

McCormack

There are four questions. The time allocations reflect the relative weight to be given your answers in the grading. The time allocations add up to 2.5 hours and you are given 3 hours for the test. You should use a half hour for reading and outlining before beginning to write your answers.

I.

(30 minutes)

Peter Piper placed his two-year-old son Paul in a nursery provided for patrons of defendant Dietrying Fitness Center (DFC). After almost an hour of exercising, Mr. Piper was called to the nursery because Paul had been found lying on his back, crying.

Mr. Piper immediately took Paul to the family pediatrician. Medical examination revealed a skull fracture at the back of his head, and a perforation of the skull between the two bony prominence at the base of the head.

The nursery had three adult attendants to care for approximately 31 children. At the time of the incident, the only attendant then in the room testified that she heard a loud “thud.” She also testified that her back was turned and she did not see Paul fall. Another attendant who emerged from an adjoining room where infants were kept stated that she saw her co-worker pick Paul up from the floor.

P sues all of the individual attendants as well as DFC. At trial, although both sides willingly speculated, neither side was able to present any direct evidence as to how the injury occurred. Mr. Piper introduced evidence that the drinking fountain in the play area could have had water in front of it to make a slippery surface. No witnesses from either side observed anything abnormal about Paul’s actions or appearance when he arrived at the nursery.

Assume that the jury returns a verdict for Piper against all defendants and all defendants appeal. As a judge on the court of appeals, what would you decide and why?

II.

(1 hour)

Dagwood Detention Services, Inc. (DDS) designed and marketed the Dagwood Home Detention System (the System). The System is intended to permit the monitoring of persons who are convicted of crimes and not imprisoned, but rather are to be under house arrest.

Daschell County was a heavily populated county which had in its boundaries a large metropolitan area. The Daschell County Board of Supervisors was experiencing serious problems with overcrowding of its jail, so it decided to use the System to take some of the pressure off the criminal justice system. They wanted to use the System because the only other alternative was to build an addition on the county jail, an alternative they decided was too expensive. The Board of Supervisors decided to lease the transmitters from DDS.

The Daschell County police were charged with the responsibility for implementing the System. The police department personnel responsible for the System were trained in the use of the System by DDS. The county parole board was instructed by the Daschell County Board of Supervisors to release 50 inmates from the jail. These 50 inmates were to be fitted with the System ankle transmitter and placed under house arrest for the remainder of their sentences. This alternative was specifically sanctioned by state statute.

The System worked through telephone monitoring. The ankle transmitter was fitted on the offenders and a receiver attached to the telephone. Any tampering with the ankle transmitter or the telephone receiver would

result in a telephone signal to the police department. Under the procedures established by the County Board, the signal would require the police to investigate immediately to determine if the offender had broken house arrest.

One of the 50 offenders selected to be fitted with the ankle transmitter for house arrest was Dale Dun. Dun had recently been convicted of sexual assault. He was a repeat offender. He had served 30 days of a nine-month jail sentence. Dun was assigned to house arrest at his mother's house, with her permission. He was fitted with the ankle transmitter and the receiver was attached to his telephone. He was warned by the county judge before being released that he was under house arrest and under no circumstances was he to leave the house. The house arrest was to last for the remaining eight months of his sentence.

For the first six months of his house arrest there was no problem. Then, one morning, the police dispatcher received a signal indicating that the ankle transmitter was no longer working. The dispatcher delayed sending a squad car to Dun's address until early afternoon. That morning Dun walked away from his house and sexually assaulted and beat a woman, Paula, who lived two houses away. At the time of the assault and beating Paula was six months pregnant. Her child, Phyllis, was born with birth defects as a result. Her spouse, Peter, rushed to the hospital emergency room after he was notified of her injuries. He suffered serious emotional distress as a result. Since the accident, Paula has been withdrawn. Her relationships with her ten-year-old son, Phil, and her husband have suffered as a result.

The ankle transmitter failed to work because of battery failure. DDS had placed powerful batteries in its transmitters. The batteries were intended to work for a year without changing. Two months after Dun committed his crime, DDS realized that the batteries it used in its ankle transmitters had a shorter life than they thought. Some of the batteries lasted only six months. The problem with the batteries was due to a flaw in the design of the batteries that caused them to lose their energy more quickly than expected. The problem was not known by DDS at the time the ankle transmitters were leased to Daschell County, nor could it have been discovered.

Paula, Phyllis, Peter, and Phil brought suit against Daschell County and DDS. You are the law clerk to the judge in the case. She has asked you as her law clerk to give her a roadmap through the issues that are likely to arise in this case. Describe each issue, what rulings she probably will need to make, and explain why she should decide as you recommend.

III.

(30 minutes)

On the evening of March 12, 2002, plaintiff was walking along Roseville Road. Because the sidewalk narrowed as the road crossed Arcade Creek, plaintiff was concerned for his safety and decided to use the nearby Union Pacific railroad bridge to cross the creek. He had an unobstructed view of the train tracks, which ran in a straight line. The metal grid area on the side of the bridge is three feet, 10 inches wide. Plaintiff walked on the walkway portion of the metal grid area, which is one foot, nine inches wide. Plaintiff understood he did not have Union Pacific's permission to use the bridge and it would be hazardous to be on the bridge while a train was crossing it.

While plaintiff was on the bridge, a Union Pacific freight train approached from the opposite direction at a speed of approximately 50 miles per hour (which was less than the speed limit). The conductor first saw plaintiff when he was about 200 feet away. The engineer sounded the horn. Plaintiff saw the train's lights and heard the horn, but he did not take evasive action. As the train passed, it either struck plaintiff or threw him to the ground. Plaintiff admitted there was nothing Union Pacific's train crew could have done to avoid the accident. Union Pacific has a "zero tolerance" policy towards trespassing on railroad property, responds to reports of trespassing with warnings or arrests when possible, and sponsors community awareness programs about the risks of trespassing on railroad property. Standard chain-link fences are not an effective deterrent against trespassing. A tamper-proof fence would cost about \$ 1 million per mile and could endanger people

in the event of a derailment.

Defendant submitted deposition excerpts supporting the foregoing assertions. Of specific interest, plaintiff's deposition testimony showed:

"Q. Certainly you knew that it was a hazard to be on the railroad bridge if there was a train, correct?"

"A. Yes.

"Q. Did you view walking on the railroad bridge as a safe pathway?"

"A. Yes.

"Q. Did you view walking on the railroad bridge a safe pathway if there was a train that would be occupying that bridge at the same time you would be on it?"

"A. I wasn't sure if that would be safe or not. I'm used to riding the light rail, and trains pass within that far of me all the time on Light Rail. So I assumed it would be safe, yes."

Plaintiff also testified he did not see the train until it was 20 to 30 feet away. He could not explain why he did not notice the train earlier (other than to speculate the track might dip before it reaches the bridge). He said it "seemed like one second" that the train sounded its horn. When he saw the train "[t]here was nothing I could do. The train was moving at a high rate of speed, so there wasn't time." He did not remember whether he moved to the edge of the bridge. He did not remember if he fell down. He also said he continued to walk upon seeing the train. When asked why he did not hug the railing, he said, "There wasn't time." When asked, "There was time to continue walking, wasn't there?" he said he did not remember. When asked if he knew what caused him to fall, he said, "No, either the wind blast of the train or being struck by the train." He admitted he was guessing. He did not remember whether he was standing when the train passed him. When plaintiff heard the train whistle, he waved, because when he used to live near railroad tracks the train conductors would beep the whistle and he would wave. When asked whether, in his opinion, there was anything this train crew could have done to avoid the accident, plaintiff said, "No, I don't think there was."

Train conductor Patrick Marino testified in his deposition that the walkway consisted of steel plate grating bolted to the bridge structure and was common on railroad bridges. Such walkways are not for pedestrians, but for railroad personnel in case the train breaks down. Marino never observed any warning signs or barricades that would prevent pedestrian use. He had observed non-employees using similar walkways on other bridges, but not the Arcade Creek bridge. He first saw plaintiff about 15 or 20 feet from the east end of the bridge and about 200 feet from the train. Plaintiff did not react to the horn but just kept walking. When asked if there was anywhere plaintiff could have moved back away from the train to avoid being struck, Marino said, "No," but then said, "He could have laid down," and that was the only thing he could have done to avoid being hit.

Union Pacific agent Blair Geddes testified there are no signs on the bridge, he has responded numerous times to reports of trespassers, and there was another incident in which two males were hit by a train on the same bridge as they ran from a confrontation with other men in the creek area. Defendant's director of police operations, George Slaats, estimated in a declaration that more than 95 percent of the trespassers are old enough to be aware of the risks of walking on or next to railroad tracks.

If all of this information were developed in discovery and both parties moved for summary judgment, what should the court decide?

(*See Christoff v. Union Pacific R.R. Co.*, 36 Cal. Rptr. 3d 6(2005))

IV

(30 minutes)

James Smith and Barbara Jones both worked in the main factory of International Truck and Engine Company (ITEC). In response to rumors of sexual harassment in the factory, ITEC's personnel department began interviewing employees about workplace behavior. On May 8, 2002, Mr. Smith was interviewed about his knowledge of sexual harassment at the plant.

During the course of the investigation, and shortly before Mr. Smith's scheduled interview, Ms. Jones complained to supervisors that she had been subjected to inappropriate sexual conduct. She did not provide the name of the alleged harasser.

Ms. Jones was interviewed shortly after Mr. Smith's interview on May 8, 2002. She told the investigators that she had been subjected to sexual conduct by a male coworker with whom she had worked directly since September 2001. She reported that this employee:

- had pulled up his gym shorts and intentionally exposed his penis to her;
- had patted her crotch five or six times;
- had repeatedly slapped her on her buttocks while exclaiming, "That's a tight butt, tight booty";
- had grabbed and squeezed her breast while she was bent over a trash can; and
- had repeatedly asked her for sex (using words such as "get down" and/or "do the wild thing," among other phrases).

She also reported that this conduct made her extremely uncomfortable, to the point that she dreaded coming to work. Ms. Jones added that she consistently refused the coworker's requests for sex, oftentimes appealing to the fact that they were both married in hopes that it would stop.

Ms. Jones told the investigators that she was aware that ITEC's harassment policy includes multiple avenues for reporting harassment, but she chose not to report the misconduct because she felt reluctant to "tell on" a fellow "Union brother." The investigators advised Ms. Jones of ITEC's commitment to ensuring a workplace free of inappropriate harassment and requested that she disclose the name of the employee so that management could take the proper steps to ensure that such conduct did not continue. She refused. She did, however, provide certain information which allowed the harasser to be identified: (a) he had been assigned to perform "fill in" work in Ms. Jones's area for another employee whom had been out on leave, since September 2001; (b) he had just worked with Ms. Jones the prior day; (c) he was African-American; and (d) he wore gym shorts to work.

Following Ms. Jones' interview, and in order to identify the alleged harasser, the investigators compared Ms. Jones's interview responses against their other interview notes and International's records. Based on their analysis they identified Mr. Smith as the possible harasser. During his May 8, interview, Mr. Smith was wearing the type of gym shorts that Ms. Jones described having witnessed the male coworker wear on the day he allegedly exposed his penis to her. Mr. Smith's work record confirmed that he had commenced working in Ms. Jones' area around September 2001 and had worked with her directly the day before her interview. And several other interviewees reported that they had heard rumors that Mr. Smith had exposed himself to a female coworker. At least one interviewee recalled overhearing Jones complain to coworkers that a male coworker had shown her his penis.

On August 15, 2002, the investigators met again with Mr. Smith. They presented him with Ms. Jones' allegations. Mr. Smith admitted that he had patted Ms. Jones on the butt, but blamed it on the close quarters of their work area and her behavior. He also admitted that they had engaged in sexual conversations. Mr. Smith denied the remainder of the allegations. He complained that Ms. Jones had herself engaged in inappropriate sexual conduct, including that she had pulled down his shorts and underwear (exposing his

genitals) while he had both hands filled with pistons. The reason he patted her on the butt was that she confronted him in tight spaces threatening to pull down his shorts and he patted her to get around her and out of the area. Following Mr. Smith's interview, the interviewers conducted several additional interviews to fully investigate the complaints against Ms. Jones. Mr. Smith's report was corroborated by other co-workers who also said they had had their pants pulled down by Ms. Jones. One co-worker reported that on at least one occasion in the lunchroom, Ms. Jones intentionally flashed her breasts at her coworkers.

Ms. Jones was interviewed a second time to allow her to respond to the allegations of inappropriate sexual conduct against her. She acknowledged the "breast flashing" incident, but claimed that it was unintentional and happened while she was attempting to correct a "backwards" shirt. She denied the pants-pulling incident, but admitted that on at least one occasion she had threatened an employee with "snap-up your gym pants" that "someone should pull your pants down" or "someone is going to pull your pants down."

Based on a review of all of the evidence and the demeanor and credibility of the witnesses, the investigators concluded that both Mr. Smith and Ms. Jones had violated the harassment policy. They recommended that termination was the appropriate discipline for the violations committed by these employees according to ITEC's harassment policy. Based on the report and recommendations of the investigators, ITEC terminated both Mr. Smith and Ms. Jones in January of 2003.

Jones filed suit against Smith and Smith filed counterclaims against her, both alleging intentional torts on the part of the other. You are the trial judge. What will you tell the jury they need to find and why?

(*See Smith v. Int'l Truck & Engine Corp.*, 2006 U.S. Dist. LEXIS 71881 (2006))