

Checklist of Points to be Covered for Complete Answers
FSM Bar Examination, August 5, 2010

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

EVIDENCE
(20 points)

- I. (20 points)
- A. (3 points) judge should rule that report is admissible
1. 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)];
 2. general rule: hearsay inadmissible unless falls within one of the exceptions to the hearsay rule [FSM Evid. R. 802];
 3. public records are an exception to hearsay rule when they involve matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel [FSM Evid. R. 803(8)(B)] [this is **not** a criminal case]
 4. Witness's statement is hearsay within hearsay, but
 - a. hearsay included within hearsay is admissible under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule [FSM Evid. R. 805]
 - b. "present sense impression" exception for statement made contemporaneous to or immediately following an event is admissible [FSM Evid. R. 803(1)] & Witness's statement may qualify as present sense impression; if not, then Witness's statement would have to be excluded
 - c. car speed should be acceptable as lay opinion testimony [FSM Evid. R. 701] because it is an opinion which is
 - (1) rationally based on the perception of the witness and
 - (2) helpful to the determination of a fact in issue
- B. (3 points) judge probably should rule diary inadmissible
1. out-of-court statement offered for truth of matter
 2. declarant (wife) unavailable (deceased)
 3. not within any hearsay exception UNLESS
 - a. it falls within the catchall exception [FSM Evid. R. 804(6)] –
 - (1) statement not specifically covered by any of {Rule 804} hearsay exceptions for when declarant unavailable, but having equivalent circumstantial guarantees of trustworthiness
 - (2) when the court determines that
 - (a) the statement is offered as evidence of a material fact;
 - (b) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and
 - (c) the general purposes of the evidence rules and the interests of justice will best be served by admission of the statement into evidence
 - (3) this statement can't be admitted under this exception unless
 - (a) Plaintiff makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to

1. if the court learns that an attorney is providing legal advice and/or drafting documents for a *pro se* litigant but concealing that fact from the court, the court should consider ordering the attorney to file a formal notice of appearance or be subjected to sanctions [Panuelo v. Amayo, 12 FSM Intrm. 365, 373-74 (App. 2004)]
 2. when you appeared with Claudius at the pretrial hearing you should've informed the court that your appearance was for that hearing only, but court may refuse because
 - a. generally, attorneys should either enter formal appearances and accept full responsibility for a case, or not be permitted to appear before the court [Panuelo v. Amayo, 12 FSM Intrm. 365, 373 (App. 2004)]
 - b. in which case, you would've either entered an appearance or not (after consultation with Claudius)
 3. when you received orders & notices from the clerk you had an obligation to inform the clerk about your scope of representation & to seek withdrawal from representing Claudius if the court thought believed you had or should've entered an appearance on his behalf
- III. (3 points) You may ask the court to relieve you of the appointment to represent Malolo for good cause such as
- A. Malolo is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent [FSM MRPC R. 6.2(c)] because of his bullying of you & your brother; and
 - B. the representation may result in an unreasonable financial burden on you [FSM MRPC R. 6.2(b)] since you haven't had any paying clients yet

GENERAL

(70 points)

- IV. (10 points)
- A. (6 points)
 1. motion will probably be treated as a summary judgment motion under Rule 56 [Alokoa v. FSM Social Sec. Admin., 16 FSM Intrm. 271, 276 (Kos. 2009)] because
 - a. Andy's deposition transcript is matter outside the pleadings
 - b. when matter outside the pleadings is presented & not excluded by the court, motion will treated as Rule 566 summary judgment motion [FSM Civ. R. 12(c)]
 2. 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
 3. genuine issue of material fact remains for trial
 - a. since Bill denies that his repairs caused the fire &
 - b. Andy, Sam's expert, states that there is a chance that the engine burned because Sam didn't perform recommended maintenance
 4. motion should therefore be denied since factual issue remains to be tried (court won't weigh evidence on summary judgment motion)
 - B. (4 points) Corky unlikely to prevail even if limitations period has expired because
 1. claim asserted against Corky in the amended pleading arose out of the

- 2. same transaction or occurrence set forth in the original pleading
- 3. Corky has received such notice of the institution of the action that Corky will not be prejudiced in maintaining his defense on the merits &
- 4. Corky knew or should have known that, but for a mistake concerning the identity of the repair shop's owners, the action would also have been brought against the party
- 5. the amendment therefore relates back to the date of the original pleading [FSM Civ. R. 15(c)]

V. (14 points) rights of the parties

- A. Carrie may sue
 - 1. Hawk's estate for negligence
 - 2. negligence is
 - a. duty of reasonable care
 - b. breach of that duty
 - c. causation
 - d. damages
 - 3. Carrie will argue that Hawk breached his duty of reasonable care by failing to stop at intersection even though stop sign was missing
 - 4. since FSM is a comparative negligence jurisdiction
 - a. contributory negligence not recognized in FSM since it is contrary to custom [*see, e.g., Epiti v. Chuuk*, 5 FSM Intrm. 162, 167 (Chk. S. Ct. Tr. 1991); *Suka v. Truk*, 4 FSM Intrm. 123, 127 (Truk S. Ct. Tr. 1989)]
 - b. comparative fault or comparative negligence is the rule in the FSM [*Fabian v. Ting Hong Oceanic Enterprises*, 8 FSM Intrm. 63, 66 (Chk. 1997)]
 - 5. Carrie's own negligence won't bar her recovery
 - a. under "pure" comparative negligence defendant is entitled to a proportional reduction in any damage award upon proof that the plaintiff's negligence was in part the cause of the plaintiff's injuries
 - b. under other comparative negligence version the plaintiff must be less at fault than the defendants in order to recover anything
- B. Hawk's spouse, Wilma, & child, Darla may sue
 - 1. Carrie, under the wrongful death statute based on Carrie's negligence in
 - a. driving while lighting cigarette &
 - b. not stopping for stop sign [argue whether disobeying statute to stop at stop sign is per se negligence or just evidence of negligence]
 - 2. wrongful death damages only recover pecuniary injuries; limited to \$100,000
- C. Wilma may sue
 - 1. Carrie for
 - a. negligence for
 - (1) driving while lighting cigarette &
 - (2) not stopping for stop sign
 - (3) will recover from Carrie her portion of the fault
 - b. loss of consortium
 - (1) for loss of husband
 - (2) as loss of consortium claim is derivative from a spouse's claim for damages an award for loss of consortium is

properly reduced by the percentage of fault attributable to the spouse Hawk [Epiti v. Chuuk, 5 FSM Intrm. 162, 170 (Chk. S. Ct. Tr. 1991)]

2. Hawk for negligence
 - a. unless spousal immunity would bar
 - b. recover from Hawk's estate his portion of comparative fault
 3. Bones for medical malpractice
 - a. no informed consent from Wilma for prescription pain medicine – not informed of possible side-effects
 - b. Bones's defense that possibility of brain damage side-effect was so remote no reasonable person, if informed, would refuse the medicine
 - c. Bones's defense should prevail
 4. Drugco, the medicine's manufacturer on product liability theory
 - a. Drugco's defenses
 - (1) it informed the medical doctor
 - (2) can Wilma obtain jurisdiction over Drugco under the long-arm statute?
 - (3) was Wilma expected user?
 - b. Drugco may prevail
 - c. but if Wilma can show less dangerous drug available or economically feasible she might prevail against Drugco
- D. Darla can sue
1. Carrie for
 - a. negligent infliction of emotional distress resulting from seeing her parents injured
 - (1) claim for negligent infliction of emotional distress requires evidence of actual physical illness resulting from the mental and emotional distress [*e.g.*, Tomy v. Walter, 12 FSM Intrm. 266, 272 (Chk. S. Ct. Tr. 2003)]
 - (2) Darla has suffered such injury
 - (a) became violently ill & collapsed as a result of seeing parents injured
 - (b) has recurring depression (maybe physical?)
 - b. possibly loss of consortium for loss of father (Hawk, deceased) and mother (Wilma, totally disabled)
 2. Hawk's estate
 - a. but is there parental immunity?
 - b. is suing parent for tort contrary to Micronesian custom?
- E. all parties may sue the State for failure to replace missing stop sign
1. Recovery will depend on state's sovereign immunity act &
 2. whether State has waived its immunity for its alleged negligence in failing to replace stop sign

VI. (4 points)

- A. Baker's statement was unconstitutionally obtained, and could not be used against him
- B. but statement is not being used against him (it is not being used at all) – Baker is testifying personally
- C. right to object to unconstitutional evidence is personal only Baker could have objected to use of his statement, not Able and Charlie – they lack standing

- D. if Baker had not testified, Able & Charlie could have objected to admission of those portions of Baker's statement that referred to them on grounds they could not confront witness against them [*see, e.g., Hartman v. FSM*, 5 FSM Intrm. 224, 229 (App. 1991)]
- E. therefore motion denied
- VII. (9 points)
- A. (3 points) motion to remand denied
1. case involves a maritime contract – a contract to ship goods over the ocean
 2. case is thus a maritime case
 3. FSM Supreme Court has exclusive jurisdiction over admiralty & maritime case [FSM Const. art. XI, § 6(a)]; remand to Kosrae State Court thus impossible since that court has no jurisdiction [*see Kelly v. Lee*, 11 FSM Intrm. 116, 117 (Chk. 2002)]
- B. (3 points) motion to remand granted
1. case is an employment contract case – contract law is generally state law matter
 2. although parties are of diverse citizenship both parties foreigners
 3. FSM Supreme Court doesn't have "diversity" jurisdiction when all parties are foreigners [*see Trance v. Penta Ocean Constr. Co.*, 7 FSM Intrm. 147, 148 (Chk. 1995); *International Trading Co. v. Hitec Corp.*, 4 FSM Intrm. 1, 2 (Truk 1989)]
 4. no other ground for jurisdiction apparent, must remand to Pohnpei Supreme Court, the court with jurisdiction
- C. (3 points) motion to remand denied
1. College of Micronesia is a party
 2. College of Micronesia is an instrumentality of national gov't
 3. no interest in land at issue
 4. FSM Supreme Court has exclusive jurisdiction when instrumentality of national gov't is a party and no interest in land involved [FSM Const. art. XI, § 6(a)]; remand to Yap State Court thus impossible since that court lacks jurisdiction [*see Kelly v. Lee*, 11 FSM Intrm. 116, 117 (Chk. 2002)]
- VIII. (15 points)
- A. (3 points) court should order that Dr. A's attorney give Pluto's lawyer a copy of the medical examination report [FSM Civ. R. 35(b)(1)]; if report not provided, court may impose sanctions or may exclude testimony or the report at trial [FSM Civ. R. 37(b)(2)]
- B. (3 points) no FSM rule requires, permits, or prohibits the videotaping of a party's deposition
1. although parties may stipulate to modify the procedure for depositions [FSM Civ. R. 29]
 2. parties didn't stipulate to the videotaping
 3. Pluto didn't get court order allowing him to videotape Dr. A's deposition
 4. Dr. A apparently within his rights to refuse videotaping
 5. therefore Pluto not entitled to costs in scheduling & canceling deposition; &
 6. if Pluto wants to video-tape deposition, he should seek court order permitting it
- C. (3 points) likely default will be removed
1. service was proper, so no ground there to remove default

2. the broad, liberal standard of good cause [FSM Civ. R. 55(c)], & not the higher standard of excusable neglect, must be shown to remove default [e.g., FSM Dev. Bank v. Gouland, 9 FSM Intrm. 375, 378 (Chk. 2000)]
 3. in determining whether good cause to vacate an entry of default exists a court evaluates {FSM Dev. Bank v. Gouland, 9 FSM Intrm. 375, 378 (Chk. 2000)}
 - a. whether the default was willful
 - b. whether setting it aside would prejudice the adversary, and
 - c. whether a meritorious defense is presented
 - d. court may also examine such things as the proffered explanation for the default, the parties' good faith, the amount of money involved, and the timing of the motion {FSM Dev. Bank v. Gouland, 9 FSM Intrm. 375, 378 (Chk. 2000)}
 4. if Dr. B can show default wasn't willful, Pluto not prejudiced, & that he has a meritorious defense, default should be removed
- D. (3 points)
1. court should order missing x-rays produced
 - a. Dr. A is under a duty to seasonably amend a prior discovery response if he obtains information upon the basis of which he knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment [FSM Civ. R. 26(e)(2)(B)]
 - b. Dr. A knew that missing x-rays were no longer misfiled or missing
 2. court will impose sanctions of counsel fees and expenses if the failure to supplement was willful but if it was merely inadvertent & had not yet gotten around to supplementing, it might not
- E. (3 points)
1. Dr. A has right to depose opposing party
 2. Pluto must submit to deposition
 3. defendant is entitled to examine a plaintiff in the jurisdiction where the plaintiff has chosen to file the lawsuit [McGillivray v. Bank of the FSM (II), 6 FSM Intrm. 486, 488 (Pon. 1994)]
 4. court may grant an exception to the rule requiring plaintiffs to submit to depositions in the jurisdiction where the suit is pending when a plaintiff makes a good faith application based on hardship [McGillivray v. Bank of the FSM (II), 6 FSM Intrm. 486, 488 (Pon. 1994)]
 5. court has discretion to order deposition taken telephonically [FSM Civ. R. 30(b)(7) or on written questions [FSM Civ. R. 31]
 6. if plaintiff Pluto continues to refuse to be deposed, court may impose sanction of dismissal [McGillivray v. Bank of the FSM, 7 FSM Intrm. 19, 23-26 (Pon. 1995)]
- IX. (9 points)
- A. basis upon which FSM Supreme Court can hear appeal – regardless of state constitution anything involving national constitution, law, or treaty may be appealed to FSM Supreme Court
 - B. issues considered by FSM Supreme Court on appeal – because was state crime tried in state court FSM Supreme Court, based on facts as presented, will only consider issues raised by accused's rights under the FSM Constitution
 1. was confession obtained in violation of Atilla's FSM Constitutional rights

against self-incrimination and to counsel?

- a. Attila may waive right if done so knowingly, voluntarily and intelligently
 - b. argue whether waiver voluntary if done in sleep-deprived state and police would not let Attila sleep until he confessed [also was it done intelligently?]
 - c. argue whether waiver done knowingly [and intelligently] if done while drunk
2. Likely Outcome – conviction reversed, confession suppressed, remanded for new trial in state court

X. (9 points)

1. ABC has right to cease performance on the contract because of the state's nonpayment, has right to payment for work done on a quantum meruit theory, or on theory that contract is a series of contracts
2. cause of action is breach of contract and/or quantum meruit
3. damages of
 - a. \$500,000 for putting batch plant into operation (reliance damages)
 - (1) but duty to mitigate damages, therefore
 - (2) if can easily sell batch plant elsewhere for more than the \$175,000+ shipping cost may have to reduce the \$500,000 by the sale price minus the shipping cost
 - b. plus the value of the repair work done before state informed ABC it couldn't pay
 - c. plus expectancy damages – lost profits – for work not performed, if such profits are not merely speculative but can be reasonably calculated [note: ABC is experienced contractor in Micronesia and had estimated at \$180,000 (6% of \$3 million) on the repair work and \$150,000 (5% of \$600,000 x 5 years) for five years of maintenance – therefore expectancy damages would be \$330,000 minus the profit on the one month's work it did; because damages includes some future payments it should be reduced to present value]
4. if state had paid \$500,000 & a little over 1/2 of the repair work was done, ABC entitled to recovery for amount of work done (about \$1.5 million) & expectancy damages on the remaining undone work