM Evid. R. 801(d)(2)]
 2. for what Helsinki did (could be considered non-verbal statement) — should be admissible as something Paris has personal knowledge of because she observed it

VII. (5 points)

- A. objection will be hearsay;
- B. prosecution may argue the public records and reports exception to hearsay [FSM Evid. R. 803(8)] but police reports in criminal cases are excluded from the exception [FSM Evid. R. 803(8)(B)] therefore judge will not allow its admission
- C. Warsaw is unavailable to testify so prosecution may try to admit her statement as hearsay exception for unavailable declarants [FSM Evid. R. 804]; but no Rule 804 exceptions apply except possibly the general catchall exception [FSM Evid. R. 804(6)]; defendant has right to confront witnesses against him [FSM Const. art. IV, § 6]; therefore judge will not allow its admission
- D. although not admissible, Ottawa, because he has forgotten the case, if called to testify might be

allowed to use the report to refresh his recollection [*see* FSM Evid. R. 612]

VIII. (5 points)

- A. Pilaf would want haggis's testimony to show a pattern of food poisoning — because it happened there before it was likely to happen there again (unless Kiev Store took steps to prevent)
- B. objection will be relevance [*see* FSM Evid. R. 401] — evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence
- C. court's ruling — probably allowed (argue relevancy)

IX. (6 points)

- A. (3 points) proof of specific instances of conduct may be admitted when character or a trait of character of a person is an essential element of a charge, claim, or defense [FSM Evid. R. 405(b)]; one of William's causes of action is defamation so his character is part of his claim
- B. (3 points) generally, evidence of a persons's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion [FSM Evid. R. 404(a)]; and evidence of other crimes, wrongs, or acts is not admissible to provide the character of a person in order to show that he acted in conformity therewith, but it may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident [FSM Evid. R. 404(b)] but cheating at poker doesn't seem related to William's fraud complaint against Starr, therefore objection sustained; [cheating at poker might be inquired into on the cross-examination of Starr should he testify as a witness [FSM Evid. R. 608(b)] but his truthfulness as witness hasn't been put in question yet]

ETHICS
(10 points)

X. (6 points)

- A. Amman's ethical concerns
 1. a lawyer is prohibited from communicating with about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter [FSM MRPC R. 4.2]
 2. but Jakarta is the Sana's *former* employee, not a party so there's no violation there (that's probably why Amman called her instead of Sana anyway)
 3. Muscat is current employee of party, Sana; whether speaking to him violates FSM MRPC R. 4.2 depends on whether Muscat is employed in a managerial position or a position where his acts or admissions in connection with the matter can be imputed to his employer, Sana

[see FSM MRPC R. 4.2 cmt.]; otherwise no violation

- B. Kabul's ethical concerns
 - 1. disturbing that Kabul spent time and effort filing disciplinary complaint against Amman but never amended complaint or withdrew motion when he should've known that initial complaint was incorrect
 - 2. lawyer has duty of candor towards the tribunal [FSM MRPC R. 3.3] and there are circumstances where failure to disclose is equivalent to a knowing misrepresentation; also Kabul subject to sanctions for filing papers when he hasn't made reasonable inquiry that it is well-grounded in law and fact [FSM Civ. R. 11]

XI. (4 points)

- A. denying withdrawal of counsel in the middle of a criminal trial is within court's discretion (as long as counsel is providing effective assistance a criminal defendant has the choice of either continuing with that counsel or representing himself pro se)
- B. when ordered to by a tribunal, defense counsel is ethically obligated to continue representation even if good cause to withdraw is present [FSM MRPC R. 1.16(c)] (Bamako will have to delay his departure to the Marshalls)