CIVIL PROCEDURE II  
SPRING 2012  

Professor Josh Douglas  

Final Examination  

INSTRUCTIONS  

1. This is an open book examination, with a few exceptions. You may bring in to the exam any course materials I assigned or handed out and any notes or outlines you have prepared. You are prohibited from bringing in any commercial outlines or materials prepared solely by someone else.  

2. I have provided approximate time allocations for each of the questions, and they are weighted accordingly. You have a 20 minute reading period during which you may only read the exam and outline your answer; you may not begin to write your answer during this time. You then have three hours to complete the exam.  

3. Remember not to add facts to the problem. Apply the law we have learned to the facts I have provided. Make sure to present and analyze both sides’ argument for each issue.  

4. Relax. You are an excellent group. Do not lose your sense of humor or calm, and you will do well. Read each question carefully (twice!). Then answer my questions, not yours! Keep your answer organized, using headers and paragraph breaks where appropriate. If you choose not to type your answer, please write clearly.  

5. Congratulations on completing your first year of law school!
John Calipari is the head basketball coach of the men’s basketball program at the University of Kentucky (“UK”). On April 2, 2012, his team defeated the Kansas Jayhawks to win the NCAA national championship. The basketball team’s win, however, was not without controversy. Coach Calipari is known to recruit the best high school basketball players in the country, with the understanding that they will likely stay at the University of Kentucky for only one year before they leave to go play professional basketball in the NBA. Many commentators have lambasted this “one-and-done” philosophy as exploiting high school players for Calipari’s benefit. In addition, Calipari has had basketball success at two prior universities, but the NCAA has vacated those seasons because his players were declared ineligible.

Rick Pitino is the men’s basketball coach at the University of Louisville, a bitter rival of UK. In addition, Pitino and Calipari have an acrimonious history. Although Pitino helped Coach Calipari land his first coaching job, the two have grown to dislike each other immensely. Indeed, Calipari’s team beat Pitino’s team in the 2012 semifinals of the NCAA basketball tournament, leading Calipari to comment in the media, “It feels good to beat Pitino again.”

On April 3, 2012, the sports website ESPN.com ran several stories about the University of Kentucky’s big win. One of those stories, written by well-known and highly-respected freelance reporter (and law professor) Steven Clowney, stated as follows:

Kentucky Wildcat fans should enjoy their merriment at winning the national championship while they can, because it is all going away in short time. When the game against Kansas ended and the Wildcats were celebrating, University of Louisville coach Rick Pitino had this to say: “Coach Calipari’s celebrations will be short lived, because he won’t be celebrating next week. I know for a fact that Calipari engaged in recruiting violations with respect to UK’s big star, Anthony Davis. The NCAA will be vacating UK’s 2011-2012 season, just like it did for Calipari’s previous so-called successes at other universities. He will finally be exposed as a cheat and a fraud. He is bad for the game, and I hope he cannot land another job in college basketball, or, for that matter, anywhere else.”

That same day, Calipari and his team returned home to Kentucky from New Orleans, where they had played the game against Kansas. That night Calipari took his family out for ice cream at Graeter’s, his favorite Lexington establishment. Expecting to receive a hero’s welcome, instead the workers at Graeter’s refused to serve him. “We don’t serve ice cream to those who have to cheat to win,” the manager said.

Upset at the treatment he was receiving, Calipari decided to investigate why Kentucky fans had turned against him so soon after his team won the national championship. He quickly realized that Clowney’s story on ESPN’s website was tarnishing his reputation. The obvious next step was for Calipari to contact his lawyers.
Calipari’s lawyers decided that the best course was for him to sue both Pitino and ESPN in state court for defamation under Kentucky law for $200,000. Immediately upon receiving the complaint, Pitino and ESPN removed the case to the United States District Court for the Eastern District of Kentucky. Calipari lives full-time in Kentucky, while Pitino maintains his permanent residence in Florida and ESPN is incorporated in and has its principal place of business in Connecticut.

Pitino and ESPN then moved to dismiss the complaint for failure to state a claim, asserting that Calipari did not provide enough factual detail in his complaint. Specifically, the defendants pointed to a 2006 Kentucky Court of Appeals decision, Smith v. Gillespie, in which the court held that “under Kentucky Rule of Civil Procedure 8.01 plaintiffs who are ‘public figures’ who allege defamation must assert in their complaint specific facts to show that the defendant engaged in the defamation with ‘actual malice,’ that is, with an intent to harm.” The language of Kentucky Rule of Civil Procedure 8.01 is identical in all material respects to that in Federal Rule of Civil Procedure 8. Although the Kentucky Supreme Court refused to review this case, in the 2008 legislative session Kentucky state senator Paul Salamanca introduced a bill “to reverse Smith v. Gillespie and remove any heightened pleading standard for ‘public figure’ plaintiffs asserting defamation.” The bill passed both Kentucky houses, but the Governor vetoed the bill based on the “unfairness to defendants such as newspapers and reporters in the proposed new law,” and the legislature was not able to override his veto.

After dispensing with the required assertions of jurisdiction and venue, Calipari’s complaint stated, “On April 3, 2012, ESPN ran a news story that quoted Pitino making materially false statements about me, defaming my good name and reputation.” The complaint also explained to a sufficiently plausible level the content in the news story that allegedly defamed Calipari and the injury he suffered. The only thing missing, therefore, was an assertion of actual malice (with accompanying factual support), which Pitino and ESPN argue makes Calipari’s complaint insufficient under Smith v. Gillespie.

Calipari responds to the motion to dismiss, alleging that his complaint meets the federal standard. He argues that the federal court is not required to follow Smith v. Gillespie in construing his complaint.

**Question One [30 points/30 minutes]: You are the district judge assigned to this case. Write an opinion that discusses each side’s arguments and resolves the motion to dismiss.**

Assume for the purposes of the remaining questions that the court grants the motion to dismiss as to ESPN, but denies the motion to dismiss with respect to Pitino [this should have no bearing on your analysis of Question One].

At the same time that Calipari is engaged in litigation against Pitino, the University of Kentucky decides to initiate an investigation into Pitino’s allegations. On April 4, 2012, Eli Capilouto, UK’s President, sends an email to Mitch Barnhart, UK’s Athletic Director, stating, “I want your investigation into these serious allegations of recruiting violations to
be your top priority. Be sure to include our General Counsel’s Office in your inquiry. Let’s make sure the University of Kentucky is protected.”

Upon receiving this email, Barnhart sends two emails of his own. First, he sends an email to Nicole Huberfeld, UK’s General Counsel (the University’s main lawyer), that states:

Nicole-

Looks like John Calipari might have us in hot water. I don’t know if anyone will sue us, but let’s be prepared. Can you have someone from your office accompany me when I interview the key people involved?

Thanks,

-Mitch

Second, he sends an email to Calipari, which states:

John-

Congratulations on winning the other night. That was very exciting!

I’m sure you’ve seen the Clowney story on ESPN.com. Is there any truth to it? I’d hate to have to fire you right after winning the national championship. Let’s talk.

By the way, don’t forget that the UK Athletic Department’s regulations state that you have to keep relevant electronic data on your computer only until the end of each season.

-Mitch

Immediately after Nicole Huberfeld received Barnhart’s email, she sends one of her own to Robbie Corley, the University of Kentucky’s Director of IT. In it, she states,

Robbie-

I know we have talked about implementing a full-blown electronic back up system and document retention policy for the University to follow. But it looks like that will cost a lot of money, so let’s hold off for now. We can continue to let each department decide what electronic data to retain and how to store it.

Thanks,

-Nicole
Barnhart then begins his investigation. He decides to interview Anthony Davis, the player mentioned in Clowney’s news story, as well as Davis’s parents. He conducts the interviews in his office and asks Richard Ausness, a junior lawyer in UK’s General Counsel’s Office, to join him. During the interview, Davis admits that Calipari gave him a cell phone during his senior year of high school “so that I could reach Coach Cal whenever I wanted.” Davis’s parents admit that Calipari gave them over $1,000 worth of UK gear before Davis officially signed with UK. These gifts would likely constitute NCAA recruiting violations. Both Davis and his parents then sign a written statement making these same admissions.

Barnhart and Ausness also interview Calipari in Calipari’s office. Calipari denies that he ever gave a cell phone or UK apparel to Davis or his parents. When Ausness asks if Calipari has any emails regarding his recruitment of Davis, he says that he deleted them the day before pursuant to the Athletic Department’s regulation stating that he needed to retain them only until the end of the season.

Barnhart and Ausness immediately report the results of their interviews to Huberfeld, UK’s General Counsel. Huberfeld asks Ausness to write up a summary of the interviews for her review. After considering Ausness’s written summary, she determines that she believes Calipari. She sends an email to both President Capilouto and Athletic Director Barnhart stating her conclusions and closes the investigation.

Most UK basketball fans, however, are still concerned that Calipari violated NCAA rules in recruiting Davis. Steven Clowney, the freelance reporter and law professor who wrote the story for ESPN.com, is also a UK basketball season ticket holder. Based on his investigation, he believes that he was defrauded in watching a team that ultimately was ineligible. Because Clowney is also a renowned legal scholar, he knows about the federal law, enacted in 2000, that makes it illegal for a “public figure” to deprive the public of his “honest services.” Specifically, the federal law provides, “A public figure who deprives the public he or she serves from honest services, that is, honestly carrying out the duties of his or her position, is liable to any plaintiff who is so injured.”

Clowney files suit against both the University of Kentucky and Calipari in the United States District Court for the Eastern District of Kentucky for violating this federal law. He claims that as a season ticket holder he suffered injury from Calipari’s deprivation of honest services in fielding a basketball team based on recruiting violations. He seeks an injunction against further “questionable recruiting practices” by the University of Kentucky’s men’s basketball program, as well as damages in the amount of $50,000. He states that his damages include the cost of his season tickets as well as compensation for the injury to his reputation among professors at other law schools, because he is now affiliated with a University that “cheats to win.” His complaint demands a jury trial.
Question Two [60 points/60 minutes]: You represent Clowney. What discovery requests will you make on the University of Kentucky and Calipari? What objections would you expect them to make? How do you expect the court to rule on the discovery disputes?

Question Three [20 points/20 minutes]: Is Clowney entitled to a jury trial for his claim? Why or why not? Be sure to address the arguments on both sides of this issue.

Assume for the purposes of the remaining questions that Clowney receives all of the emails and written statements referenced above [this should in no way impact your analysis in Question Two.] Assume also that the court grants Clowney’s request for a jury trial [again, this should in no way impact your analysis in Question Three].

Calipari files a counterclaim against Clowney for defamation under Kentucky law based on the ESPN article discussed above. Assume that the court has proper jurisdiction over this claim, and that the complaint asserting defamation meets whatever standard of specificity the court deems is necessary. Calipari and the University of Kentucky then move for summary judgment against Clowney regarding the honest services claim. Clowney cross-files for summary judgment against Calipari regarding the defamation claim.

Question Four [30 points/30 minutes]: You are the district judge assigned to this case. Write an opinion resolving the defendants’ summary judgment motion against Clowney, as well as Clowney’s summary judgment motion against Calipari.

Assume for the purposes of the remaining questions that the court denies the defendants’ summary judgment motion but grants Clowney’s summary judgment motion [this should in no way impact your analysis in Question Four.]

The jury returns a general verdict on the honest services claim in favor of Clowney and awards him $50,000. Calipari and the University of Kentucky move for judgment as a matter of law, or, in the alternative, for a new trial, asserting that Clowney failed to prove that Calipari is a “public figure” for purposes of the federal honest services statute. The defendants state that besides establishing that Calipari is the men’s basketball coach at the University of Kentucky and that UK has one of the most storied programs in college basketball history, Clowney failed to put on any affirmative evidence that Calipari is a “public figure.”

Question Five [20 points/20 minutes]: You are Clowney’s lawyer. How would you respond to the motion for judgment as a matter of law, or, in the alternative, for a new trial?

Assume for the purposes of the remaining question that the court denies the motion for judgment as a matter of law, or, in the alternative, for a new trial, thereby upholding the
Even though Calipari lost to Clowney in Clowney’s honest services suit, he has not forgotten about his defamation action against Pitino. [Recall that the court denied Pitino’s first motion to dismiss the defamation claim.] Under Kentucky law, a plaintiff must prove five elements in a defamation action: (1) a false statement, (2) about the plaintiff, (3) which is published, (4) which causes an injury to the plaintiff’s reputation, and (5) if the plaintiff is a “public figure,” that the defendant made the statement with “actual malice,” that is, with an intent to harm.

Pitino moves once again to dismiss Calipari’s defamation suit against him, this time based on the verdict in Clowney v. Calipari.

**Question Six** [20 points/20 minutes]: What about the decision in Clowney v. Calipari led Pitino’s lawyers to seek dismissal of Calipari’s defamation action against him? Will he succeed in his argument?

**BONUS QUESTION:** [0 points/10 seconds] What is Professor Douglas’s favorite ice cream flavor?

CONGRATULATIONS ON FINISHING YOUR FIRST YEAR OF LAW SCHOOL!
HAVE A GREAT SUMMER!!!