FINAL EXAMINATION: CIVIL PROCEDURE

Wednesday, Dec. 2, 2020—4.0 hours

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

Read the instructions carefully. When time expires, all work must cease.

Note that multiple-choice question one requires you to certify that you did not seek, receive, offer, or provide any assistance from or to anyone else in the taking of this exam. Make sure you look at question one before beginning this examination. It is found on page eight (8).

Length. This document is eighteen (18) pages long. Make sure the PDF has all pages.

Open book. The examination is open book. You may use, for example, your book, notes, outline, any handouts, and your Statutory supplement. You may not, however, seek, receive, offer, or provide any assistance from or to any other person in taking this examination.

AGN. Indicate your 3-digit final examination AGN number on this exam as indicated by the instructions you have received from the Registrar. Do not put your real name or any other personally identifying information on the examination except for your AGN.

Do not contact me. Do not contact me with any questions about the examination until grades have been released as that may constitute a breach of exam anonymity. If you have any questions or concerns, please contact Dean Hernandez or whatever other persons that the administration instructs you to contact in the case of any problems.

Time and scoring. The examination has been written as a three-hour exam, but I am giving you four hours to complete it. You may not write anything on, or erase anything from, any examination materials after time runs out.

- *Essay questions (three questions, 120 minutes total):* The suggested time for each essay question is 40 minutes. Write your answers using **Exam4**. You may not exceed 5000 words for all answers combined. Since Exam4 counts all words towards the limitation, I suggest that you do not include your outline in the exam submission. You would be better advised outlining on paper or outlining on computer and then turning your outlines into your essay answer.

- *Multiple-choice (20 questions, 60 minutes total):* Answer the questions using **Remark**. Do not enter your multiple-choice answers into Exam4, you will waste words and your multiple-choice answers will not get any credit. The only thing that matters for multiple choice is what you enter into Remark.

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 any classmates who have not yet completed this exam. Any breach will be considered to be a serious violation of the Code of Academic Integrity and will be addressed accordingly.

ESSAY QUESTIONS

Three questions, suggested total of 120 minutes for all three questions

Instructions for essay questions.

- Some of the questions may make statements about the content of the substantive law of various states. These statements are hypothetical and for purposes of this examination only.

- Despite the names used in the essay fact pattern, all litigants (Atticus Dog, Luci Rabbit, and Shelly Turtle) are human. The peacock, however, is a bird.

- The essay portion of this examination asks you to act as the Judicial Law Clerk to a federal district judge. The judge's memorandum provides three (3) questions you are asked to answer using the information found in the memorandum and related pleadings and papers.

- *Exam4*. You must use **Exam4**.

- *Writing*. Proper spelling, grammar, and organization are expected and are part of your score.

- *How to address essays.*

    - Read the call of the questions and materials carefully—twice—before you outline and write. The call of each question will guide you on what to discuss, and whether some issues should not be addressed.

    - 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, 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.

THE RELEVANT ESSAY MATERIALS CAN BE FOUND ON PAGES 3-7.

READ THEM CAREFULLY BEFORE YOU BEGIN TO OUTLINE AND WRITE.

MEMORANDUM

From: The Hon. Ira Steven Nathenson, U.S. District Court for the Southern District of Florida

To: My esteemed new Judicial Law Clerk

Re: Pending motions in *Dog v. Rabbit* and joined third-party complaint of *Rabbit v. Turtle*

Date: Dec. 2, 2020

Dear Judicial Law Clerk:

Welcome to your first day working as a law clerk for the United States District Court for the Southern District of Florida! Your first day will be busy, as I have a number of motions pending in the case of *Dog v. Rabbit*, which includes a third-party claim filed by Rabbit against a fellow by the name of Turtle. Apparently, the case involves a vintage car from a TV show as well as a pesky peacock.

There are three (3) motions pending. Treat them as three separate inquiries. I would like you do write an objective memo on each, making recommendations on how I should rule on each motion. For relevant information, review this memo along with the pleadings and other court filings, which can be found on the pages that follow (this page through page 7).

Motion one (question one, 40 minutes). Defendant Rabbit answered Dog's complaint and has now moved to dismiss Dog's complaint for failure to state a claim pursuant to FRCP 12(b)(6). She has included an affidavit in support of her motion, which struck me as odd. I want you to determine whether I can properly consider Rabbit's affidavit in the context of her 12(b)(6) motion, and regardless of your conclusion to that question, make a recommendation on whether her 12(b)(6) motion to dismiss should be granted. Also, if I do grant the motion, should it be with or without prejudice? Don't bother analyzing FRCP 12(c) or FRCP 56. Stick to the 12(b)(6) issue, thanks.

Motion two (question two, 40 minutes). As mentioned above, Rabbit also filed and served a third-party complaint against Shelly Turtle, who has timely moved to dismiss for lack of personal jurisdiction. Assume for purposes of this assignment that the Florida long-arm statute extends to the full extent of the United States Constitution. Address FRCP 4(k)(1)(A), which in turn requires you to address the Florida long-arm statute as well as whether there is specific jurisdiction over Turtle. Do not spend time discussing other bases for personal jurisdiction; I've already considered them and they are not worth addressing.

Motion three (question three, 40 minutes). Turtle has also moved to dismiss Rabbit's third-party complaint against him for lack of subject-matter jurisdiction. Should I grant the motion?

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

ATTICUS DOG, Plaintiff, v. LUCI RABBIT Defendant.	Case No.: CA-No.-2020-5150CV/ISN **COMPLAINT FOR NEGLIGENCE** **JURY TRIAL DEMANDED**

COUNT I (NEGLIGENCE) AGAINST DEFENDANT LUCI RABBIT

1. Plaintiff Atticus Dog ("Plaintiff," or "Dog"), a citizen of Florida, is the owner of a vintage black 1967 Chevrolet Impala that he bought in August 2020 for $75,000. Prior to Dog's purchase, the Impala had been prominently featured on the popular television show *Super-Duper-Natural*. According to an appraisal conducted in October of 2020, Dog's Impala was worth at least $82,000.

2. On November 17, 2020, Dog was driving eastbound in his Impala on the Palmetto Expressway in Miami Gardens, Florida.

3. As Dog neared the 37th Avenue exit, a VW Rabbit automobile ran into Dog's vehicle, causing Dog to lose control. As a result, Dog's Impala was destroyed. The Impala is now worthless, except for scrap parts worth about $2500.

4. The VW Rabbit automobile that struck Dog's Impala was driven by Defendant Luci Rabbit ("Defendant" or "Rabbit"), a citizen of New York.

5. Rabbit breached a duty of reasonable care, proximately and actually causing damage to Dog's vehicle.

6. At all relevant times, Dog acted lawfully, and did not engage in any contributory or comparative negligence.

7. Rabbit is liable for negligence.

WHEREFORE, Plaintiff Dog requests that this Honorable Court order Defendant Rabbit to pay damages for Dog's destroyed 1967 Chevrolet Impala in an amount exceeding $75,000 to be determined at trial, along with damages for pain and suffering, punitive damages, attorney's fees, costs, and such other and further relief that the Court deems just and proper.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

ATTICUS DOG,
Plaintiff,
v.

LUCI RABBIT
Defendant.

Case No.: CA-No.-2020-5150CV/ISN

DEFENDANT'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

DEFENDANT LUCI RABBIT'S MOTION TO DISMISS

Defendant Rabbit admits that her rental car struck Plaintiff Dog's vehicle. However, at no time did Rabbit breach any duty of reasonable care, nor does Dog effectively plead any breach, so Dog's claim is not plausible. Accordingly, this Honorable Court should grant Rabbit's motion to dismiss for failure to state a claim upon which relief can be granted. Please see Defendant Rabbit's affidavit for details.

AFFIDAVIT OF LUCI RABBIT

1. I, Luci Rabbit, am an adult over the age of 21. I am competent and of sound mind, and if called to testify, would attest to the following under oath based on my own personal knowledge.

2. On Nov. 14, 2020, I rented a VW Rabbit car in Brooklyn, NY, with the intention of driving it to Florida. I drove safely from New York to Miami Beach, FL.

3. On Nov. 17, 2020, while operating the rented VW Rabbit vehicle on the Palmetto Expressway in Miami Gardens, FL, a large peacock jumped onto my windshield, obstructing my view.

4. I tried to make the peacock go away by using the vehicle's windshield wipers. However, the wipers were inoperative. Prior to this moment, I was unaware that the windshield wipers were inoperative.

5. Before I could slow and safely stop the vehicle, my vehicle struck another vehicle that allegedly belongs to Plaintiff Dog. This was solely due to an Act of God (or an Act of Peacock), and not due to any breach by me. A true and correct photo of the trouble-making peacock is shown below.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

LUCI RABBIT,
Defendant/Third-Party Plaintiff,

v.

SHELLY TURTLE
Third-Party Defendant.

Case No.: CA-No.-2020-5150CV/ISN

THIRD-PARTY COMPLAINT FOR CONTRIBUTION AND BREACH OF CONTRACT

JURY TRIAL DEMANDED

COUNT I (CONTRIBUTION) AGAINST TURTLE

1. Defendant/Third-Party Plaintiff Luci Rabbit ("Rabbit") is a citizen of New York.

2. Third-Party Defendant Shelly Turtle ("Turtle") is a citizen of New York.

3. This court has subject matter jurisdiction pursuant to 28 U.S.C. § 1332 and/or § 1367. It also has personal jurisdiction pursuant to FRCP 4(k)(1)(A), the Fourteenth Amendment of the United States Constitution and the Florida Long-Arm Statute.

4. In the Fall of 2020, Rabbit needed a rental car to drive from New York to Florida and back.

5. Turtle advertises rental cars in the *New York Post* and *New York Times*. His ads state: "Rent-a-car and drive a clean, safe car to Chicago, Philadelphia, Boston, even Sunny Miami!" His advertisements regularly appear in major New York City newspapers as well as on their websites, all of which are available for people to access and read in Florida. The advertisements state that car rentals must be made by personally visiting Turtle's place of business in Brooklyn, NY.

6. On or about Nov. 14, 2020, Rabbit went to Turtle's place of business to rent a 2009 VW Rabbit. She gave Turtle her credit card information and prepaid a $400 fee for the cost of the vehicle rental. Rabbit asked Turtle whether the vehicle was fit for a long road trip to Florida. He said, "it's like new, it'll get you anywhere you want to go." He also gave Rabbit a voucher for a free day of theme park hopping at Universal Studios in Orlando.

7. On Nov. 17, 2020, Rabbit was driving the rental car on the Palmetto Expressway in South Florida when a large peacock jumped onto the windshield, obstructing Rabbit's view. She attempted to make the bird go away by using the vehicle's windshield wipers, but the windshield wipers would not move. A later inspection showed that the motor for the windshield wipers was inoperative and from the amount of rust, had been defective for months.

8. Because of the obstructed view, the rental vehicle driven by Rabbit ran into another vehicle operated by Plaintiff Atticus Dog, who has sued Rabbit for negligence in the original complaint in this civil action.

9. The vehicle rented to Rabbit by Turtle was inoperative, due to either fraud, negligence, or breach of warranty.

10. Turtle is liable to Rabbit under Florida law by way of contribution to cover any liability or other relief in any form that Rabbit may be deemed to owe Plaintiff Dog in this civil action.

COUNT II (BREACH OF CONTRACT) AGAINST TURTLE

11. Plaintiff Rabbit incorporates paragraphs 1-10 as if fully stated herein.

12. Turtle promised Rabbit a "a clean, safe car," for which Rabbit paid good and valuable consideration, constituting an enforceable contract.

13. The vehicle Turtle rented to Rabbit was defective, having a non-functional windshield wiper that was the sole cause of an accident involving Rabbit and Dog.

14. Turtle breached his contract with Rabbit.

15. Turtle is liable to Rabbit under Florida and/or New York law for breach of contract.

WHEREFORE, Defendant/Third-Party Plaintiff Rabbit requests that this Honorable Court order Third-Party Defendant Turtle to pay contribution to Rabbit for any amounts that Rabbit may be deemed to owe Plaintiff Dog for negligence; and additionally that Turtle provide restitution to Rabbit for all monies that she paid for the rental vehicle, along with all consequential and incidental damages, along with any applicable punitive damages, along with attorney's fees, costs, and such other and further relief that the Court deems just and proper.

MULTIPLE-CHOICE QUESTIONS

Suggested total time for 20 multiple-choice questions: 60 minutes.

Read these rules carefully before proceeding:

- *Remark:* You must use **Remark** for your multiple choice. If you enter your multiple choice using Exam4, you will not receive credit.
- *Choose the best answer:* If more than one answer seems to be correct, choose the best answer.
- *References to state law:* Some of the questions make statements about the content of the substantive law of various states. These statements are hypothetical and for purposes of this examination only.
- *Unless a question expressly provides otherwise:*
    - The facts of each multiple-choice question stand on their own.
    - All suits take place in federal court.
    - The relevant long-arm statute states: "A court of this state may exercise personal jurisdiction to the full extent permitted by the Constitution of the United States."

1. I certify that I did not seek, receive, offer, or provide any assistance from or to any other person in taking this examination.

A. True.

B. False.

2. Paul sued Deborah for negligence. He served the summons and complaint on Deborah on February 1. On February 10, Deborah served an answer that included the defenses of lack of personal jurisdiction and insufficient service of process. On February 15, she amended her answer to add the defenses of improper venue and failure to state a claim. On Feb. 18, she amended again to add the defenses of insufficient process and lack of subject-matter jurisdiction. Which defenses, if any, have been waived?

A. Insufficient process, improper venue, failure to state a claim, and lack of subject-matter jurisdiction.

B. Insufficient process, improper venue, and failure to state a claim.

C. Insufficient process and improper venue.

D. Insufficient process.

3. Penny sued Donald and Deborah for negligence for a car accident that happened in Tallahassee, Florida. She filed the suit in federal court in Tallahassee in the Northern District of Florida. Donald was the driver of the car that hit Penny. Deborah owned a brake repair shop in nearby Thomasville, Georgia. Penny alleged that Donald drove negligently, and that Deborah did a negligent job of repairing Donald's brakes. Deborah was served with process at her brake shop in Thomasville, GA, which is less than 100 miles from the federal courthouse in Tallahassee. Deborah moved to dismiss for lack of personal jurisdiction. Should the court grant Deborah's motion to dismiss?

A. No, because Deborah could reasonably foresee that a bad repair job might cause an accident in Florida, which is nearby.

B. Yes, because Deborah has no ties, contacts, or relations with Florida.

C. No, because Deborah was served in a judicial district of the United States not more than 100 miles from the federal court that issued the summons.

D. Yes, because a State may not assert jurisdiction over persons or property found outside the State.

4. Albert, Betty, Charlie, and Debbie got into an automobile wreck in Tijuana, Mexico. Albert is domiciled in New York City (Southern District of New York). Betty is a French citizen domiciled in Paris, France. Charlie is a French citizen and lawful permanent resident of the United States who is domiciled in Philadelphia, PA (in the Eastern District of Pennsylvania). Debbie is a United States citizen domiciled in Pittsburgh, PA (in the Western District of Pennsylvania). If Albert sues Betty, Charlie, and Debbie, in which district or districts would venue be appropriate?

A. No district would have venue because the case should be heard in a Mexican court.

B. Western District of Pennsylvania or Eastern District of Pennsylvania.

C. Any district where any defendant is subject to personal jurisdiction.

D. Western District of Pennsylvania, Eastern District of Pennsylvania, or Southern District of New York.

5. Petunia sued Demitrius for stealing her expensive Stradivarius violin valued at more than $2 million. During discovery, Petunia admitted she had not seen Demitrius steal the violin, but instead believed that Demitrius must have been the thief "because he knew I had the violin and now it's gone." Demitrius moved for summary judgment, stating in an affidavit that he had not stolen Petunia's violin and that Petunia had no evidence to the contrary. May the court grant Demitrius' motion?

A. No, because a jury is needed to decide whether Demitrius is telling the truth, and credibility is a quintessentially factual issue.

B. Yes, because Petunia's allegations are not credible.

C. No, because Demitrius' knowledge of Petunia's violin creates a triable dispute of fact over whether he stole the violin.

D. Yes, because there is no need for a trial unless Petunia can show why a jury is needed to decide whether Demitrius stole the violin.

6. Albert sued Betty and Charlie for battery, seeking $1 million against each defendant. Albert is a citizen of France. Betty is a citizen of Michigan. Charlie is a citizen of California. The fight occurred in Philadelphia, PA (in the Eastern District of Pennsylvania). Albert filed the lawsuit in state court in Los Angeles, California. Betty and Charlie removed the case to the U.S. District Court for the Eastern District of Pennsylvania. Were removal and venue proper?

A. The case was properly removed and it was removed to a district with proper venue.

B. The case was properly removed, but to a district with improper venue.

C. Venue was proper, but the case should not have been removed.

D. The case shouldn't have been removed and it was removed to a district with improper venue.

7. Paul (citizen of Oregon) sued Big Drug Co., Inc. for negligence per se, arguing that pain relief pills made by Big Drug Co. made his headaches worse, not better. His complaint argued that the labels on the bottles did not disclose that the pills might make headaches worse, and that the omission of this information constituted a breach of a duty of reasonable care due to the labels violating federal regulations administered by the Food and Drug Administration governing what information ought to appear on medicine labels. Big Drug Co. is incorporated in Delaware. Its headquarters are based in Portland, Oregon, and its main manufacturing facility and most of its employees are located in Seattle, Washington. Paul seeks $100,000 in good faith for his pain and suffering. What is Paul's best argument that a federal court has subject-matter jurisdiction?

A. The parties are completely diverse and the amount in controversy is satisfied.

B. The federal labeling regulation is a federal cause of action.

C. The federal labeling regulation is a substantial issue of federal law.

D. Paul's well-pleaded cause of action was created by federal law.

8. On Feb. 1, 2018, Paul was run over by a Suzuki motorcycle. Paul erroneously believed that the motorcycle was driven by Debbie. On January 31, 2020 (just one day before the expiration of the two-year statute of limitations), Paul sued Debbie for negligence. A few days later, Debbie was served with the summons and complaint. Debbie was furious because she knew she had not hit or hurt anybody with her motorcycle. She remembered that her friend Donald once had an identical Suzuki motorcycle and that Donald had mysteriously "gotten rid of" the motorcycle around the time of the alleged accident. On Feb. 8, 2020, Debbie showed the summons and complaint to Donald. At that moment, Donald's face turned beet red, and Donald said he "had to go." Debbie's attorney contacted Paul's attorney to report this information. Paul subsequently amended his complaint to drop Debbie and substitute Donald as the defendant. Donald has moved to dismiss, arguing that Paul's claim is barred by the statute of limitations. Should the court grant Donald's motion to dismiss?

A. No, because Donald learned about the suit within 90 days of the date the lawsuit against Debbie was filed.

B. Yes, because the statute of limitations has expired.

C. No, because Donald knew all along that he was the person who hit Paul.

D. Yes, because Donald was not formally served with notice within the statute of limitations period.

9. On January 1, 2020, Penny filed a complaint against Donald for negligence. Several days later, Penny amended her complaint unilaterally without seeking court or party permission. Penny's amended complaint was served on Donald on Feb. 1, 2020. On Feb. 20, 2020, Donald served a pre-answer motion on Penny for failure to state a claim. On Feb. 28, 2020, Penny served on Donald a further amended complaint that attempted to address the problems that Donald had identified in his motion to dismiss. Donald filed a motion with the court, complaining that it was too late for Penny to amend her complaint unilaterally and that she would either need Donald's consent (which he was unwilling to provide), or that she would have "to bug this Honorable Court for permission." Is Donald correct?

A. Yes, because a litigant may only amend as a matter of course within 21 days after serving the pleading.

B. No, because a litigant may amend as a matter of course up to 21 days after the service of an opposing motion to dismiss.

C. Yes, because Penny may only amend once as a matter of course, something that she did earlier.

D. No, because Donald has not yet answered the complaint, giving Penny the right to cure any defects in her complaint.

10. Pam sued Daria for negligence for a car accident. During discovery of Wilma (a witness), Pam's lawyer asked Wilma if anybody had seen Daria drinking the day of the accident. Wilma started to answer that her friend Willard had told her that he and Daria had "gotten totally toasted" earlier in the day of the accident. However, Daria's lawyer objected, "IRRELEVANT AND INADMISSIBLE HEARSAY!" The lawyer argued that Wilma was not allowed to testify to Willard's out-of-court statements, and that the deposition should end due to abuse of process by Pam's attorney. Is Daria's lawyer correct?

A. No, lawyers can ask anything they want during a deposition, as the purpose of a deposition is discovery.

B. Yes, because hearsay testimony is prohibited from use at trial unless a proper exception to hearsay exists, which is not the case here.

C. No, because the hearsay about what Willard supposedly said to Wilma might lead to discoverable information that is relevant to the lawsuit.

D. Yes, because asking irrelevant questions is a basis for ending a deposition.

11. Penny sued Dexter for running into Penny's Ferrari 458 automobile, previously worth $250,000 but now totally destroyed. Dexter brought in Tanya as a third-party defendant, alleging that Tanya had damaged Dexter's own car (a 2012 Fiat 500 Sport) by hitting it from behind, causing $1000 damage, and that Tanya had hit Dexter's car so hard that she shoved Dexter's car into Penny's car, causing damage to Penny's car. Dexter demanded that the court order Tanya to pay Dexter for his own $1000 damages as well as any damages (up to $250,000) that he might owe Penny. Assuming that the parties are completely diverse, are Dexter's claims against Tanya properly joined?

A. Yes, because Dexter's $250,000 claim against Tanya is a proper third-party claim, his $1000 claim against her for his own damages does not need to be justified by Rule 14.

B. No, because Dexter's $1000 claim against Tanya is for his own damages, which is not permitted by Rule 14.

C. Yes, because subject matter jurisdiction exists over all parties and claims.

D. No, because the amount in controversy for Dexter's $1000 claim against Tanya is too low and cannot be aggregated with his $250,000 claim.

12. Petyr, from Warsaw, Poland, got into a bar fight in Scotland with Daniela, Demitrius, and Dustin. Petyr spent several weeks in a Scottish hospital recovering. Petyr filed suit in California State court because he thought he could get more money in an American court than a Scottish court. Also, although Demitrius and Dustin were from Scotland, Daniela was actually from Los Angeles. The defendants appeared in court and argued that the case should be heard in Scotland, since most of the evidence and witnesses were there. The defendants did not, however, object to personal jurisdiction or California state-court venue. The California court, after careful analysis, concluded that personal jurisdiction and venue had been waived, and that the California court had subject-matter jurisdiction. What should the court do?

A. It should hear the case on the merits. A court does not have the power to decline to exercise proper subject-matter jurisdiction.

B. The court should dismiss the case pursuant to the doctrine of forum non conveniens.

C. The court should engage in a transfer of venue to a Scottish court.

D. The court should sue sponte remove the case to federal court, which could then transfer the case to Scotland pursuant to international treaties.

13. Peter, a citizen of California, was hit in Arkansas by a car driven by Daniel, an Arkansas citizen. Peter sued Daniel in federal court in Arkansas. Daniel argued that Peter was not watching what he was doing while crossing the street, namely, that Peter was too busy looking up photos of bunny rabbits on Instagram. Both litigants agreed that *if* any's state's substantive law applied to this civil action, it would be Arkansas law. However, the parties disagreed on whether the federal court should apply Arkansas law or federal law. Daniel argued that Arkansas state law must be applied. He further argued that Arkansas state courts consistently dismiss a negligence claim based on a "contributory negligence" defense that totally bars a plaintiff from recovery, even if the plaintiff is only 1% negligent. Daniel noted that the Arkansas Supreme Court had in just the past year reaffirmed its commitment to the contributory negligence rule. Peter argued that the "Arkansas Supreme Court might change its mind," and that federal courts have the discretion to disregard erroneous state law when an opportunity emerges to articulate a better view of the law. Peter concluded that the federal court should use a "comparative negligence" standard that might reduce, but not totally bar any recovery for him. Peter also noted that most other states had decided to adopt the more flexible comparative negligence rule rather than contributory negligence. Which rule should the federal court apply?

A. Contributory negligence because the Arkansas Supreme Court has recently spoken on the issue, and the federal court has no reason to believe that the Arkansas Supreme Court is likely to change its mind.

B. Comparative negligence because it is the better rule and we are not in state court, we are in federal court. Article III of the U.S. Constitution implies the power for federal courts to develop a body of practice, procedure, and rules of general law.

C. Contributory negligence because a federal court must always apply the law of a state.

D. Comparative negligence because the modern trend is to avoid the harshness of the old contributory negligence rule.

14. Paul owned a patent for a method of chewing bubblegum. Paul sued Daniel for patent infringement when he saw Daniel chewing bubblegum. During the litigation, the parties vigorously fought over every last issue, such as the meaning of the patent, the patent's legal validity, and whether Daniel infringed Paul's patent. After a lengthy jury trial, the jury found that Daniel had in fact infringed Paul's patent. Flush with joy over his victory, Paul filed a new lawsuit against Denorah for infringing the same bubblegum patent in the same way. After discovery established that Denorah had chewed bubblegum in the same exact way as Daniel, Paul made a motion for partial summary judgment, asking the court to use principles of preclusion to find that Paul's patent was valid and that Denorah had infringed. As Paul argued, "those issues were actually litigated and actually decided in the first litigation, and there is no reason to waste this court's time litigating them again." Paul told the court that the only remaining issue should be the amount of damages Denorah owed Paul. May Paul use the factual and legal findings from the first case of *Paul v. Daniel* in the second case of *Paul v. Denorah*?

A. Yes, because the same issues were fully litigated, actually decided, and essential to the final judgment in the first case.

B. No, because preclusion may not be used unless both cases involve the same parties or their privies.

C. Yes, so long as Paul had a full and fair opportunity to litigate the issues in the first litigation, and additionally, so long as Denorah could have, but chose not to, intervene in the first suit.

D. No, because the findings from suit # 1 are being used offensively against somebody who did not participate in that suit.

15. Paxton sued Darius for negligence for a car accident. At trial, Paxton's lawyer called Wilson as a witness. Darius' lawyer was alarmed, as he had never heard of Wilson before. Darius' lawyer asked for a sidebar conference with the judge. Paxton's lawyer told the judge that Wilson would testify that Darius was "rip-roaring drunk" at the time of the accident. Darius' lawyer objected because Paxton's lawyer had never before mentioned that he might use Wilson as a witness. For his part, Paxton's lawyer admitted that he had known about Wilson "since the day of the accident," but argued that defense counsel had "never asked for the names of my witnesses, not by interrogatory nor by any other discovery device." Darius' lawyer admitted that he had not asked for a list of Paxton's witnesses, but nevertheless asked the judge to prohibit Wilson from testifying. May the court prohibit Wilson from testifying?

A. Yes, the court may prohibit Wilson from testifying because Paxton's lawyer never disclosed the existence of a witness that might help Paxton's claim.

B. No, Paxton's lawyer is under no obligation to respond to discovery requests that Darius' lawyer never made.

C. Yes, the court may prohibit Wilson from testifying because Paxton's lawyer never disclosed the existence of a witness that might be relevant to Darius' defense.

D. No, but the judge must inform the jury that Paxton's lawyer failed to disclose the existence of Wilson to Darius' lawyer.

16. Paul decided to open a music school that he would call STRUM ACADEMY. Paul asked his lawyer Louie to check the availability of the name for Paul's new school. Louie did a thorough search of trademarks, business names, trade names, and domain names, and wrote up a detailed clearance memo to Paul advising Paul that it was most likely safe for him to adopt and use the name STRUM ACADEMY, and also detailing Paul's potential litigation strategy if he were ever to be sued for infringement. A few months later, Paul was sued for willfully infringing trademarks by a music school called STRUM MUSIC ACADEMY. Paul answered the complaint by alleging that he was not a willful infringer because he had reasonably relied on the clearance advice of his counsel, Louie. Later, during discovery, STRUM MUSIC ACADEMY requested production of Louie's clearance memo and additionally, requested a deposition of Louie. Louie objected to both on the basis that they sought the discovery of privileged communications between an attorney and his client, and that they sought the discovery of attorney work product. Is Louie correct?

A. Yes, because the document request and notice of deposition both seek discovery of privilege communications and work product.

B. No, because a plaintiff cannot hide his wrongful conduct by hiding behind the veil of privilege and work product.

C. Yes, because a litigant cannot obtain discovery of privileged materials or attorney work product unless the litigant shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

D. No, because Paul waived privilege and work-product protection by asserting that he reasonably relied on advice of counsel.

17. Paola owned a condominium complex of 400 units. Darien and Daxon promised to paint the building for $80,000. However, the paint they used was of poor quality and washed away after a tropical storm. Paola sued Darien and Daxon for breach of contract, seeking restitution and other damages. Darien then crossclaimed against Daxon for breach of contract regarding a 1968 Mustang that Daxon had sold Darien. Are all parties and claims properly joined?

A. Daxon and Darien are properly joined as co-defendants, and Darien's crossclaim against Daxon is proper as a "permissive" crossclaim, even though it is unrelated to Paola's main claim.

B. Daxon and Darien are not properly joined as co-defendants, and Darien's crossclaim against Daxon is improper as a "permissive" crossclaim because it is unrelated to Paola's main claim.

C. Daxon and Darien are properly joined as co-defendants, but Darien's crossclaim against Daxon is improper as a "permissive" crossclaim because it is unrelated to Paola's main claim.

D. None of the claims are properly joined.

18. *Two Men and a Van*, a national moving company, filed suit against another moving company that used the name *A Big Truck and Two Dudes*. The district court granted a preliminary injunction against the defendant. A week after the preliminary injunction was granted, the defendant filed a Notice of Appeal with the United States Court of Appeals. The plaintiff then filed a motion before the Court of Appeals arguing that the defendant's appeal was premature because a trial on the merits had not yet happened and the judgment was therefore not "final." Should the Court of Appeals dismiss the appeal as premature?

A. Yes, because appeal cannot be taken before a judgment is "final."

B. No, because an order granting a preliminary injunction can be appealed even though it is interlocutory.

C. Yes, because after a full trial on the merits, the district court might conclude that an injunction is no longer needed, obviating the need for "piecemeal" appeals.

D. No, because the preliminary injunction implicates the defendant's First Amendment rights of free speech and association, which is a "substantial" issue ripe for immediate appeal.

19. Pedro sued Dyson for negligence. The case proceeded to a jury trial. At trial, after Pedro's lawyer finished the plaintiff's case-in-chief, Dyson's lawyer made a motion for judgment as a matter of law, arguing that Pedro had failed to put on sufficient evidence of a breach of duty from which a reasonable juror could find in Pedro's favor. The judge denied the motion. After Dyson's lawyer presented her own defense case-in-chief, she rested, and eventually the case went to the jury. The jury came back with a verdict in Pedro's favor for $1,000,000. A few days after the judge entered judgment on the jury's verdict, Dyson's lawyer filed a motion for renewed judgment as a matter of law on the basis that the judge had erroneously permitted inadmissible hearsay testimony, and that without that inadmissible hearsay evidence, Pedro should have lost as a matter of law. Dyson's lawyer joined that motion with an alternative motion for a new trial. Assuming that the judge agrees that the hearsay testimony should not have been entered and that it was substantial rather than "harmless" error, what should the court do?

A. Grant the motion for renewed judgment as a matter of law, and in the alternative, conditionally grant the motion for a new trial.

B. Deny the motion for renewed judgment as a matter of law, but grant the motion for a new trial.

C. Deny the motion for renewed judgment as a matter of law, and deny the motion for a new trial.

D. Grant the motion for renewed judgment as a matter of law, but conditionally deny the motion for a new trial as moot.

20. Plaintiff sued defendant for negligence for a car crash. In her complaint, plaintiff alleged in paragraph 12 that "The defendant's red Porsche hit my blue Audi because the defendant was drunk and driving above the posted speed limit." After a reasonable investigation into the facts, defense counsel concluded that the plaintiff's Audi was red and that the defendant's Porsche was blue. Defense counsel also concluded that her client was not drunk but just liked driving too fast. Which of the following is an appropriate allegation for the answer to paragraph 12?

A. "Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 12."

B. "The allegations of paragraph 12 are denied."

C. "Defendant admits that she was driving her Porsche above the posted speed limit when her Porsche struck the plaintiff's Audi. The remaining allegations of paragraph 12 are denied."

D. "Defendant denies that the Porsche was red or that the Audi was blue. The remaining allegations of paragraph 12 are admitted."

[END OF EXAMINATION]

The Nathenson Family "Not Ready for Prime Time" Exam Scenario Players wish you all a happy, healthy, and safe holiday break!

The Borky Atticus Dog

Our Beloved Luci Rabbit

The Persistent Shelly Turtle