

Monterey College of Law - Hybrid

Civil Procedure – Section 1

Final Examination

Spring 2024

Prof. Siobhan Kelley

Instructions:

The final exam is composed of three essay questions. Each is intended to take approximately one hour to complete. Answer each call of the question using IRAC format. For each call, your answer should clearly state the issue and the applicable rule. Then apply the law to the facts and analyze how the rule applies here. Come to a clear conclusion that directly answers the call of the question. While perfect spelling and grammar is not required, each rule must be stated correctly and use the correct terms. Make sure you are answering the questions in terms of civil procedure.

QUESTION ONE

Petal bought a brand new electric car from a Desla dealership. About a month after buying it, Petal was driving the car when it suddenly caught fire. Petal suffered severe burns as a result of the fire. The CEO of Desla saw a news report about the accident. The CEO immediately called one of Desla's attorneys to complete an internal investigation of the accident and to put together an assessment of Desla's potential liability. Desla's attorney interviewed the Desla engineers who had worked on the car. The Chief Design Engineer told the attorney that she had reported to the CEO that there was a risk that the engine would spontaneously catch fire when the car was running.

Petal sued Desla in federal court, claiming a design defect caused the fire. Petal's claim for damages included the loss of the car, her medical bills, future medical costs and pain and suffering. Petal also asked the court to issue an injunction prohibiting Desla from continuing to sell the car. Jurisdiction and venue were properly satisfied. Petal requested a jury trial in the complaint.

Desla timely filed an answer.

During discovery, Petal deposed the CEO of Desla. In the deposition, Petal's attorney asked the CEO, "Did anyone at Desla ever tell you there was a risk of the car catching fire?" Before the CEO could answer, the Desla attorney interrupted, saying "Objection! Attorney-client privilege." Petal's attorney and the Desla attorney then spent a few minutes arguing about whether the CEO was obligated to answer the question. The next day Petal's attorney filed a motion to compel the CEO's answer to the question.

Desla told Petal it intended to seek an order for her to undergo a mental and physical examination by a psychiatrist and a physician, respectively.

Petal has heard that juries are unpredictable and is considering asking for a bench trial instead.

Answer the following questions:

1. How should the court decide Petal's motion to compel related to the CEO's deposition?
2. Is Desla likely to be successful in its request for a mental and physical examination of Petal?
3. Discuss Petal's options for a jury or bench trial.

QUESTION TWO

In 2020, BTX opened a cryptocurrency exchange. BTX itself was also a publicly traded company. In 2021, in response to reports in the media that its business model was inherently flawed, BTX sent a letter to its investors stating that it had enough cash reserves to cover all investor deposits. That was the first time BTX had ever made such a claim.

BTX continued to publish updates to their investors and to the public that it had enough cash reserves to cover all investors deposits. In 2022 the company announced it had become insolvent. Most BTX investors lost everything they had invested in BTX.

The Securities and Exchange Commission (“SEC”) is the federal agency charged with enforcing federal securities laws. In 2023 the SEC filed suit against BTX. The suit alleged that BTX had violated many securities laws. One of the claims made by the SEC was that the statements by BTX that it had enough reserves to cover their investors’ deposits was “materially false and misleading” to investors.

The SEC suit against BTX was filed in federal district court in California. All jurisdictional and venue requirements were met. At the end of the trial, the jury returned a verdict in favor of the SEC. The verdict stated that BTX’s statements from 2021 on that it had enough reserves to cover all its investors deposits was materially false and misleading.

The court appointed a receiver to manage the remaining assets of BTX and reimburse investors where possible. The receiver has arranged to reimburse the investors based on when they invested. The investors who can show they bought after the 2021 statement issued by BTX will have priority.

One of the BTX investors is Paul Pantal. Paul heard about BTX from a buddy at the gym and in 2020 he invested his entire life savings, about \$80k, into BTX. He lost all of it when BTX closed.

Paul contacted an attorney about a class action against BTX and in 2023 they filed against BTX with Paul as the named plaintiff/class representative. The class action alleged that the statements made by BTX in its investment materials materially misled the investors. The plaintiffs sought to use introduce the jury finding in the SEC case that the statements were materially false.

There are 2500 class members, a mix of private individuals and corporate investors. The average loss is \$3k.

The plaintiffs filed a motion for class certification. BTX has timely filed an opposition to the motion.

Answer the following questions:

1. Discuss the likelihood that the class will be certified.
2. Discuss how notice to the putative class should be provided, including who must pay.
3. May Paul's class use the jury's finding in the SEC case? If so, how?

QUESTION THREE

In 2022, Daniel sold Blackacre to Portia. Blackacre consists of two acres of land with a house on it. After Portia moved into the house on Blackacre, she noticed her neighbors walking on a path across part of the lot. She complained to her neighbors, who explained they believe they have the right to use the path to get to their mailbox. Portia was frustrated about the situation and sued Daniel in federal court in California. All the requirements of jurisdiction and venue were met.

During discovery, the Daniel requested from Portia the documents she received as the buyer of the real estate. Portia turned over the documents to Daniel.

Ten days after the close of discovery, Daniel filed a motion for summary judgment asking the court to find for him on all claims and to dismiss Portia's case. Daniel's motion for summary judgment argues that there is a valid easement and it was properly disclosed to Portia when she bought the property. With the motion for summary judgment Daniel included three exhibits: the seller's disclosures, which states there is an easement on the property; the recorded title to the property which states there is an easement on the property; and the deposition testimony of Portia's realtor who testified that she asked Portia if she was okay with buying a property with an easement and that Portia had said "Sure, whatever."

Portia filed an opposition to Daniels' motion for summary judgment. In her opposition, Portia argues that she did not know about the easement. She attached as an exhibit her own deposition testimony in which she testifies that she did not know there was an easement on the property when she purchased it. She asks that the court find for her and order judgment in the case.

The court denies Daniels' motion for summary judgment and the case proceeds to trial. The jury found for Daniel.

Portia files a timely appeal. The basis of the appeal is that that the document request from Daniel was improper because he already had the documents that were the subject of the request in his possession.

While the appeal is pending, Portia files suit against the neighbors for trespass. The neighbors ask that the case be dismissed based on the judge's ruling in Portia's case against Daniel.

Answer the following questions:

1. Evaluate the likelihood of success of Portia's appeal.
2. Was the court correct to grant Daniel's motion for summary judgment?
3. Can Portia's neighbors use the outcome in Portia v Daniel suit to their advantage? If so, how?

**Hybrid Civil Procedure
Spring 2024 Final Exam
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Question One - Answer Outline and Issues

1. How should the court decide Petal's motion to compel related to the CEO's deposition?
Start with basic rules on discovery. The answer should explain that the underlying fact is not privileged. Should mention the requirement to meet and confer prior to the filing of a MTC and that the argument in the deposition likely does not meet this requirement, The court should grant Petal's motion to compel.
2. Was the court correct to deny Desla's request for a mental and physical examination of Petal?
A complete answer must explain that a mental or physical examination can only be compelled with a court order upon a showing that the mental or physical condition is "in controversy" and there is "good cause" for the order. A complete answer will also address the requirement that the parties meet and confer. In this situation, the discussion of Petals' damages must refer to the fact that she has asked for "future medical costs" and "pain and suffering" and discuss that the former almost certainly places her medical condition at issue and the latter likely places her mental injuries at issue. Simply stating that there is good cause without discussing why is an incomplete answer.
3. Is Petal's request for a jury trial proper? Discuss.
A complete answer will start by defining the right to a jury trial under the 7th Amendment and discuss that the default rule is that jury will hear legal issues, and then the judge will make decisions on questions equity. This is a relatively minor issue in this exam and does not require complex analysis.

Issues tested:

Discovery

Depositions

Attorney-Client Privilege

Motions to Compel

Mental and Physical Examination

Trial

Jury Trial/Seventh Amendment

Legal vs Equitable Issues

ANSWER OUTLINE **Question 2**

1. Discuss the likelihood that the class will be certified.

Rule statement identifying the four elements of class certification and analysis that references the difficulty of typicality of claims (*Amchem*) and Paul as a representative of the class.

2. Discuss the obligations for providing notice to the putative class.

The answer should plainly state that these costs are borne by the plaintiff, although BTX will be obligated to cooperate by providing information about the investors that is easier for them to access (name, contact information, amount invested and when). A complete answer will also explain that the obligation to provide notice is higher when the class member cannot opt out.

3. May Paul's class use the jury's finding in the SEC case? If so, how?

This fact pattern is intentionally similar to that of *Parklane Hosiery* and therefore the answer should reflect the central holdings of that opinion: nonmutual offensive collateral estoppel is ultimately within the discretion of the trial court judge and is more likely to be granted if the plaintiff did not have the opportunity to join in the first lawsuit.

Issues tested:

Class actions

Class certifications

Notice to a class

Issue preclusion (nonmutual offensive collateral estoppel)

QUESTION THREE

1. Evaluate the likelihood of success of Portia's appeal. Discuss both her arguments.
Answer must state full MSJ rule and discuss the question of whether there is a material issue in dispute. The answer should discuss the question of whether the easement was disclosed as a "material fact" in the case and why that is. The answer must also describe the evidence on each side and why there is a "genuine dispute" – specifically because a jury may choose to believe Portia's testimony.
2. Claim preclusion
A complete answer will give the elements required for claim preclusion and that there is no privity here.

1)

Petal's Motion to Compel

Attorney Client Privilege

Privileges protect communications between privileged parties told in confidence to obtain or provide legal assistance. For attorney-client the communication must be between and actual or prospective client and a legitimate attorney or their agent. The communication must pertain to a fact related to the legal assistance and it must be shared without the presence of strangers, and the communication cannot be in furtherance of a crime or tort. This privilege is waived if not raised.

Corporate Application (Privilege under Upjohn)

Corporations and employees can be afforded attorney-client privilege as long as the communication is in regard to the scope of the individual's employment and the employee providing the information understands that it will be used to make recommendations to the corporation.

Here, Desla has their own attorney assigned to investigate Petal's accident. It can be reasonably inferred that the engineers and CEO understand the Desla attorney's role because the CEO initiated this investigation by calling the attorney and because Desla has more than one attorney, it is likely that the engineers are aware of their role in the organization and how the information provided would be used to inform the CEO and provide legal advice. Assessing risk of an engine that could spontaneously catch fire while the car was running is within the scope of the Chief Design Engineer's scope as an employee, and this information was necessary to a realistic assessment of liability the

Desla attorney was tasked to provide the CEO. However, attorney-client privilege cannot be used to insulate facts requested during discovery.

Discovery

this should be first

good rules
All discovery applies to non-privileged information relevant to a party's claims and defenses. The information need not be admissible, but must be reasonably calculated to lead to admissible evidence. The discovery sought must be proportionate to the needs of the case. Relevant evidence has the tendency to show a material fact could be more or less likely and affect the outcome at trial.

good analysis
Here, while deposing the Desla CEO, Petal is asking for relevant information because the fact that the CEO knew or did not know that a risk the car could catch on fire existed has the tendency to make it more or less likely that Desla's engine's defective design caused the fire at issue. If the CEO had any awareness of the risk for fire that could show Desla is responsible for the harm suffered by Petal and would reasonable lead to admissible evidence like any standard Desla investigative report documents or the deposition of the Chief Design Engineer to provide even more evidence.

Duty to Respond

The duty to respond exists where a party must respond truthfully to discovery requests for relevant information as long as the information is both relevant and not privileged. *good*

Here, Desla's attorney is attempting to argue privilege that exists between them and Desla/the CEO rather than encourage a truthful response from their client during the deposition which is a permissible discovery mechanism that the corporation should

respond to in good faith and in a timely manner not just because it is the right thing to do but to avoid sanctions.

Desla owes a truthful response to Petal regarding possible risk of fire.

Duty to Meet and Confer

Parties must meet and confer at the commencement of case, Case Management Conference, and before any discovery-related motions. They must meet in a timely manner and in good faith as to avoid sanctions and possible dismissal with prejudice of the case.

Here, because Petal and Desla along with their representation never met again after their argument during the CEO's deposition, and Petal immediately filed, Petal has failed to fulfill her duty to meet and confer. A motion to compel that Desla provide the answer to the question is a discovery related motion and therefore required the parties meet and confer before filing.

good - perhaps address whether P could argue the conversation in the depo was a meet and confer (not successfully).

Motion to Compel

The court must assign sanctions if a party or their attorney refuse to meet and confer in a timely manner and do not show good faith. Even if the party prevails in the motion they may still be sanctioned.

Here, Petal failed to meet and confer since she filed immediately after the day after the unfruitful deposition without further discussion with Desla. However, the information sought was within the scope of discovery because it was relevant to a fact that could affect the outcome of the case and one that a reasonable jury could reach different

↓ "because the issue of whether Desla knew the car would catch fire goes to the ultimate issue in the case, whether Desla is liable."

conclusions about, and because in all honesty the information was not privileged simply because the fact had been shared with the attorney previously by the engineer. The CEO still owed a truthful answer because the attorney represents the corporation and its employees who have properly obtained and been afforded legal advice.

The motion to compel should be granted. Even though Petal should prevail in the motion to compel, the court should still impose sanctions for a failure to meet and confer in good faith.

No, if meet + confer isn't met then motion is denied.

Number your answers

Desla's Mental and Physical Exam Request

A mental or physical exam must be ordered by the court. If the party's physical or mental condition is not necessary to their claim or defense then the opposing party must show that the party's physical and mental are in controversy and they must show good cause. The order will not be granted simply if the party's physical or mental condition could be relevant. It is on the moving party who bears the burden of proof to convince the court that the examination is absolutely necessary and make that showing that the condition is in controversy.

good use of facts
Here, Petal's physical and mental condition is necessary to her claim because she is asking for relief related to her medical bills, future medical costs, and pain and suffering. The amount will be dictated by her physical and mental state once examined by a physician and psychiatrist. Her condition she claims was caused by a fire and that fire was due to a defective engine from Desla. Even if Desla concedes that the Chief Design Engineer did make the statement to the CEO and they were criminally negligent, the amount of damages should be determined by her condition and her condition is the only predictor for future medical cost. Yes, her hospital bills and expenses can be tallied now but her future costs depend very much on her state post-accident after recovery. The request is

good analysis

reasonable and Desla has that good cause because Petal's condition is essential to her claim since the fire is what caused her injuries.

The request for examination will be granted.

Jury Trial

The Seventh Amendment right to a jury trial applies only in federal court. There must be at least 6 jurors and no more than 12 and they must vote unanimously. The jury applies for legal remedy only.

explain Petal is asking for both legal and equitable remedies since she is requesting damages and an injunction. The legal claim must be tried first - the damaged which you can determine using the tull test - character of the claim and then nature of remedy sought. Petal wants both, she can have a jury for the legal claim and a jury can determine damages.

The unanimous vote should be considered by Petal when she makes her decision jury or bench, but Desla has a role in that choice too. The right to the jury trial can only be waived if both Desla and Petal agree to do so. Petal should consider what Desla decides.

Jury Selection

Jury bias should make Petal apprehensive. If Petal is concerned with Desla having a huge following and lots of support as a big business, this could effect her negatively. However, if Petal is a relatable person a jury pities she could benefit. Petal needs to consider the agency and lack of agency her attorney will have during voir dire.

Challenges for Cause

An attorney may ask the court to excuse any number of jurors for cause. The three categories for cause are general disqualification, implied bias and actual bias. General disqual could be felony or some other inherent disqualifier, implied bias means your attorney believes the juror could be bias, and actual bias means that the juror has indicated they would decide based on predetermined beliefs or values.

Here, Petal needs to be concerned with bias. Does she trust her attorney to anticipate and determine bias accurately? Preemptive challenges allow an attorney to shape the jury maybe based on strategy but they only get 3. For challenges for cause they must specifically articulate to the court exactly why the juror's presence would be detrimental to the verdict.

The issue is whether P can revoke her request for a jury trial

Too much time in the third question spent on jurors qualifications. Otherwise good notes. Try to narrow down the main issue + do more analysis of that issue.

75

2)

1. likelihood of certification

certification:

In order to have a class action there must be certification which requires:

- need a better rule*
1. numerosity is where the size of the P's is too large for joinder because its impracticable because there would be too much caseload on the court dockets and the D cannot possibly be sued separately that many times
 2. Commonality is where the ^{question} claims have a common issue of fact or law *to the class*
 3. typicality is where the representatives claims or defenses are typical to the the class *good*
 4. fair and adequate representation by the named P to protect the interests of the class *good*

Here, numerosity is satisfied because the number of class members is 2500 which is too large and impracticable to try separately because it would lead to a burdened case load for the courts because this is a lot of P's suing for the same claim and issues based on the same facts. Further it is very burdensome for the D to have to try 2500 claims separately.

Shorter sentences

Further, the commonality claim is satisfied because all the investors share the same cause of action that arose from the same transaction or occurrence because they all share the same facts that they invested in BMX company and relied on BTX claims that they had enough reserves to cover all its investors deposits to their detriment because BTX ended up being insolvent and all the investors lost what they had invested in the company. This is the same facts that resulted in their claims of losing money with BTX. The representative has the same claim as all the class members because they all are claimingg that the statements made by BTX were false and misleading and casued them to invest and caused them to lose their money because BTX was insolvent. Thus, the court will hold that there is commonality.

why does this satisfy the element just repeat the facts

However, the typicality factor is not met because although all the investors put in money into BTX, they did not have the same amount that the representative party, Paul had put in and lost because the average amount of money that the class members lost in damages was \$3k where as the Representatives damages were significantly higher at \$80k. Paul has a much higher damages claim because he lost all his life savings, so this is not typical of the other 2499 members who on average only lost \$3k. Further, the class is made up of both corporate and private members which is different from the rep P because he is a private investor who put in his life savings which would make him have a lot more damages incurred than a corporate investor who may not be affected as much.

Thus the court will hold there is not typicality because the Rep P has significantly higher damages because he spent his whole life savings of \$80k where as the other members only have damages of 3k. Further, the class is mixed of both private and corporate individuals which might make a difference in the amount of damages that they incurred.

Finally the representative is not fairly and adequately representing the class because although they all have the same claims and defenses of losing money and being materially falsely lead into believing they could get their deposits back from BTX, the representative's damages are too significantly different from the class because his is \$80k where as the other 2499 class members only have 3k in damages. *Why doesn't it meet typicality?*

Thus, the court will hold that there is not a certified class because they did not meet the requirements of typicality and fair and adequate representation.

What about the pre-2021 and post-2021 members?

2. Notice to putative class members

Types of class actions/Notice:

Damages: Class actions that seek damages relief do need notice and can opt out of the class action if they want.

Here, this is a class action for damages because the P's seek monetary damages for the money they lost due to the misleading and false statements by BTX.

What about the obligation if class members cannot opt out?
Who must pay:

Generally the P will pay for the notice to class members however, the costs may be shifted if it would be unreasonable for the P due to unreasonable burden or expense and the D has better accessability to the class without unreasonable expense and burden.

good
Here, the party who needs to pay for notice is generally the P. however, in this circumstance the P will be burdened with unreasonable expense and would take a long time in trying to find all the investors who lost money due to BTX's false and misleading statements, thus they would file a motion to shift the burden of notice and cost to the D because they would have easier accessability of who the investors are. BTX would easily be able to provide notice to the investors because they has accessability to their systems that shows who invests with them and their information where as the P's do not have this ability or access to a list of teh investors. The D will argue that they can provide a list of the investors but should not have to pay the notice for them because they can just hand the information of to the P who would have to call them or send notice through the mail. The D will argue that they would have to do the same thing and be burdened of having to call or send each mail notice where the P should have to do it and incur that cost because providing the name, number and address of each investor is enough for them to do.

The court will likely hold that the D will need to hand over the list of all investors information and the p will likely have to have the burden of costs to provide notice to each of teh investors.

P would still have costs but D would have to cooperate

Issue Preclusion:

Precludes the relitigation of issues of fact and law

1. Final and valid judgement on the merits of the 1st suit
2. same issue was actually litigated fully and fairly
3. that issue was essential to the outcome of the 1st suit

good rule!

Here, there was a valid and final judgement of the 1st suit between SEC v BTX because the jury returned a verdict for SEC and stated that BTX's statement from 2021 that stated it had enough reserves to cover all deposits was materially false and misleading.

Further, the same issue was actually and fully and fairly litigated because in the 1st suit SEC sued BTX claiming that the 2021 statement from BTX that claimed they had enough reserves to cover the investors deposits were materially false and misleading because they were actually insolvent. This is actually decided because the jury decided it was false and misleading. This issue is the same as the 2nd suit because the second suit between the class action with Paul as the representative v Btx is also claiming that the statement by BTX in its investment materials was materially misleading to investors and want to preclude relitigating this issue because SEC case already decided it was misleading and false. further, the deciding of this issue in the 1st case was essential to the outcome because the SEC needed to litigate that issue in order to prove negligence and liability on behalf of BTX to prove that they said those statements knowing they were false because they were actually insolvent and couldn't back up the deposits from the investors. This was necessary to be litigated because they needed to know that they falsely gave those statements to mislead investors to invest with them.

good analysis

Thus, the court will hold that the P can use issue preclusion because the issue was already litigated and so they can use SEC's jury finding since its the same issue actually and fairly litigated. However the parties are not the same so the next step is to go through non mutual offensive and defensive preclusion to see if it is fair for a non party to use preclusion.

Non mutual offensive preclusion is whne a nonparty uses preclusion as a sword to not relitigate the same issue and use it against the D in the 1st trial.

Non mutual defensive issue preclusion is when the non party P sues the D who won in the 1st trial and the D uses preclusion as a shield to not relitigate the same issue.

Here, there is nonmutuality because there the 1st suit was SEC who was teh P against BTX who was teh D. The second suits parties differ because the P is now a class action with Paul as the represenative P, and the D is BTX. The court will allow a non party to use preclusion if it is fair. But first we will decide whether the P is using preclusion defensively or offensively. Here, the P is using preclusion as a sword because they are wanting to use the previous already litigated issue that the jury held that D's 2021 statements were materially misleading and false and that they want to use this as a sword against the D so they do not need to relitigate this issue again. Further it is fair for the P to use the preclusion because it was already decided by the 1st trial on the merits because they decided it was materially false and misleading. It is fair because the D already had an opportunity to litigate the issue and had the same motive to litigate with all their evidence and resources. Thus, the P would be able to use it against the D.

Thus, the court will hold that the P class can use the jury finding of the SEC case as nonmutual offensive issue preclusion because it was already actually and fairly litigated. ✓

* mutuality - P could not have joined the first case (Paul/Class)

Claim Preclusion

1. final valid judgement on the merits in the 1st suit
2. same parties or in privity between the P and D
3. 2nd suit has the same claim tried in the 1st suit based on the same cause of action arising from the same transaction or occurrence

Merger is when a P won in the 1st suit and their verdict is merged with the 2nd judgement

Barred is when the P lost in the 1st suit and they're barred from relitigating the same claim in the 1st suit

A new party is not bound by claim preclusion

Here, claim preclusion doesn't apply because the parties are not the same and are not in privity because the P's differ between the 1st and 2nd action. the P in the first action was the SEC and the 2nd action was Paul's class. Further, the issue was decided on whether the statement was materially false and misleading not a claim.

Thus, claim preclusion doesn't apply.

Analysis in first call needs work
Good job in issue preclusion!

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3)

SUCCESS OF PORTIAS APPEAL

Final Judgement Rule

A party cannot appeal to a decision prior to the final judgement being entered. *not the correct file*

Here, the court entered a judgment in favor of Daniel. Provided the law clerk has entered the judgment into the system, this decision is final and can be appealed.

Standard of Review

great! For issues of fact, a court will use a "clearly erroneous" standard of review which requires that there was a clear and definite mistake made. For issues of law, the reviewing court will use a "De Novo" standard of review, meaning they will look at the issues of law with a fresh perspective.

Here, Portia is arguing a question of law, as she feels it was improper for her to have to disclose of documents that Daniel already had possession of. Here, the court will look at her argument without consideration of the trial court's decision.

Preserving the Right to Appeal

good issue spotting In order to appeal, a party must have at trial raised the proper objection, must argue the objection properly in the appellate brief, must not have been a harmless error, and must appeal within 30 days of the judgment.

Properly Raised at trial

In order to appeal, at the trial, Portia must have filed a motion for a judgment as a matter of law for the same purpose of her appeal. Here, Portia is appealing the decision because

she felt the document request from Daniel was improper. Portia never objected to the motion to compel the evidence before trial or at trial, and therefore she is barred from raising the issue at appeal.

Argue Objection In Appellate Brief

In order to appeal, the appellate must file the complaint in an appellate brief which she submits to the appellate court. Here, Portia properly argued that her basis for appeal is that the document request was improper.

Must not be a harmless error

In order to appeal a decision, the basis for the appeal must not have been harmless, ✓ meaning that it must be able to change the outcome of the case, if the appeal is granted. Here, Portia is claiming that the document request was improper because he already had the documents in his possession. While this may be an abuse of proportionality for discovery (although it likely is not), this would not change the outcome of the case. Whether or not the defendant already had the documents in his possession would not have resulted in a judgment in favor of Portia. *good!*

Filed within 30 days

We have been told the appeal was timely filed.

Because the appeal was not properly objected to at trial and because the error is harmless, Portia will not have a high likelihood of being able to appeal the decision. *nice conclusion*

GRANT DANIEL'S MOTION FOR SUMMARY JUDGMENT

Motion for Summary Judgement

A court will grant the moving party's motion for summary judgment if there is no genuine dispute of a material fact, the court will grant the movant's motion as a judgment as a matter of law. A material fact is a fact that would change the outcome of the case where there is a genuine issue that a reasonable jury could conclude differently on.

great
notes

Here, the disputed fact is that Portia had notice of the prior existing easement on her property. This fact is material to the case, as if a jury concludes that Portia did have notice of the easement, they will enter a judgment in favor of Daniel, and if the jury concludes that she did not have notice, they will enter in favor of Portia. The moving party has the burden of producing facts that support that Portia did have notice of the existing easement. The burden then shifts to the nonmoving party who must produce evidence that she did not have notice of the existing easement. Portia must do more than simply deny the claims, but must also provide evidence to support her claim. Here, Daniel provided evidence that Portia had notice of the easement. he provided sellers disclosures, recorded title, and proof that Portia's realtor testified that Portia knew and was okay with buying the land with an easement. Because Daniel submitted evidence to support his motion for summary judgement, the burden shifted to Portia to provide evidence beyond denial that she did not have notice of the easement. Portia only denied that she knew and the only evidence provided was a deposition where she said she did not know. None of this was concrete evidence, as her own deposition could be biased and is not sufficient evidence.

would like to
see a counter
argument
here?

But a jury might believe her testimony, right?

A reasonable juror would look at the overwhelming amount of evidence that Daniel provided, that shows three different instances where she had notice and a reasonable juror would conclude that there was no way that Portia did not have notice, especially pertaining to the sellers disclosures, which Portia would have been required to sign. Portia also failed to properly oppose the motion, by failing to offer any evidence contrary to Daniel's evidence.

The court erred in denying Daniel's motion for summary judgment.

Claim Preclusion

A cause of action or affirmative defense that has been adjudicated on the merits is barred from subsequent actions when (1) it involves the same claim, (2) same parties, and (3) *good* valid final judgment

Here, Portia's claim against Daniel was that he failed to disclose the easement. Portia's claim against the neighbors is for trespassing. Because these are not the same claims, claim preclusion does not apply.

What about the other elements?

would?

Issue Preclusion

An issue that has been decided in a previous case cannot be disputed in a subsequent case even if the cause of action is different, when (1) same issue (2) actually litigate (3) full and fair opportunity to litigate (4) actually decided (5) necessary for the decision. *good*

Same issue

In order for issue preclusion to apply, the party must be arguing the same issue in the subsequent case as the previous case. Here, the previous issue that was decided by the court is that Portia had notice of the existence of the easement. Portia's neighbors want to use the decision of the issue of notice of the valid easement to defend against the claims made by Portia. Here, there is the same issue of Portia having notice of the valid easement.

Actually Litigated

In order for issue preclusion to apply, the issue must have been actually litigated in the first suit. Here, in the first suit of Portia and Daniel, the issue of notice of the easement was fully litigated in court, as the decision was tried in front of a judge and a jury.

Full and Fair Opportunity to litigate

In order for issue preclusion to apply, the party must have had the full and fair opportunity to litigate the issue. Here, this issue was a material issue to Portia's case with Daniel. The outcome of the issue was fully and fairly litigated, as Portia had the opportunity to present evidence that she did not have notice of the easement. Both parties went through full discovery and a full trial, which gave Portia a fair opportunity to support her issue.

Actually Decided

In order for issue preclusion to apply, there must be a final judgment entered on the issue. Here, there was a final judgment in favor of Daniel on the issue of whether there was notice of an easement. The jury reached a verdict and a final judgment was entered. The fact that Portia is appealing the case does not effect the final judgment.

Necessary for the Decision

In order for issue preclusion to apply, the decision of the issue must have been necessary for the first action. In the first suit, Portia was suing Daniel for not disclosing that there was an existing easement. Whether Portia had notice of the easement was imperative and necessary to decide if Daniel was liable for nondisclosure. Because a judgment could not have been made without determining the issue of whether Portia had notice of the easement, it was necessary to the case.

Non-Mutual Defensive Estoppel

A defendant that was not a party to the prior suit can use the decided issues in their subsequent suit to prevent the plaintiff from litigating on that issue again.

Here, in the prior suit with Portia and Daniel, the court concluded that Portia had notice of the existing easement. Portia, in a subsequent suit is suing her neighbors for trespass, even though the court has decided previously that there is a valid easement on Portia's

property that allows the neighbors to use it. Portia's neighbors can use that decision to shield themselves from Portia's claim that the neighbors are trespassing, and can stop this issue from being litigated.

However, the neighbors must argue that issue preclusion would be fair to apply to this case, and that the issue was decided fairly at trial in the first action. Here, Portia was the plaintiff in both actions, and therefore she had the same motive to fully litigate the issue in both instances. Where Portia was a defendant when the issue was decided at one time, and a plaintiff in a second suit, there may be questions to if issue preclusion would be fair to apply, however that is not the case here.

Portia's neighbors can use the fact that Portia had notice of the easement in their subsequent suit against Daniel.

END OF EXAM

Great rules and analysis
Maybe tone it down on the subheadings. :)

would have liked more discussion of claim preclusion
in the third section

85