

CIVIL PROCEDURE

Professor Ira Steven Nathenson, St. Thomas University School of Law

FINAL EXAMINATION, FALL 2019

Wednesday, Dec. 4, 2019—4.0 hours

You must read the instructions carefully before beginning.

When time is called, all work must cease.

This is a closed-book exam. With the exception of the Exam Supplement and exam materials described below, you may not refer to any other materials during this exam.

Time and length. This document has eighteen (18) pages (including this cover). The examination is four (4.0) hours long. Once the proctor indicates that time has started, make sure that you have all of the pages. If you do not, alert the proctor immediately.

Supplement. Included is an Exam Supplement with relevant sections of the Constitution, federal and state statutes, and sections of the Federal Rules of Civil Procedure (“FRCP”). The Exam Supplement includes a federal district court map.

Exam materials & AGN. Indicate your final exam AGN number on this exam, the Exam Supplement, your scantron sheet, any Exam4 laptop-written answer, and on any bluebook(s). Do not include your name or student ID, and do not include any other information that may reveal your identity. At the end of the exam, you must turn in all materials. You may not write anything on, or erase anything from, any examination materials after time runs out.

Time and scoring. The exam is four hours (240 minutes) long. Budget your time and use it carefully. The times suggested below for the essays and multiple-choice questions add up to only 200 minutes (3 hours and 20 minutes), so you may use the extra 40 minutes of time as padding to help you make sure that you complete the exam.

- *Essay questions (three questions, 110 minutes total):* Essay question one is 20 minutes. Essay questions two and three are 45 minutes each. Write your answers in a bluebook or on a computer with Exam4.
- *Multiple-choice (30 questions, 90 minutes total):* The first ten (10) multiple-choice questions are after the essays and build upon or vary facts from the essays. The remaining multiple-choice questions (11-30) are independent of the essay facts. **[Multiple-choice Questions 1-10 are posted online; the remainder are not.]**

Instructions specific to multiple-choice questions. Use a # 2 pencil to enter answers on your scantron sheet. Make your marks on the scantron sheet clear. If you change an answer, be sure to erase any marks you intend to remove. The only document relevant to scoring multiple-choice questions is your scantron sheet, so make sure you enter things correctly on the scantron sheet before time runs out. Markings in your examination book do not count. Except where otherwise

expressly stated, the facts of each multiple-choice question stand on their own. If more than one answer seems to be correct, then choose the best answer.

Instructions specific to essay questions.

- *Writing.* Write your answers to essay questions using bluebook(s) or a computer with Exam4. (Computer use is subject to STU computer examination guidelines.) Legibility, proper writing, and good organization are expected and are part of your score.
- *Bluebooks.* If you use bluebooks, write in pen. Write on every other line and, except where needed to make an addition or clarification, on only one side of each page. If you use more than one bluebook, please number your bluebooks (e.g., “1 of 2,” “2 of 2”).
- *How to address essays.*
 - Read the call of the question and the facts carefully—at least twice—before you outline and write.
 - Raise, discuss, and decide all issues reasonably raised by the call of the question, whether or not they are dispositive, and whether or not resolution of one issue makes discussion of other issues technically unnecessary. However, do not engage in negative issue-spotting, which is discussing: 1) issues or parties falling outside of the call of the question, or 2) tangential issues that, although technically falling within the call of the question, are nonetheless frivolous.
 - If you believe you have discovered an error in any essay question, then expressly identify the error in your written answer and resolve it in a reasonable manner.
 - If (and only if) you believe that it is absolutely necessary to assume additional facts, then state what those facts would be and how they would affect your analysis.

THIS EXAM IS CONFIDENTIAL

As a St. Thomas Law student, you are bound by the St. Thomas University School of Law Code of Academic Integrity. In addition, you may not discuss this examination with anyone from this class who has not yet taken this exam. Unless you have written authorization from the Professor, you may not retain or reproduce any part of this examination or related materials. Any breach will be considered to be a serious violation of the Code of Academic Integrity and will be addressed accordingly.

ESSAY FACT PATTERN: THE WAYWARD GOLFER

Luci Rabbit was a golfer. She had an excellent swing and an enormous temper to match her swing. Luci's friends called her "Hoppy Gilmore," a reference to the Adam Sandler movie *Happy Gilmore*, a film about a golfer with an excellent swing and a horrible temper. Luci was born and lived her entire life in Juneau, Alaska. Because the land was so open in Alaska, Luci developed a golf swing so long and accurate that she could hit a puffins bird from 400 yards away. Luci loved to travel the world playing golf, regularly and systematically visiting courses in places besides Alaska, such as Florida, Colorado, California, Georgia, and Hawaii. Luci used some of her golf winnings to buy a hunting lodge in Lake Lanier, Georgia, although Luci never went there.

Luci particularly loved playing golf with her "golf buddies," including Shelly Turtle, a young woman who had been born and lived in Tallahassee, FL. On Valentine's Day 2019 (Feb. 14), Luci went to play golf with Shelly in northern Florida, but Luci forgot her golf clubs. Luci asked Shelly if she could borrow her 7-iron club. Shelly expressed doubt about lending her 7-iron to Luci, telling Luci "You can use my 7-iron club but only if you promise not to aim any balls at anybody or anything." Luci said "fine dude, whatever."

While Luci and Shelly were playing, Luci spotted a nervous-looking man on the other side of a high fence outside of the golf course. The man was walking slowly and smelling the flowers and trees on the other side of the fence, about 450 yards away. The man was wearing a BULLDOGS sweatshirt. Luci laughed and said to Shelly, "See that dumb dog-eared dummy? *He's mine!*" Shelly said, "Don't do it, Luci, I know that guy, that's Atticus Dog. You may think his bark is worse than his bite, but he's known to be very litigious!"

Shelly's warnings to Luci went unheeded. As Shelly shouted "NOOOOOO!," Luci swung and drove the ball hard, over the fence and onto Atticus' nose, knocking him down. Atticus got up and started to yap furiously, barking at Luci "*You hit my nose-posey, I'm going to suuuuuuuue!!*" Luci didn't care, she just laughed and laughed at silly Atticus and yelled back, "Stupid dog, I missed! I was aiming for your head!" Shelly, however, was green with anger at Luci for behaving so poorly, grumbling, "I told you not to do that!" Luci responded, "It's your fault, dude. *You trusted me!*" Shelly said, "That fence is the Florida-Georgia border. You purposefully aimed that ball all the way from Florida to Georgia!" Luci said, "I didn't aim the ball at Georgia, I aimed it at that dog-eared loser!"

Atticus, a life-long Georgia Bulldogs fan, was born and lived in Whigham, Georgia, just north of the Florida border. Because of Luci's attack, Atticus suffered a broken nose that required extensive surgery to repair. On March 1, 2019, Atticus filed a federal-court lawsuit in the United States District Court for the Middle District of Georgia (in Albany, GA, about 75 miles from the Florida golf course) against Luci Rabbit for battery, seeking "bazzillions and bazzillions of dollars, and at the very least \$75,000.01 exclusive of interest and costs." He alleged that Luci had purposefully aimed the ball at him while he was "at home" in Georgia. A process server went to Luci's house in Juneau, Alaska on March 10, 2019 and knocked on the door; because nobody was home, he left the summons and complaint between the screen door and front door. A few hours later, Luci found the papers and read them. She shook her head and muttered, "Dumb Dog!"

Additional relevant information and instructions for essay questions:

- Regardless of the names, photos, and story, assume that Atticus, Luci, and Shelly are human.
- For purposes of all the essay questions, assume that Georgia's law is as follows (regardless of what Georgia law may be in the real world):
 - Long-arm: "A court of this state may exercise personal jurisdiction on any basis not inconsistent with the Constitution of . . . the United States."
 - The statute of limitations for all tort claims is one year after the date of the event giving rise to the tort claim.

Atticus Dog
Victim



Luci Rabbit
(a/k/a "Hoppy Gilmore")



Shelly Turtle
FOL (friend of Luci)



ESSAY QUESTION ONE (20 minutes)

On March 25, 2019, Luci timely answered Atticus' complaint, alleging lack of personal jurisdiction. On April 2, 2019, she amended her answer to add the defense of lack of venue. On April 3, 2019, she amended again to add the defenses of failure to state a claim and insufficient service of process. On April 4, 2019, she amended yet again to add the defense of lack of subject-matter jurisdiction. On June 5, 2019, Luci moved to dismiss Atticus' complaint on the basis of *all* of these defenses. You are the law clerk to the federal judge presiding over the case of *Atticus v. Luci*. Assuming that all of Luci's amendments were allowed under the FRCP, discuss whether each of these defenses were preserved or waived by Luci's filings. Do *not* discuss the *merits* of the defenses; instead, discuss whether each defense was *waived or preserved*.

ESSAY QUESTION TWO (45 minutes)

Your judge had asked you to write an additional memorandum, solely on the merits of the Luci's motion to dismiss for lack of personal jurisdiction. Assuming that Luci has not waived the defense, tell your judge whether she should grant Luci's motion. Discuss any and all bases for personal jurisdiction that are reasonably raised by the facts, regardless of your conclusion for any particular basis. Once you decide to address a particular basis, be sure to discuss it fully. However, do not negative issue spot or discuss bases that are frivolous under the facts or the law.

ESSAY QUESTION THREE (45 minutes)

Regardless of your answers to essay questions one and two, assume that the court has denied all of Luci's motions to dismiss. During discovery, Atticus learned that Shelly lent Luci her 7-iron golf club. On Feb. 28, 2020, Atticus sought and was granted leave to amend his complaint to add a claim against Shelly for negligent entrustment, alleging that Shelly was negligent in lending her golf club to Luci Rabbit, a person Shelly knew to hit living creatures with her "malicious golf-swinging skills." Atticus sought the same damages against Shelly as he did against Luci.

A few days later, on March 2, 2020, Shelly was playing golf by herself at the Florida golf course near the Georgia border (the same one she went to with Luci back in 2019 when Luci hit Atticus with the golf ball). While Shelly was teeing up her ball at the ninth hole, a process server handed her the summons and amended complaint. "How in the world am I being sued in a federal court in Georgia, I've never been to Georgia except for a trip last year to go to an Atlanta Braves game!!" Shelly spent the remainder of her golf game complaining bitterly to nearby birds and alligators.

A week later, Shelly moved to dismiss Atticus' amended complaint against her on the basis of the one-year Georgia statute of limitations for torts. In opposition to Shelly's motion, Atticus conceded that the statute of limitations had expired, but argued that his amended complaint related back to his original complaint against Luci. Your judge has asked you to write a memorandum discussing whether or not Atticus' claim against Shelly relates back to his original complaint against Luci.

MULTIPLE-CHOICE QUESTIONS

(30 multiple-choice questions; suggested total time of 90 minutes)

Instructions: Use a # 2 pencil to enter answers on your scantron sheet. Make your marks on the scantron sheet clear. If you change an answer, be sure to erase any marks you intend to remove. The only document relevant to scoring multiple-choice questions is your scantron sheet, so make sure you enter things correctly on the scantron sheet before time runs out. Markings in your examination book do not count. Except where otherwise expressly stated, the facts of each multiple-choice question stand on their own. If more than one answer seems to be correct, then choose the best answer.

Note re multiple-choice questions 1-10: Facts needed to answer multiple-choice questions 1 through 10 can be found in the essay fact pattern and in the text of essay questions one through three. Additionally:

- Some of multiple-choice questions 1-10 below provide additional facts or change facts. But any additional or changed facts are relevant to that question only.
- Although the facts of multiple-choice questions 1-10 might build upon or change essay facts, the converse is not true: additional or altered facts found in multiple-choice questions 1-10 may not be used to answer any of the essay questions. Because some of multiple-choice questions 1-10 add or change facts from the essay facts, you are strongly encouraged to complete the essays before turning to multiple-choice questions 1-10.
- The remaining multiple-choice questions (11-30) are independent of the essay facts. **[NOTE: THESE ARE NOT POSTED TO THE WEBSITE]**

1. Was the summons given to Luci sufficient?
 - A. Yes, because Luci never raised any objection to the form or content of the summons, and any objection of insufficient process was therefore waived.
 - B. No, because the summons is the modern equivalent of the *capias ad respondendum*, and crucial to the exercise of court power, any defect in the summons must be strictly construed in favor of a defendant haled before a court.
 - C. Yes, because the complaint and summons were left at Luci's usual place of abode, where a person of usual age and discretion resides.
 - D. No, because service of process must be done via personal service.

2. Does the United States District Court for the Middle District of Georgia have venue over the amended complaint of Atticus v. Luci and Shelly?
- A. No, because neither defendant resides in Georgia, let alone in the Middle District of Georgia.
 - B. Yes, because at least one defendant is subject to personal jurisdiction in the Middle District of Georgia, supplying “fallback” venue.
 - C. No, because the golf ball was launched from the Northern District of Florida.
 - D. Yes, because the golf ball hit Atticus’ nose in the Middle District of Georgia.
3. If Shelly Turtle timely objects to personal jurisdiction, should the court grant her motion to dismiss?
- A. No, because she has sufficient contacts with Georgia.
 - B. Yes, because she lacks any contacts with Georgia.
 - C. No, because she was served within 100 miles of the Georgia federal court, which is about 75 miles from the Florida golf course where she was served.
 - D. Yes, because she was joined as a party by Atticus and not by Luci
4. Did Atticus properly join Luci and Shelly as co-defendants?
- A. No, because the legal theories differ (one is an intentional tort, the other is a negligent tort).
 - B. Yes, because once a party asserts a proper claim against one party, they can “pile on” as many additional claims as they may have against any party.
 - C. Yes, even though the legal theories differ.
 - D. No, because evidence of Shelly’s entrustment of her golf club to Luci is not relevant to proving Luci’s intent to batter Atticus.

5. Assume that Shelly's answer to Atticus' amended complaint against her includes a crossclaim by Shelly against Luci, seeking \$50 for breach of contract. Shelly alleges that on Feb. 14, 2019 (the date of Luci's battering Atticus), Luci asked Shelly to borrow \$50 for lunch after they played golf, and that Luci never paid Shelly back. Is Shelly's crossclaim against Luci properly joined?
- A. No, it does not arise from the same transaction or occurrence underlying Atticus' claims against Luci and Shelly.
 - B. Yes, it's a proper third-party claim seeking indemnification.
 - C. No, it does not arise from a common nucleus of operative fact as Atticus' claims against Luci and Shelly.
 - D. Yes, it's a proper Rule 18(a) "pile it on" claim.
6. As noted in question 5, Shelly's answer included a crossclaim against Luci for \$50 for the unpaid lunch money. Does the court have subject-matter jurisdiction over the crossclaim?
- A. No, because Shelly's claim against Luci is not a proper crossclaim.
 - B. Yes, because Shelly is not a plaintiff suing a third-party defendant, but a co-defendant suing another defendant.
 - C. No, because the facts that are central and material to Shelly's lunch money claim lack a sufficient overlap with the tort claims Atticus made against Luci and Shelly for his nose.
 - D. Yes, because the addition of Shelly's breach of contract claim would not "contaminate" diversity jurisdiction.
7. Suppose Atticus's complaint was instead filed in Florida state court, and asserted claims against both Luci (battery) and Shelly (negligent entrustment). Can the defendants remove the civil action to federal court?
- A. Yes, because the federal court would have subject-matter jurisdiction over all claims and parties.
 - B. No, because the claims are based solely on state law.
 - C. Yes, because federal courts and state courts have "concurrent" jurisdiction over most types of civil actions, except for specialized matters, such as copyright, patents, and plant variety protection.
 - D. No, because removal can never be done if any defendant is a citizen of the state where the state-court lawsuit was filed.

8. During discovery, Luci and Shelly wrote Atticus to demand that he undergo a medical examination to prove the extent of the alleged injuries to his nose. Must Atticus undergo the demanded medical examination?
- A. Yes, but only if Luci and Shelly agree to undergo medical examinations as well.
 - B. No, because Luci and Shelly didn't bother to read the FRCP.
 - C. No, because medical examinations are not permitted under the FRCP.
 - D. Yes, because Atticus put his medical condition "at issue" by alleging that Luci and Shelly are responsible for his injured "nosey posey."
9. Luci refuses to provide initial disclosures to Atticus of the names of any of her witnesses. In response, may Atticus also refuse to provide names of his witnesses until Luci provides hers?
- A. No, because Atticus must comply with the disclosure rules even if Luci does not.
 - B. Yes, because in court, two wrongs do make a right!
 - C. No, because attorneys must produce their work product upon timely demand, and Atticus' list of useful witnesses is work product.
 - D. Yes, the rules allow a party to temporarily delay its own disclosure or discovery as a means to ensure that the other side complies with its own obligations under the rules.
10. Suppose that all persons playing golf at the golf club used by Shelly and Luci on Feb. 14, 2019, are required to sign a contract, which includes the following clause; "Any disputes arising from the use of this golf course must be litigated solely in state or federal courts located in Tallahassee, Florida." Would such a contractual clause, if enforceable, divest the United States District Court for the Middle District of Georgia of personal jurisdiction over Atticus' amended complaint against Luci and Shelly?
- A. Yes, because the forum selection clause establishes personal jurisdiction in Florida.
 - B. No, because contracts cannot substitute for Due Process analysis.
 - C. No, because the forum selection clause is irrelevant to this lawsuit.
 - D. Yes, because the forum selection clause divests personal jurisdiction in Georgia.