

July 2005

To: 2004-05 Civil Procedure Students
From: David Levine
Re: Spring 2005 Examination

This is my memorandum regarding the May 2005 examination. In the short answer section, the scores ranged from 6-24. A perfect score would have been 30; the class average was 13.5. On the first essay, the raw scores ranged from 10-45 points, with an average of 26. On the second essay, the raw scores ranged from 10-35 points, with an average of 22 points. All scores were then adjusted so the relative weighting of the three sections would be correct, and then the spring grades were assigned in accordance with the Hastings grading range. Your final course grade was obtained by combining your fall letter grade (25%) with the spring letter grade (75%).

The essays were based upon two real cases. Question One (personal jurisdiction) was based upon *Bombliss v. Cornelson*, 824 N.E.2d 1175 (Ill.App.2005). Question Two (preclusion and necessary/indispensable party) was based upon *Kruckenbergh v. Harvey*, 694 N.W.2d 879 (Wis.2005). To clue in those who missed the cultural references, the characters in the first question were named for characters in "Best in Show." The characters in the second question came from "This is Spinal Tap." Both movies are highly recommended for your amusement.

Most years I prepare an essay, which is often based upon the relevant judicial opinions. This year, however, I was very impressed with the organization and analysis in one student answer. With the student's permission, I am reproducing it here—without editing or other correction--so that you and future students can see what a fellow student was able to do in the time available during an examination. You are most welcome to read the opinions also. The Wisconsin case also has a lower court opinion published, which will provide another view concerning that case. Together, you will see that there were many possible conclusions that you might have reached concerning the issues presented.

Let me take this opportunity to thank you again for a good year of learning. I especially appreciated all your cards, expressions of good will, and the tangible help that many of you gave me as I recovered from my broken leg this semester. Thank you all. Good luck in the rest of law school. I hope to see you again in class.

Question One

STUDENT, Presiding Judge:

Defendant Meg Swan ("Swan") has brought a motion to dismiss the complaint of Plaintiff Gerry Fleck ("Fleck") on the basis that (1) there exists no subject matter jurisdiction by which this court can adjudicate the proceeding; and (2) there exists no personal jurisdiction over Swan so as to compel her to appear before this court. For the reasons set forth below, the motion is DENIED.

FACTS

The facts are adequately summarized in the adjoining "fact pattern." The Court thus incorporates those facts by reference herein.

SUBJECT MATTER JURISDICTION

This suit is before a Federal District Court. Since the causes of action do not arise under federal law, there exists no federal question jurisdiction over the claim (28 USC Section 1331). Swan contends, however, that this court lacks subject matter jurisdiction because the total amount in controversy of this claim (\$1050 for vet bills, \$2000 for cost of animals, and \$70,000 in possible lost future income, for a total of \$75,050) will never be reached.

Under 28 USC Section 1332, Fleck has appropriately aggregated his individual claims to reach the requisite amount in controversy. Courts are unwilling to question a plaintiff's claimed amount in controversy unless the defendant can prove that the plaintiff's amount in controversy will never be reached. Here, it is clear that the \$1050 and \$2000 amounts are provable. Although the \$70,000 claim in lost future income might require proof during the proceedings, defendant has been unable to prove that the amount will never be reached. Accordingly, defendant's motion fails on this basis.

The Court will also remind the parties that if Fleck eventually does recover less than the required \$75,000 for subject matter jurisdiction, such a finding will be immaterial and jurisdiction will not be voided on that basis. If such an event does occur, Plaintiff Fleck may be denied costs, or may be imposed with bearing Defendant Swan's costs.

As an aside, the Court finds Defendant Swan to be a citizen of Oklahoma and Plaintiff Fleck to be a citizen of New York. Thus, the parties are completely diverse from one another, as required by 28 USC Section 1332.

Accordingly, Swan's motion to dismiss for lack of subject matter jurisdiction under FRCP Rule 12(b)(1) is DENIED.

PERSONAL JURISDICTION

We next turn to Defendant's claim that there this court cannot exercise personal jurisdiction over her with regard to this claim. We find there to be two separate bases for Fleck's claims over Swan: (1) the contract entered into between the parties for the sale of the puppies; and (2) Swan's posting on the Internet chat room regarding doing business with Fleck. Each will be addressed in turn.

Notice

Nothing present in the facts before this Court indicate that there is any controversy with regard to the sufficiency of notice. As held in Mullane v. Central Hanover Bank, sufficient notice is required in order to justify personal jurisdiction. Having not raised such a claim in her first papers filed with this court, it is now barred in accordance with FRCP Rule 12(h)(1).

Long-Arm Statute

In determining whether there exists personal jurisdiction, a federal judge must address the claims

as though he were a judge of the state in which he sits. FRCP Rule 4(k)(1)(A). Thus, prior to engaging in a constitutional analysis, we must first look to New York Civil Practice Law & Rules ("NYCPLR") Sections 302 in order to determine whether the New York legislature intended for there to be jurisdiction over this non-domiciliary defendant.

Section 302(a)(1) provides jurisdiction over any non-domiciliary who has transacted any business within the state or contracts to supply goods within the state. Swan contracted with Fleck to provide him with goods (the dogs) within the state, by shipping them from Oklahoma. Swan's posting on the Internet, however, would not meet the requirement of Section 302(a)(1), since it did not involve any transaction within the state. We find for the purposes of jurisdiction, however, that Swan's contract with Fleck satisfies the requirements of the New York long-arm statute. We nonetheless look to the remaining sub-parts of Section 302 to determine if there exists any other basis for personal jurisdiction.

Section 302(a)(2) permits jurisdiction when a party commits a tortious act within a state (excluding those for defamation of character). While the contract entered into between the parties does not fall within this subsection, an argument could be made that Swan's posting in the chat group does satisfy this requirement. However, following the holding of Bensusan Restaurant Corp. v. King, we do not find that Swan's action of posting an item in chat room, while in Oklahoma, can be interpreted as committing a tortious act within the state of New York. Accordingly, we find there to be no jurisdiction under this sub-section.

Section 302(a)(3) permits jurisdiction when a party commits a tortious act from beyond the state which causes injury to those within the state, so long as that party (1) regularly engages in business or derives substantial revenue from the state, or (2) should expect the act to have consequences in the state AND derives substantial revenue from interstate/international commerce. The court in Bensusan, a case which involved a web site utilized by an out-of-state restaurant with the same name as that operated by Bensusan, was unwilling to find that the out-of-state web site satisfied this third subsection. Bensusan can be distinguished, however, since the out-of-state party did not engage in any business within New York, whereas here we are faced with a defendant who advertises nationally to sell her animals. While the facts are insufficient to establish whether Swan "regularly does or solicits business" with New York, if such a finding were to be made it could reasonably be concluded that her action of posting the notice in the chat room satisfied NYCPLR Section 302(a)(3). Due to the lack of facts, however, we do not make any such determination at this time.

Having found there to be sufficient jurisdiction under New York's long-arm statute based on the contract between Defendant Swan and Plaintiff Fleck (satisfying Section 302(a)(1)), we next turn to a constitutional analysis.

Constitutional Analysis

A party must have sufficient contacts with a forum state in order to justify jurisdiction. Burger King Corp. v. Rudzewicz. Since none of the traditional bases for finding jurisdiction over the defendant are present (i.e., present in the forum state, etc.), we must look to whether her contacts with the forum state are sufficient. The majority in Burger King established a two-part test for making such a determination. The first involves looking to that party's contacts with the state; the second addresses "balancing" factors that should be considered in determining whether finding personal jurisdiction does not offend "traditional notions of fair play and substantial justice."

Minimum Contacts. Courts have four methods of determining whether a party has engaged in

sufficient minimum contacts with the forum state. Those include purposeful availment of the forum state's laws, purposeful direction of conduct to the forum state, actions which have undeniable effects within the forum state, and stream of commerce leading to the forum state. Each will be assessed in turn.

Purposeful Availment: It does not appear that Defendant Swan has purposefully availed herself of New York law. The test for purposeful availment was established in International Shoe v. Washington, where the Supreme Court found that a defendant engaged in business within the forum state was purposefully availing itself of that state's laws. The court found that a defendant's "presence" within the state, as established through its activities therein, were sufficient to find minimum contacts. It held that if a party enjoys the laws and privileges of a state, then it is fair to assert jurisdiction. Here, although Defendant entered into one contract with Fleck, we do not have any indication that she enjoyed the laws and privileges of New York. She did not visit New York, and she did not engage in the sale in New York. Moreover, her posting of comments about Fleck on the Internet do not indicate that she purposefully availed herself of New York law. Thus, purposeful availment will be insufficient in establishing minimum contacts.

Purposeful Direction: Following the reasoning of the majority of the Supreme Court in Burger King v. Rudzewicz, we look to whether Swan purposefully directed her actions to another state. Like the defendant in Burger King, Swan entered into a contract with a New York resident and transported goods into the state of New York. Such actions should meet the Burger King court's inquiry into whether a defendant was on notice that it had done enough, through its own conduct, to justify jurisdiction. Swan clearly had done enough by entering into the contract and shipping the goods into New York to justify jurisdiction. Although this case is distinguishable from Burger King in a few unique respects (i.e., the contract in Burger King referenced the following of Florida law), the facts are similar enough to follow Burger King in finding jurisdiction over Swan with respect to the contract.

Effects: The Restatement (Second) of Conflict of Laws, Section 37, states that wrongful activity from beyond a state which has an effect within the state can be a sufficient basis for finding contacts. Kulko v. Superior Court. In Kulko the effects of a defendant sending his children into a state were said to be insufficient. However, we look to Pavlovich v. Superior Court, a California Supreme Court decision, which addressed a similar situation involving a posting on the Internet. The Pavlovich majority found there to be no jurisdiction over a defendant who had posted materials on the Internet which had adversely affected a California agency. There, the Court found that the fact that the posting would affect a California agency was unknown to the defendant. It was also debated as to whether the defendant's actions rightfully constituted a "wrongful act." The facts here lend greater support to a finding of jurisdiction resulting from the defendant's actions. Here, the defendant made a posting and specifically targeted a New York resident and that New York resident's business. She was aware at the time that Fleck was a resident of New York, and thus knew that the effects of her actions would impact New York. This is much more akin to the facts of Calder v. National Enquirer (where a defendant's writings directly affected a California resident known to him at the time), then the facts of Pavlovich. Accordingly, we are willing to find that Swan's posting on the Internet satisfies the effects test established by the Restatement and embodied in Kulko and Calder.

Stream of Commerce: Stream of commerce is an alternate theory on which contacts can be alleged. World-Wide Volkswagen v. Woodson. In World-Wide, the court distinguished between a consumer moving a goods into a state and a manufacturer or retailer sending goods into a state. A plurality in Asahi Metal Industry Co. v. Superior Court found that more than just directing

goods into a state was required, however, and held that the products must be purposefully directed to the state (rather than simply foreseeing that they might end up in a state). Here, Swan entered into a contract and purposefully directed the dogs to New York, satisfying the tests of both World-Wide and Asahi. Accordingly, stream of commerce provides another basis for finding contacts.

Second Stage Balancing. After finding contacts, we proceed to a second stage to determine whether it would be fair to maintain jurisdiction over a defendant. A very substantial amount of these factors will be required to find no jurisdiction (see, e.g., Asahi). They can also buttress a claim of jurisdiction when the contacts are rather weak.

The Burger King majority established seven factors that should be looked to in determining whether finding jurisdiction would offend traditional notions of fair play and substantial justice. Those included (1) the extent of the defendant's purposeful interjection into forum state affairs; (2) the burden of defending in this forum; (3) the extent of a conflict with the sovereignty of defendant's state; (4) the forum state's interest in adjudicating the dispute; (5) the location which would provide the most efficient judicial resolution of the controversy; (6) the importance of the forum to plaintiff in affording him convenient and effective relief; and (7) the existence of alternative forums available to plaintiff.

Here, a sufficient number of these factors are met to justify jurisdiction over Swan. First, she purposefully interjected herself into New York's affairs by contracting to do business with a New York resident, and then posting items on the Internet which adversely affected the New York resident. Second, with modern technology as it is today, it should not be too great a burden for her to defend the suit in New York (the court in Burger King made a similar finding involving a Michigan resident being haled into a Florida court). Third, this will not greatly affect the sovereignty of Oklahoma (as might have been the case with China and Japan in Asahi). Fourth, New York has a substantial interest in protecting its resident and his rights. Fifth, New York is just as efficient as anywhere else to resolve the dispute. Sixth, New York will provide the plaintiff with far more convenient and effective relief than anywhere else. And Seventh, although alternative forums are available to the plaintiff, New York is the most sufficient.

Accordingly, having reviewed the "second stage balancing" factors, we find that they militate even more strongly in favor of asserting jurisdiction over Defendant Swan.

CONCLUSION

Defendant's motion for dismissal for lack of subject matter jurisdiction is DENIED. Plaintiff has successfully pled diversity jurisdiction by meeting the amount in controversy and by establishing his complete diversity from the defendant. Defendant's motion for dismissal for lack of personal jurisdiction is also DENIED. The New York long-arm statute provides a sufficient basis for jurisdiction, and that basis is not contradicted by a constitutional analysis. Defendant has sufficient contacts with New York, and asserting jurisdiction over her would not offend traditional notions of fair play and substantial justice.

IT IS SO ORDERED.

Question Two

Plaintiff David St. Hubbins ("St. Hubbins") has filed sued against Defendant Marty DiBergi ("DiBergi") in Federal District Court in Oregon for trespass, conversation and declaratory relief.

DiBergi has brought two motions before the court: (1) seeking summary judgment on the basis that St. Hubbins' claims are precluded; and (2) seeking dismissal on the basis that former property owner Nigel Tufnel ("Tufnel") is not a party to the action. Each will be addressed in turn.

MOTION FOR SUMMARY JUDGMENT

DiBergi has moved for summary judgment on the basis of preclusion. Specifically, he is likely arguing that the settlement from the previous lawsuit with Tufnel precludes St. Hubbins' action against him. A number of determinations must be made in order to determine whether the claims and issues are in fact precluded.

Claim Preclusion

In determining whether the entire claim is precluded from being brought, we must look to whether (1) the same parties are involved in the action; (2) the action involves the same claim; (3) the original action reached a final judgment; and (4) that judgment was on the merits.

Same Parties. Clearly St. Hubbins and Tefnel are not the same parties. However, St. Hubbins might be precluded by the judgment in Tefnel's 1982 action if it can be shown that, although he was an unknown party, he is still bound by the judgment. Such a determination would be made, in accordance with the court's decision in Hansberry v. Lee, by looking to (1) if the new party was adequately represented by the previous owner; (2) if the party are of a common interest; (3) if the party should have anticipated the litigation; and (4) anything that makes it clear that the unknown parties interest were not properly protected. In Hansberry, the court found that these factors were not met in concluding that a stipulation from a suit involving the previous owner of Hansberry's land would not preclude Hansberry from re-litigating the same issue, since that previous party was not of common interest with Hansberry, and Hansberry's interests were not adequately represented.

Here, a court is likely to conclude that St. Hubbins' action is not precluded by Tefnel's previous action. Since Tufnel settled the action for a mere \$1,500, and did not do anything further to restore the line fence (that settlement led only to that payment and the planting of grass seed), St. Hubbins' interests were not adequately represented. Although, as a successor in ownership, it could be argued that St. Hubbins' interests are common to those of Tufnel, this would not be the case if Tufnel simply gave up the action or did not really care about restoring the line fence. This new litigation involving the property line clearly had to be anticipated (since DiBergi knew that he had not restored the line fence, and he was clearing land that was not his). Thus a comprehensive review indicates that although St. Hubbins owns the same property as did Tufnel, they should not be considered the "same party" for the purpose of claim preclusion.

In case the court finds otherwise, however, we will look to the remaining factors of claim preclusion in order to ascertain what a court may decide.

Same Claim. Tefnel's 1982 claim was for restoration of the fence line, restoration of the eroded portion of his property and \$10,000 in damages. St. Hubbins' recent action is for trespass, conversion, and declaratory relief. The conversion claim did not even exist at the time of the 1982 action, and thus it cannot be said to be the same claim. In determining whether an action is the "same claim," we look to whether it "could have been brought" at the time of the original action. Manego v. Orleans Board of Trade. Here, the conversion claim could not have been brought. Thus, it is not precluded.

As to St. Hubbins' claim involving trespass and declaratory relief, whether those claims are

precluded would depend on the type of claims preclusion analysis utilized by the Oregon state court. In determining whether a new claim is precluded by a previous action, the court (in this case the Federal District Court of Oregon) must give "full faith and credit" to the previous court's decision (in this case the Oregon state court) by applying whichever test it uses in determining whether causes of action are of the same claim. The federal judiciary, and most states, utilize the "transactional" test, as discussed in Manego. The plaintiff in Manego was barred from bringing antitrust claims after it had brought racial discrimination claims, after the court applied the "transactional test." The transactional test includes looking to time, space, origin, motivation, and whether the claims create a convenient trial unit. Since both claims arose out of the same general set of facts, the Manego court found the second action to be precluded.

If the Oregon state courts follow the transactional test, it is like that the claims would be barred. The entire action stems from DiBergi's digging of the ditch and his subsequent utilization of Tufnel (and later St. Hubbins') property. The claims arise from the same nucleus of operative facts (the actions for which they seek correction is one and the same), and thus following the transactional test the claim would be barred (if Tufnel and St. Hubbins were found to be the "same parties" for the purposes of preclusion).

However, a minority of courts, including California, forego the transactional test for the "legal issue" test. Thus, any legal issues not brought in the first action can be brought in the second action. Here, the first action did not involve a claim of trespass, it simply sought restoration of the line fence. Although the claims are somewhat similar, a permissive court applying legal issue standard (as the Federal Court judge would have to do if Oregon uses that test) might find that the claims are not of the same legal issue, and thus are not precluded.

Final Judgment/On the Merits. The original action can be said to have reached a final judgment, and that judgment was on the merits. Specifically, the parties requested that the court enter an order dismissing the action with prejudice, meaning that the settlement was reached "on the merits." Although the issue was not reached by the court, the parties agreed to the terms of the settlement. This is similar to the stipulation agreed to by the parties in the first action in Hansberry. Even though the stipulation involved no judicial decision, had the parties been found to be the same it would have resulted in preclusion of the claim in the second action.

Accordingly, since a court will likely find that Tufnel and St. Hubbins were not the "same parties" for the purposes of this action, the motion for summary judgment will be denied as to outright claim preclusion.

Issue Preclusion

DiBergi might also seek to at least avoid the litigation of certain issues by finding them precluded. In order to do so, he would need to establish that they were already litigated and that the Tufnel had lost, and thus they could not be litigated again.

DiBergi would be seeking to use issue preclusion defensively (meaning he is seeking to use a previous judgment in which he prevailed on an issue to bar litigation of that issue in a future action against him). In accordance with Blonder Tongue Labs v. University of Illinois, no mutuality of the parties is required in order to use issue preclusion defensively. Thus, it is not relevant to this analysis that Tufnel was the plaintiff in the first action whereas St. Hubbins is the plaintiff in the present action. (This would not be the case, however, if we were to find that one of the parties was representing the interests of the government (which is rather unlikely). Following the court's reasoning in Mendoza v. United States, non-mutual issue preclusion can

never be used against the government).

Finally, DiBergi admitted in the 1982 action that he had dug a ditch along the northern boundary of his property. That admission means that the issue as to whether the ditch was dug was never litigated (and thus never lost). Only issues which are denied in the answer and subsequently determined are precluded. Accordingly, St. Hubbins can likely assert that the issue as to whether the ditch was actually dug (and issues collateral to it, such as where it was dug), were not decided in the settlement of the 1982 action, and thus are not precluded from being asserted in this action.

It is not really clear if any issues were actually litigated and lost in the 1982 action (we only know that there was a payment of damages and some seeding). Accordingly, a motion for summary judgment as to issue preclusion is also likely to be denied.

MOTION FOR DISMISSAL

DiBergi asserts that Tufnel should be brought into the action, and that the action should be dismissed if he has not. This can only be true if Tufnel is found to be an indispensable party. Otherwise, DiBergi may implead Tufnel into the action if he is under the impression that he is owed some type of indemnification.

Necessary Party

A party is necessary to an action, in accordance with FRCP Rule 19(a), where bringing him into the action will not destroy subject matter or personal jurisdiction, and (1) he is needed for complete relief; or (2) the party claims an interest in the action, such that without that non-party (a) the non-party's ability to protect its interest will be impeded, or (b) the remaining parties to the action will be subject to inconsistent or double judgments. As the court addressed in Janney v. Shepard Niles, in reviewing these factors it must be clear that the party is required for complete relief and there must exist concrete evidence that a non-party's interests will be impeded or that the remaining parties will be subject to inconsistent or double judgments.

Here, there is little evidence that Tufnel is a required party to the action. Tufnel does not satisfy FRCP Rule 19(a)(2) because he does not claim an interest in the action. He also does not satisfy FRCP Rule 19(a)(1) because he is not needed for complete relief. Although he was a party to the previous action, he no longer has any interest in the action whatsoever. The burden established in Janney (requiring evidence of inconsistent or double judgments) also has not been met.

Although DiBergi might be subject to a second judgment on the same claim, it is not clear his original damages were designed to pay for (i.e., was it payment for the taking of the land, or was it a payment for the burden and distress Tufnel had suffered?). Moreover, under FRCP Rule 14 DiBergi can implead Tufnel as a third-party defendant and seek indemnification if he believes that the burden of the suit should fall on Tefnel's shoulders.

However, in the even the court does find that Tufnel is a necessary party, we must then look to whether he would be classified as an indispensable party. This would first require a showing that Tufnel is not subject to personal jurisdiction (which he clearly is before an Oregon court as an Oregon resident), or that bringing Tufnel into the action would destroy subject matter jurisdiction. Bringing Tufnel into the action would only destroy subject matter jurisdiction if Tufnel were brought into the action as an additional plaintiff (28 USC Section 1332 requires that all plaintiffs be completely diverse from all defendants). If this were to occur, we would then need to consider whether Tufnel would be found indispensable, meriting dismissal of the action.

Indispensable Party

Looking to FRCP Rule 19(b), a party is classified as indispensable after a court considers (1) the extent a judgment rendered in the absence of that party would harm parties already in the action; (2) the extent to which prejudice can be lessened or avoided; (3) whether a judgment rendered in the absence of that party will be adequate; and (4) whether the plaintiff will have an adequate remedy if the action is dismissed.

Here, a judgment without Tufnel will result in little harm to DiBergi, and that harm can be almost completely avoided in a separate action against Tufnel or via an impleader. Second, the prejudice can easily be lessened or avoided if the court shaped a judgment for St. Hubbins in such a way so as to avoid a double or inconsistent judgment (through a finding as to what the damages in the 1982 action were meant to compensate); third, a judgment without Tufnel will be adequate, since the parties will be accorded complete relief. Fourth, if the action is dismissed we can assume that St. Hubbins may be able to pursue an action against Tufnel since the extent of the land was misrepresented to him. Despite this fact, the factors present do not provide a substantial enough basis for finding Tufnel to be an indispensable party.

Accordingly, not having found Tufnel to be necessary nor indispensable, DiBergi's motion for dismissal would likely be denied.

Conclusion

DiBergi likely would be unsuccessful in both his motion for summary judgment on preclusion grounds, and his motion to dismiss on the basis that Tufnel should be joined as a party.

Essay Question #1

Gerry Fleck is a dog breeder living near Massena, New York. His specialty is breeding purebred Tibetan Mastiffs. His regular advertisements in the nationally circulated Dog World Magazine announce that he is interested in buying or selling breeding-quality Tibetan Mastiff puppies. One day, he received a telephone call from Meg Swan, another breeder located in Oklahoma. Swan knew of Fleck because Swan's monthly advertisements in Dog World Magazine often turned up on the same page as Fleck's ads. Swan told Fleck that he could purchase the first two puppies in a new litter of Tibetan Mastiffs for \$2000 each. Swan invited Fleck to come to Oklahoma in order to select the two puppies. Fleck traveled to Oklahoma and made his selections. Swan agreed to ship the puppies to Fleck in New York as soon as the puppies were old enough to be separated from their mother. When they arrived at Fleck's farm, however, it was evident that the puppies were sick. Fleck had the puppies treated, but he decided that he did not want the puppies because they might not be suitable for breeding because of the illness. After the puppies recovered, he sent them back to Swan.

Swan got very angry at this turn of events. She did not feel responsible for the illness. She thought that Fleck had overreacted to a very minor problem with the puppies. Swan posted a message in a Tibetan Mastiff chat room on the internet, warning other breeders and Mastiff lovers not to deal with Fleck because of this incident.

Fleck in turn sued Swan in the United States District Court for the Northern District of New York. Fleck sued for return of the purchase price of the puppies (\$2000 each), veterinary bills (\$1050 total for the two dogs), and intentional interference with prospective advantage (\$70,000 in possible lost future income).

Swan has responded to the lawsuit with a motion to dismiss. Please draft an opinion for the court, addressing and resolving the issues Swan would raise in that motion.

Essay Question #2

Nigel Tufnel and Marty DiBergi were neighbors with adjoining properties near Portland, Oregon. In 1982, a dispute arose between the two when DiBergi dug a large drainage ditch along the northern boundary of his property. This altered the topography and natural watershed substantially. Soils and trees on Tufnel's property collapsed, as did the line fence separating the two properties. Tufnel's 1982 complaint, filed in Oregon state court, alleged that DiBergi violated Oregon law because he violated his duty of lateral support to the adjoining property, causing injury to and interference with Tufnel's real property. For these alleged violations, Tufnel requested: (1) restoration of the line fence, (2) restoration of the eroded portion of his property, and (3) \$10,000 in general damages.

DiBergi's answer to the 1982 complaint admitted that DiBergi and Tufnel owned adjoining parcels and that DiBergi had dug the ditch along the northern boundary of his property. DiBergi denied all other allegations of the complaint. In April 1983, the parties settled the case. DiBergi agreed to pay Tufnel \$1,500 for all the alleged damage and plant grass seed along the drainage ditch to prevent further erosion. Pursuant to the settlement, at the request of the parties, the trial court entered an order dismissing Tufnel's suit "on its merits and with prejudice."

In 1985, Tufnel sold his land to David St. Hubbins. St. Hubbins, a citizen of California, bought the land for a weekend retreat. Tufnel never informed St. Hubbins about the lawsuit, even though they had once been members of the same heavy metal band. St. Hubbins had his land surveyed in 2004. St. Hubbins learned that the line fence was not located on the boundary line with DiBergi's property; the fence had been built 16 feet north of the true boundary between the properties. In other words, the survey showed that the St. Hubbins property actually included a strip of about 16 feet wide that was previously thought to belong to DiBergi. This strip was where DiBergi had dug the ditch in 1982.

St. Hubbins did not act on this information until the following spring, when DiBergi decided to cut down some trees on the south side of the fence; according to the 2004 survey, the trees were on St. Hubbins' property. St. Hubbins asked DiBergi not to cut the trees, but DiBergi refused. After DiBergi removed the trees, St. Hubbins, armed with his new survey, sued DiBergi in federal court in Oregon. The suit sought substantial damages for trespass to land, conversion (cutting and taking the trees), and for a declaration of the true location of the boundary line between the two properties. DiBergi denied many of the allegations of the St. Hubbins' complaint. DiBergi moved for summary judgment based on principles of preclusion. DiBergi also contended that the St. Hubbins suit had to be dismissed because Tufnel, still a life-long resident of Oregon, had to be a party to the lawsuit. Will these motions succeed in federal court?