FINAL EXAMINATION: CIVIL PROCEDURE, SECTION ONE

Professor Ira Steven Nathenson
St. Thomas University College of Law
Wednesday, Nov. 30, 2022—3.0 hours

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

Time and length; general instructions. This examination is thirteen (13) pages long. I am also providing you with a 73-page supplement (not counting cover and two-page table of contents) with relevant sections of the Constitution, statutes, and FRCP. Make sure you have all pages and let the Proctor know right away if you do not. You may not write anything on, or erase anything from, any examination materials after time runs out. You must return all examination materials to the proctor at the end of the examination. Unless instructed otherwise, use the law as it exists today. If authority is split and there is a majority rule, use the majority rule.

Closed book. Except for the supplement, the examination is closed book.

AGN; avoid other personally identifying information. Indicate your 3-digit AGN number on this exam, the supplement, any bluebooks, scantron sheets, and other materials. Do not put your name or any other personally identifying information on the examination or other materials.

Please do not contact me. Do not contact me with any questions about the examination until scores 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 case of any problems.

Time and scoring. The suggested times below add up to 150 minutes (2.5 hours). However, I will give you three (3.0) hours to complete the exam. Scoring is proportional to the times noted below.

- *Essay questions (three questions, suggested time of ninety minutes):* I suggest you spend approximately (i.e., at least) 90 minutes total on the three essay questions. If you use a computer, write your answer using **Exam4** or other software required by the Registrar. You may not exceed the **2500-word limitation**, which should be more than enough to answer the essay questions. 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 outline into your essay answer. If you handwrite your essay, you are limited to **two bluebooks**, writing on one side of the page only, skipping lines.

- *Multiple-choice (twenty questions, suggested time of sixty minutes):* Answer the questions using **Remark** or other required software or sheets supplied by the Proctor. Do not enter your multiple-choice answers into a Bluebook or Exam4, because you will waste words and your multiple-choice answers will not get any credit.

Additional instructions for essay questions.

- *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.

    - Note below that the multiple-choice questions are based on the essay and may build upon or change some of the facts from the essay. You should therefore not start the multiple-choice questions until you complete the essay, to avoid the possibility of inadvertently using multiple-choice facts in your essay answer.

Additional instructions for multiple-choice questions.

- Finish the essay question first, before turning to the multiple-choice questions. First, because the multiple-choice questions are based upon the essay fact pattern. And second, some of the multiple-choice questions require you to add facts or change facts from the essay. The answer to question 20 is B. Facts added or changed in multiple-choice questions may not be used for the essay, but only for that multiple-choice question.

- You must use **Remark** or other required software or sheets provided by the Proctor for your multiple-choice answers. If you enter your multiple-choice using a Bluebook or Exam4, you will not receive credit.

- If more than one multiple-choice answer seems to be correct, then choose the best answer.

THIS EXAM IS CONFIDENTIAL

As a St. Thomas Law student, you are bound by the St. Thomas University College 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

Suggested total time for three essay questions: 90 minutes.

In the Fall of 2020, Atticus Dog (citizen of Florida, resident of Miami) and his very, *very bestest* friend, Shelly Turtle (citizen of Florida, resident of Orlando), decided to take a road trip to get some lobster rolls. They therefore packed their bags and got into Dog's brand-new 2020 Wolfvo P2 sedan to go to Boston via Georgia, the Carolinas, Virginia, Pennsylvania, and other states. The friends particularly loved driving through the mountains of Pennsylvania; Dog loved it so much that he would put his head out of the driver's-side window to smell the crisp air. For his part, Turtle loved to play with the radio, constantly changing stations to find the best song for the besties to sing to as they drove north.

As Dog drove through mountainous Central Pennsylvania, nearby was an 18-wheel tractor trailer driven by a grizzled veteran of the trucking industry, Luci Rabbit (citizen of California), well-known as "Queen B" by her CB radio name. She had been a trucker for decades and owned her own "rig" (i.e., 18-wheel semi-tractor trailer). The night before, she had overdone it a bit with her favorite beverage (Binky Beer) and had overslept at the "Lonely Truckers" truck stop in Summersville, WV. As a result, she was pushing the pedal to the medal (i.e., speeding a bit) to make up for lost time to deliver a shipment of "timothy hay" (a nutritious meal for animals in the lagomorph family).

As Rabbit quickly but carefully sped up the side of a mountain, she saw all lanes were closed but one, and up ahead was a small Wolfvo sedan going below the posted speed limit, with its idiot driver's head sticking out of the left-side window. As a result, she had to slam on her brakes. Fortunately, a second lane opened up just before she would have hit the Wolfvo, and Rabbit pulled into the right-hand lane to pass. Unfortunately, just as Rabbit was passing the Wolfvo on the right, she headed into a sharp left-hand curve and her truck began to tip over, the right tires at least a foot off the ground.

Rabbit was confident in her driving skills and knew that she could safely regain control of the truck. After a moment, she had the truck almost level again, but at the last second, the Wolfvo repeatedly and loudly blasted its horn, a *howwwwwling* sound that startled Rabbit and hurt her sensitive ears. As a result, Rabbit lost control and her truck tipped over, causing heavy damage to the truck and spilling timothy hay all over the highway. The Wolfvo avoided hitting the truck but ended up stuck in a muddy ditch by the side of the road with minimal damage.

After the accident, Rabbit and Dog got out of their vehicles and argued about who was at fault. Dog asked Rabbit to help him pull his car out of the ditch and Rabbit refused to even look at him. Since Dog was stuck in a pile of mud, he took some of the spilled timothy hay to build traction under his wheels so that he could get out. After the police came and took statements, Dog drove off to continue his journey to get some lobster rolls with Turtle. Rabbit, of course, had to wait for a tow truck to come for her rig, which was heavily damaged.

One year and 350 days later, Luci Rabbit filed suit against Atticus Dog in the United States District Court for the Middle District of Pennsylvania for negligence arising from the horn-blasting, seeking $75,000 for damages to her truck, and $1 for the timothy hay that Dog used to get his truck out of a ditch. A month later, Dog was personally served with the complaint and summons while having a hamburger with Turtle at Le Tub, a famous burger eatery in Hollywood, Florida. Dog and Turtle read the complaint together and drowned their sorrows in beer, burgers, and Key Lime Pie. Dog soon answered, including a claim against Rabbit for negligence, seeking $50 for a scratch he got on his car

during the accident.

Six months later, during his deposition, Dog testified that it was Turtle who blasted the horn at Rabbit rather than Dog, and admitted that at the time of the accident, Turtle was operating the steering wheel because Dog was too busy sticking his head out of the drivers-side window. Accordingly, Rabbit obtained leave from the District Court to amend her complaint to change her claim against Dog to a theory of negligent entrustment against Dog (by allowing Turtle to steer and honk the horn), and for the first time joined Shelly Turtle, asserting a claim against him for negligent driving and honking, seeking $75,000 for damages to her truck. Shortly after that, Dog amended his answer to add a claim against Turtle seeking up to $75,000 contribution to pay Dog back anything that Dog might owe Rabbit.

Additional instructions—assume for purposes of this examination that:

- Rabbit, Dog, and Turtle are all human beings and competent human adults.
- The fact pattern provides the citizenship of all parties, which you should treat as established for purposes of any essay answer without the need for further analysis of citizenship.
- The statute of limitations for negligence is two years and the statute of limitations for contribution is five years.

QUESTION ONE (35 minutes): Write an objective memo, discussing how parties and claims were joined, and whether joinder was proper under the applicable rules of the FRCP. Do not address subject-matter jurisdiction in this essay.

QUESTION TWO (45 minutes): Write an objective memo about the amended complaint, discussing whether each claim by each party has proper subject-matter jurisdiction. I recommend that you organize your essay party-by-party, and claim-by-claim, going in order of how the claims were asserted. To the extent that joinder is relevant to your analysis, you may incorporate any relevant joinder conclusions from Question One into this answer without having to repeat any joinder analysis.

QUESTION THREE (10 minutes): You are Turtle's lawyer and need to draft an answer to the following allegation in Rabbit's amended complaint adding Turtle:

> **15.** Immediately prior to the accident, Defendant Dog allowed Defendant Turtle to take control of the steering wheel of Dog's 2019 Wolfvo P3 vehicle, and Defendant Turtle did take control of the steering wheel of that vehicle and blasted its horn three times, causing Plaintiff Rabbit to lose control of her tractor trailer.

As Turtle's lawyer, you have engaged in a careful investigation and have confirmed the information in the essay fact pattern. Regarding paragraph 15, you reasonably believe based on your investigation that Turtle did not seek or obtain permission from Dog before seizing control of the steering wheel of Dog's vehicle, taking control and beeping twice on his own volition because Dog—who was sitting in the driver's seat—was not paying attention to his driving. Based on this investigation, draft an answer to paragraph 15 of Rabbit's amended complaint. Do not provide analysis or explanation; instead, just draft a responsive paragraph to incorporate into Turtle's answer.

MULTIPLE-CHOICE QUESTIONS

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

Read these rules carefully before proceeding:

- *Finish the essay questions first.* The multiple-choice questions are based on the essay fact pattern, but may add or change some of the facts from the essay. You should therefore not start the multiple-choice questions until you complete the essay questions, in order to avoid the possibility of inadvertently using multiple-choice facts in your essay answers.
- *Each multiple-choice question stands on its own:* Unless expressly provided otherwise, a fact added or changed from the essay for one multiple-choice question applies to that question only and not to any other question.
- *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:*
    - 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. Does the court have personal jurisdiction over Dog and Turtle?

A. No, because they are subject to general jurisdiction in Florida, where they are domiciled.

B. Yes, even though the court lacks general jurisdiction over them.

C. No, because it would be burdensome to force Florida residents to litigate in Pennsylvania.

D. Yes, because they impliedly consented to personal jurisdiction by driving and traveling in Pennsylvania, giving rise to the claims against them.

EXPLANATION: B is correct. Dog and Turtle are subject to *specific* jurisdiction because their conduct in PA gave rise to the claims against them. A is wrong because the Ds' domicile in FL (providing FL with general jur) is irrelevant to specific jur in PA. C is wrong because it wouldn't be particularly burdensome for them to travel to PA (they did it once already), and the standard for rejecting PJ based on reasonableness is not mere burdensomeness, but *compelling* burdensomeness. D is wrong because *Shoe* makes it clear that "implied consent" is a legal fiction. Also, nothing in the fact pattern suggests that PA has a driver's consent statute like Massachusetts. Thus, B is correct: the answer says "even though" GJ is lacking, there is PJ (which there is, based on specific jur.). ISSUES: Personal jurisdiction, specific jurisdiction, general jurisdiction, implied consent, reasonableness factors.

2. In which judicial districts might Rabbit have asserted venue in a lawsuit against Dog and Turtle for negligence?

A. Any judicial district in Florida.

B. The Middle District of Pennsylvania.

C. Any judicial district in Florida and the Middle District of Pennsylvania.

D. The Middle and Southern Districts of Florida and the Middle District of Pennsylvania.

EXPLANATION: D is correct. Venue is correct in the Middle and Southern Districts of Florida (because all Ds reside in FL, one in the Middle and one in the Southern District), and in the Middle District of Pennsylvania (the accident was in central PA). A and C are wrong because no D resides in the Northern District of FL. B is true but omits other parts of the correct answer. ISSUES: Venue under 28 USC 1291(b)(1) and (b)(2).

3. Assume that Turtle moves to dismiss Rabbit's negligence claim against him due to the statute of limitations having expired before Rabbit added Turtle as a defendant. Should the court grant Turtle's motion?

A. Yes, because he was not served with process before the statute of limitations expired.

B. No, so long as he is served with process within 90 days of the filing of the amended complaint.

C. Yes, because he did not learn about the suit against Dog until after the statute of limitations expired.

D. No, because he learned about the suit against Dog within a few weeks of its filing.

EXPLANATION: D is correct based on the relation-back doctrine. The original complaint was filed just days before the statute of limitations (SOL) expired. The amended complaint adds Turtle and asserts a negligence claim against him. Under FRCP 15(c)(1)(C), the elements for relation-back are met. First, a change in parties. Second, the claim against Turtle is the same one timely asserted against Dog. Third, Turtle learned about the suit within the 90-day 4(m) period of the complaint's original filing. What Turtle learned gave him notice to prepare a defense, and informed him that Dog was mistakenly sued for beeping instead of him. A is wrong because Rule 4 and Rule 15 do not require service before the SOL expires. Similarly, B is wrong because the 4(m) period for relation-back is measured from the filing of the original complaint, not the amended complaint. C is wrong because the 4(m) period does not have to fall within the SOL period. ISSUES: Relation-back, timing of Rule 4 service.

4. Assume for this question only that Rabbit filed her initial complaint against Dog in state court in Jacksonville, Florida. Could Dog remove the case to federal court?

A. No, because Dog is a citizen of Florida.

B. Yes, but he'd have to remove it to the Northern District of Florida and not the Southern District of Florida.

C. No, because he did not blast the horn and is therefore not the real party in interest.

D. Yes, because diversity jurisdiction would be satisfied.

EXPLANATION: A is correct. The forum defendant rule prohibits removal if the sole basis for original jurisdiction is diversity and any D is a citizen of the forum state, as is the case here. 28 USC 1441(a)(2). B is true but irrelevant: *if* removal were permitted, it would have to be to the federal court corresponding to the state court. But removal is not permitted. C is factually true (Dog did not blast the horn) but irrelevant. D is also true but wrong because of the forum defendant rule. ISSUES: Removal, forum defendant rule, federal question jurisdiction, diversity jurisdiction.

5. Assume for this question only that Rabbit, Dog, and Turtle, are all citizens of Florida and the original lawsuit against Dog is filed in the Court of Common Pleas for Dauphin County, PA (a state trial court in Pennsylvania). Three months after Rabbit amends her state-court complaint to add Turtle, a notice of removal is filed by Dog and Turtle, removing the lawsuit to the United States District Court for the Middle District of Pennsylvania. Three months after that, Rabbit moves for remand. Should the federal court remand the case to the Pennsylvania court?

A. Yes, because the notice of removal was filed more than 30 days after service on the defendants.

B. No, because the motion to remand was sought more than 30 days after the notice of removal.

C. Yes, because remand is necessary.

D. No, because none of the parties are a citizen of Pennsylvania.

EXPLANATION: C is correct. Remand is necessary because original jurisdiction is lacking, allowing remand anytime prior to final judgment. 28 USC 1447. A and B are both true but irrelevant; the notice of removal was late and by itself would have permitted remand, if remand was sought within 30 days of removal. But both removal and remand were beyond the normal 30 days. D is nonsense. ISSUES: removal, timing of removal, timing of remand, bases for motions to remand for procedural versus SMJ defects.

6. Assume for this question that Dog's negligence claim against Rabbit in the fact pattern is negligence per se premised on a federal regulation issued by the U.S. Department of Transportation (U.S. D.O.T.) requiring truckers driving in interstate commerce to obey all

posted speed limits. Further assume that Dog is the plaintiff rather than the defendant. Would such a claim satisfy federal question jurisdiction?

A. Yes, because it includes a federal ingredient.

B. No, because it was created by state law.

C. Yes, because it was created by federal law.

D. No, because finding federal question jurisdiction here would permit a huge expansion of cases that can be heard in federal court.

EXPLANATION: D is correct under the most pertinent test, the *Gunn/Grable* rule. A is true but irrelevant; although the claim includes a federal ingredient, that is not enough to exercise federal question jurisdiction. B is true because Dog's claim is created by state law (negligence per se), but not the best answer because it ignores the *Gunn/Grable* test, which was created to sometimes allow federal question jurisdiction over state law claims like this, ones that include a federal ingredient. D is correct because it would be a huge expansion of FQ SMJ if courts were to allow a state-law negligence per se claim just because it includes a duty found in a federal regulation. The Supreme Court has repeatedly refused to allow claims like this (negligence, negligence per se) to have FQ SMQ (*Merrell Dow*, *Grable*). ISSUES: Federal question jurisdiction, Holmes test, *Grable/Gunn* test.

7. Assume for this question that Dog's answer to Rabbit's complaint included the defense of improper service of process. Five days later, Dog unilaterally amended his answer to add the defense of lack of personal jurisdiction. Five days after that, he obtained Rabbit's consent to amend again and added the defenses of failure to state a claim and lack of venue. Which of the defenses have been waived?

A. Lack of venue.

B. Lack of venue and failure to state a claim.

C. Lack of venue, failure to state a claim, and lack of personal jurisdiction.

D. None of them because Rabbit consented to the second amendment.

EXPLANATION: A is correct. The preserved defenses are improper service of process (stated in original answer), lack of PJ (stated in amendment allowed as an amendment as a matter of course, FRCP 12(h)(1)(B)(ii)), and failure to state a claim, even though it was in the second amended answer (FRCP 12(h)(2)). Lack of venue was not in the original answer or an amendment as a matter of course, so it is waived. *See* FRCP 12(h)(1). ISSUES: Rule 12 waiver of defenses, Rule 15 amendment as a matter of course.

8. Assume for this question that paragraphs 12 to 14 of Rabbit's original complaint, alleging that Dog was negligent, state in relevant part:

12. On or about Oct. 15, 2020, Plaintiff Luci Rabbit was driving her truck on the Pennsylvania Turnpike with all reasonable care.

13. Defendant Atticus Dog, who was driving a Wolfvo sedan in the adjacent lane, negligently and without justification blasted his howling horn at Plaintiff, hurting Plaintiff Rabbit's ears, startling her, and causing her to lose control of her truck, making her truck tip over, and causing $75,000 in damages to the truck.

14. Defendant Dog is liable to Plaintiff Rabbit for negligence in the amount of $75,000.

Dog moves to dismiss Rabbit's negligence claim pursuant to Fed. R. Civ. P. 12(b)(6). Should the court grant his motion?

A. No, because Rabbit's claim presents more than sufficient plausibility, or heft, to proceed to discovery.

B. Yes, because Rabbit's claim does not present sufficient plausibility, or heft, to proceed to discovery.

C. No, because based on Rabbit's pre-filing investigation, it was possible that Dog blasted the horn.

D. Yes, because it was Turtle who blasted the horn, not Dog.

EXPLANATION: A is correct. In fact, it would appear that the allegation provides factual assertions, accepted as true for purposes of the motion, to satisfy *every* element of negligence (duty [which is determined by the court], breach [the beeping], causation [startled and distracted], damages [caused wreck]). Thus, not only is the claim "plausible," it is more than plausible. B is wrong for this reason. C is wrong because "possibility" pleading was "retired" by *Twombly*. D is wrong because even though it reflects reality, the complaint's well-pleaded facts are nevertheless treated as true for purposes of 12(b)(6) analysis. ISSUES: Rule 8(b), 12(b)(6), *Twombly/Iqbal* standard, status of *Conley*, Rule 11.

9. Assume that immediately after Dog's deposition (but before Rabbit's lawyer amended the complaint), Dog's lawyer moved for monetary sanctions under Rule 11, arguing that a reasonable investigation would have showed that Dog neither held the steering wheel nor beeped his horn at the time of the alleged accident. For her part, Rabbit's lawyer did investigate the matter before filing, which included interviewing Rabbit (who testified she saw Dog's head sticking out of the driver's side window of the vehicle shortly before and after the accident), as well as by reviewing dashboard cam footage taken from Rabbit's truck, which corroborated Rabbit's statement to her lawyer. Should the court grant Dog's Rule 11 motion?

A. Yes, because Rabbit sued the wrong person for the wrong action.

B. No, because the court may not award monetary sanctions against a represented party.

C. Yes, because the lawyer should have investigated further.

D. No, because Dog did not follow the rules.

EXPLANATION: D is correct because Dog cannot immediately move for sanctions; a Rule 11 motion must first be served under Rule 5, and provide the opponent with 21 days to cure the alleged problem. Dog did not provide Rabbit with the 21-day safe harbor. A is true in a sense, since Dog did not beep the horn (though he does otherwise appear to have acted quite negligently). But Rule 11 is not violated merely because the pre-filing investigation turned out to be *wrong*, so long as the investigation was *reasonable*. Here, it appears likely that Rabbit's lawyer made a very reasonable pre-investigation filing, even reviewing a video showing Dog in the driver's position. B is wrong because a court can award $$ against the lawyer, and against a represented party for violations *other* than those under Rule 11(b)(2) (frivolous legal assertions). The problem here is supposedly baseless factual allegations. See Rule 11(b)(3). C is wrong because even if the lawyer should have investigated further, that did not excuse Dog from giving Rabbit the 21-day safe harbor. ISSUES: Rule 11, duty to engage in reasonable pre-filing investigation, safe harbor, limitations on monetary sanctions.

10. Assume for this question that before filing suit, Rabbit filed a claim with her insurance company for the damages to her truck. An insurance investigator prepared a report on the accident to keep on file in case either Rabbit or the insurance company had to assert or defend a liability claim in court. The insurance report stated that a court would likely find Rabbit contributorily negligent for her conduct leading up to the accident. Is the insurance report discoverable?

A. No, because the report is work product.

B. Yes, because Rabbit must disclose information relevant to any claim or defense.

C. No, because the report includes legal advice and is protected by the attorney-client privilege.

D. Yes, because the report is not by an attorney and is not protected by the attorney-client privilege.

EXPLANATION: A is correct. B is wrong because initial disclosures are not as broad as the answer states. C is somewhat true-ish as the insurance report contains legal conclusions, but the facts do not state that it is being provided by a lawyer to Luci as a part of representation, so it is not legal advice. D is true (not by an attorney and thus not subject to ACP) but still wrong because the insurance report is tangible work product prepared in anticipation of litigation and thus falls under FRCP 26(b)(3). ISSUES: Attorney-client privilege, work-product doctrine, Rule 26(b)(3).

11. Assume that during discovery, Dog notices Rabbit, demanding that she submit to a hearing test to determine how sensitive her hearing is. Is Dog's demand for a hearing examination appropriate?

A. Yes, because Rabbit put her hearing at issue in her complaint and a hearing test is highly likely to provide relevant information on Rabbit's sensitivity to loud noises.

B. No, because medical examinations are not permitted on demand.

C. Yes, because Rabbit is a party.

D. No, so long as Rabbit moves before the court to strike Dog's demand for a hearing test.

EXPLANATION: B is correct; although Rabbit put her hearing at issue, an FRCP 35 medical exam can only be done upon motion and order of court, which Dog did not seek (so A is wrong). C is true but incorrect: Rabbit is a party and Rule 35 exams are only permitted on parties or persons under their legal custody or control; but here, no motion was made. D is wrong because the problem is not Rabbit failing to make a motion to strike (or more accurately, to limit discovery or seek a protective order); the problem is Dog's failure to move for an order requiring Rabbit to get a hearing test. ISSUES: Rule 35 medical examinations.

12. Building on the additional facts of the previous question, further assume that Pennsylvania law does not permit parties to request medical examinations of any type of any parties for purposes of discovery without consent, in order to protect the privacy of litigants. Rabbit denies consent, and in a motion to restrict discovery, argues that Pennsylvania law prohibits Dog's demand for a hearing test. Should the court grant Rabbit's motion?

A. Yes, because Pennsylvania law governs the parties' tort claims.

B. No, because federal law governs the parties' tort claims.

C. Yes, because Rabbit's privacy is a substantive right.

D. No, because discovery is governed by federal and not state rules.

EXPLANATION: D is correct. Valid federal rules of practice and procedure promulgated under the Rules Enabling Act will be used in lieu of conflicting state law. The Supreme Court held Rule 35 (medical exams) valid in *Sibbach* (as discussed in the assigned readings). A is not untrue but is nevertheless wrong: it is likely that using Pennsylvania choice-of-law principles (*Klaxon*), the USDC for the MDPA will be required to use *substantive* PA law regarding the state-law tort claims (*Erie*). B is just wrong by misstating the rule of *Erie* ("no federal general common law"). C is wrong because under *Sibbach*, no "substantive right" is being "abridged, enlarged, or modified." 28 USC 2072(b). (Thus, there is a distinction between "substantive rights" under the REA and "substantive law" under *Erie*.) So D is correct. ISSUES: Rules Enabling Act as compared to *Erie* doctrine, 28 USC 2072, *Hanna*, *Sibbach*.

13. Assume that during discovery, Dog sends requests to the owner of the Lonely Truckers truck stop in West Virginia seeking answers to interrogatories and requests for admission regarding Rabbit's conduct and statements the night before the accident. He also demands any written

or electronic records documenting Rabbit's stay at the truck stop. Are the discovery requests appropriate?

A. Yes, because they are likely to lead to information relevant to the parties' claims or defenses, particularly regarding how rested Rabbit was when she was driving the next day.

B. No, because discovery cannot be sought on non-parties.

C. Yes, but only for the documentary evidence, not for the interrogatories or requests for admissions, no matter how relevant they may be.

D. No, because the truck stop is located in West Virginia and the federal court is in Pennsylvania.

EXPLANATION: C is correct. Discovery on non-parties may require a subpoena (FRCP 45) and is limited to production (FRCP 34) and depositions (FRCP 30 and 31). Interrogatories (FRCP 33) and requests for admission (FRCP 36) are limited to parties. So B is incorrect. A is true but incorrect: all of Dog's requests could lead to relevant info, but interrogatories and RFAs are still prohibited against the non-party truck stop. D is incorrect because some types of discovery can indeed be sought in the federal system against non-parties found in other states. See FRCP 45(c). ISSUES: Rule 33, 34, 36, 45.

14. Assume that Dog moves for summary judgment on Rabbit's amended claim against him. He bases his motion on his discovery testimony that it was not Dog but rather Turtle who was beeping and steering at the time of the accident. He also points out or suggests to the court that even though Rabbit had multiple opportunities to seek discovery from Dog and Turtle, Rabbit still has no evidence that Dog was the one beeping and steering. Rabbit files no materials in opposition. Should the court grant Dog's motion for summary judgment?

A. Yes, because Rabbit defaulted on the motion by failing to object or otherwise defend.

B. No, because Dog's deposition testimony is self-serving and should not be credited.

C. Yes, because Dog has negated an essential element of Rabbit's claim and Rabbit failed to meet her shifted burden of showing there is a disputed issue of material fact.

D. No, because Dog has not shown that there is no genuine dispute as to any material fact and that he is entitled to judgment as a matter of law.

EXPLANATION: D is correct. Dog has shown that there is no genuine dispute over who honked the horn, but his motion ignores that Rabbit's amended complaint is suing him for negligent entrustment (allowing Turtle to steer and beep). Thus, to the extent Dog has shown "no genuine dispute," he has done so only for *immaterial* facts. He is not entitled to JMOL. A is wrong: a nonmoving party has no obligation to respond to a motion for summary judgment (MSJ) unless the movant has met their initial burden of production, which Dog has failed to do. B is wrong: first, many depositions are self-serving; more fundamentally, in a MSJ, the

court may not consider credibility. C is wrong because Dog has not negated an essential element of Rabbit's claim. ISSUES: Rule 56.

15. Assume that all parties move for summary judgment on all claims. The district judge grants summary judgment only on Rabbit's claim for $1 for the timothy hay that Dog used to get his car out of a ditch, granting summary judgment to Dog and dismissing Rabbit's $1 claim for timothy hay. The judge then schedules a jury trial date for the remaining claims. Can Rabbit immediately appeal the dismissal of her $1 claim?

A. Yes, if the district judge certifies the appeal under 28 USC 1292(b).

B. Yes, if the district judge certifies the appeal under FRCP 54(b).

C. Yes, by writ of mandamus.

D. Yes, under the collateral order doctrine.

EXPLANATION: B is correct. FRCP 54(b) permits a district judge, when one but not all claims are disposed of, to certify the order disposing less than all claims as final for purposes of the final judgment rule, if the judge finds there is no just reason for delay. Rule 54(b) is the only arguable basis for appeal here: the order disposing of the "timothy hay" claim is not closely tied to the merits of who is liable for the accident; thus, an immediate appeal of this separate claim will not lead to any delay of further proceedings at the district court regarding the negligence claims. A is wrong because 28 USC 1292(b) is inapplicable. It states that if the district judge is "of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order *may materially advance the ultimate termination of the litigation*," they can certify the issue for immediate appeal (subject to the further discretion of the court of appeals to hear the appeal). But here, the liability for the timothy hay will have no impact on the more important and still-pending claims for liability and contribution for the accident. C is wrong: a writ of mandamus (28 USC 1651) typically requires a "clear and indisputable right" that is being violated by the court itself, but nothing in the facts indicates that this is the case here. D is wrong: under the collateral order doctrine, an order *collateral* to the merits of an underlying claim can be immediately appealed, but here the order disposed of the timothy hay claim on its merits. ISSUES: Bases for appeal, 28 USC 1291, 1292, collateral order doctrine, writ of mandamus & 28 USC 1651, FRCP 54(b).

16. Assume that during trial, Rabbit testifies that she "always drives within the posted speed limit and usually five miles below." In front of the jury, Dog's lawyer then calls as a witness, Maxie, a truck driver who knows Rabbit and, as the lawyer says, "is prepared to testify that Rabbit *always* drives faster than the posted speed limit, showing plaintiff to be a big-eared liar." Rabbit's lawyer objects to Maxie's testimony because Dog had not initially disclosed his intent to use Maxie as a witness in support of Dog's case. What should the court do?

A. Permit Maxie to testify that Rabbit is a liar.

B. Prohibit Maxie's testimony and inform the jury that Dog had failed to meet his obligation to disclose a potential witness to Rabbit.

C. Permit Maxie to testify on any matter relevant to the case for which he has personal knowledge.

D. Order a mistrial because the jury has been tainted by Dog's lawyer's statement about Maxie.

EXPLANATION: A is correct. Rule 26(a)(1) does require initial disclosure of witnesses "(i) the name and, if known, the address and telephone number of each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses, *unless the use would be solely for impeachment*." Put differently, a party must disclose any witnesses that they might use to help them, except for witnesses used solely to paint another witness as a liar. That is what Dog is attempting to do here with Maxie, who will contradict Rabbit's testimony that she never speeds. B would be correct if Dog was intending to use Maxie for non-impeachment purposes in support of his claim or defense. C is not the best answer because the key to this question is recognizing that Maxie is an impeachment witness. D is wrong: a mistrial is an order for a new trial (FRCP 59), but to the extent that the jury may or may not have been tainted, the judge can fix any such problem through a curative instruction to the jury. ISSUES: initial disclosure, Rule 26(a)(1), impeachment, Rule 26(b)(1) relevance, Rule 37(e) sanctions, Rule 59 motion for new trial, the concept of curative instructions.

17. Assume that at trial, Rabbit's lawyer presents her case in chief, putting forth her witnesses and evidence. After finishing her case in chief, Rabbit's lawyer moved for judgment as matter of law, arguing that any reasonable lawyer must find in Rabbit's favor based on her evidence. The motion was denied. Later in the trial when Dog and Turtle were putting on their case in chief, they called a witness, another truck driver who was driving a mile behind them and who testified that shortly before the accident, he heard somebody on the CB radio complaining that "Queen B is puttin' an extra 40 pedals to the metal!!," which he explained meant that somebody was claiming that Rabbit was speeding, going at least 40 miles over the speed limit. Rabbit's lawyer objected to the testimony at the time as hearsay, but the objection was overruled. After all the lawyers rested their case, the case was submitted to the jury, and the jurors found in favor of Rabbit on all claims, giving her $1. The next day, Rabbit moved for renewed judgment as a matter of law on the basis of improperly admitted evidence, namely the hearsay testimony of the truck driver, as well as a new trial, based on shockingly low damages. Assuming that the district judge agrees that the hearsay evidence was improperly admitted and prejudicial, and that the damages were shockingly low, what should the court do?

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

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

C. Deny both motions because no motions were made by Rabbit's lawyer at the end of all of her opponent's evidence.

D. Inform the defendants' lawyers that the court will grant a new trial on the issue of damages unless they agree that the damages awarded to Rabbit for negligence be increased to $75,000.

EXPLANATION: B is correct. The motion for renewed judgment as a matter of law (RJMOL, FRCP 50(b)) should be denied. Even though Rabbit's lawyer sought a motion for judgment as a matter of law (JMOL, FRCP 50(a)) during trial, it was on a different basis (strength of P's evidence) and thus could not be "renewed" when the RJMOL was based on trial error (prejudicial hearsay evidence). However, a trial error that is preserved (by objection here) that is prejudicial (FRCP 61) can be a basis for a new trial (FRCP 59). So B is correct. A is wrong because you cannot grant an "renewed" RJMOL that was not made during trial. C is wrong: although an JMOL cannot be sought until the opponent has been fully heard (which Rabbit didn't bother to do), a motion for a new trial can be initially sought after entry of judgment. D is wrong because "additur" such as this violates the Seventh Amendment, as discussed in class. The court could grant a new trial limited to the issue of damages, but the judge cannot give the defendants the choice noted in answer D. ISSUES: Rule 50 JMOL/RJMOL and conditional motion for new trial, Rule 59, bases for a new trial, Seventh Amendment, Additur versus Remittitur.

18. Assume that shortly after the 2020 accident, Rabbit sued Dog, and that her only theory of liability was negligent beeping. Dog did not assert any counterclaims, instead defending on the basis of contributory negligence (regarding contributory negligence, assume that under the applicable law, if a plaintiff is found to be even partially negligent, they cannot recover any damages for the negligence of an opposing party). In this scenario, assume that the jury found Dog negligent and Rabbit contributorily negligent, and the judge therefore entered a verdict in Dog's favor. A month later (but still within the statute of limitations), Rabbit filed a second suit in the same federal court against Dog for negligent entrustment by allowing Turtle to drive and beep. Dog moves to dismiss the second suit on the basis of preclusion. Should the court grant his motion?

A. Yes, because claim preclusion prevents Rabbit from suing the same party or privy again for the same claim.

B. No, because the second claim is for negligent entrustment, which is a different legal theory, involving different facts.

C. Yes, because issue preclusion can be asserted defensively and non-mutually against Rabbit, because she was a party or privy to the first suit.

D. No, because the finding of contributory negligence was not essential to the outcome of the first suit.

EXPLANATION: A is correct. Claim preclusion prevents relitigation of a final judgment on the merits (here the jury verdict and entry of judgment) involving the same parties (here Rabbit

and Dog) and the same claim. Regarding "same claim," the modern majority rule treats any legal theory that was asserted *or could have been asserted* from the same transaction or occurrence as being the "same claim." (Merger and bar.) Here, the T/O is the accident, and whether Rabbit sues for "negligent beeping" or "negligent entrustment", it's all the same claim for purposes of preclusion. B is wrong: under the modern rule, different damages or different legal theories are irrelevant, what matters for the "same claim" part of the analysis is whether they all arise from the same T/O. C is wrong because Dog is asserted claim preclusion, not issue preclusion. Plus, the second suit involves the same parties so the use of preclusion is not "non-mutual." D is wrong because the finding of contributory negligence was indeed essential to the first suit. (See table I showed in class: Issue Preclusion: When is an issue "essential to the judgment"?). ISSUES: claim preclusion including "same claim" and "same party", issue preclusion including "essential to the judgment".

19. Assume the facts of the previous multiple-choice question with two changes: that in her second suit, Rabbit sues Turtle for negligent beeping, rather than Dog for negligent entrustment. Turtle moves to dismiss the second suit on the basis of preclusion, namely, that the issue of Rabbit's contributory negligence was already litigated and decided, and on that basis, Rabbit cannot win the second suit against Turtle. Should the court grant his motion?

A. Yes, because claim preclusion prevents Rabbit from suing the same party or privy again for the same claim.

B. No, because the second claim is asserted against a different defendant.

C. Yes, because issue preclusion can be asserted defensively and non-mutually against Rabbit, because she was a party or privy to the first suit.

D. No, because the finding of contributory negligence was not essential to the outcome of the first suit.

EXPLANATION: C is correct. This is almost the same question as # 18 but with a minor change to the line-up (Turtle rather than Dog in suit # 2) and legal theory (negligent beeping rather than negligent entrustment). This is also an example of "non-mutual issue preclusion," as noted in my handout Non-mutual issue preclusion (NMIP) scenarios. Here, NMIP is likely ok because Rabbit had a full and fair opportunity and incentive to aggressively litigate the issue of contributory negligence in suit # 1, because an adverse finding on that issue would cause her—and in fact, *did* cause her—to lose her suit against Dog. Here, Turtle is using issue preclusion *against* a party who litigated and lost on that issue in suit # 1, Rabbit; accordingly, Due Process is not violated. A is wrong because claim preclusion cannot apply when the second suit involves different claims or different parties or privies. Here, Rabbit is suing Turtle, not Dog. B is true (different D) but irrelevant since issue preclusion can sometimes be asserted non-mutually. D is wrong because the issue of contributory negligence was essential to the first judgment. (See table I showed in class: Issue Preclusion: When is an issue "essential to the judgment"?) ISSUES: limits on claim preclusion, issue preclusion including "essential to the judgment" and requirements for non-mutual issue preclusion.

20. In the real world, Atticus Dog is Professor Nathenson's beloved shepherd mix. What is the most likely to entice Atticus to come inside when he is outside barking at birds and cats? (You already have all the information you need to answer this question. *Do not ask the proctor for clarification.*)

A. Publix Bacon treats.

B. True Chews.

C. A snakey toy that squeaks.

D. Whatever Mom and Dad are eating.

EXPLANATION: The answer is B. How would you know this? You would (or did) if you followed the instructions at the top of the exam: "Read the instructions carefully." The answer to this question could be found on page two of the exam. Indeed, aren't the exam instructions the ***rules*** of the examination? And aren't lawyers supposed to read the rules?

[END OF EXAMINATION]

The Nathenson Family "Not Ready for Exam Time Players" would like to wish you a happy, healthy, and safe holiday break!

Atticus Dog	**Luci Rabbit**	**Shelly Turtle**
		
"Never underguesstimate da power of da treets."	"Dawg is a Toopid Woof."	"BlaHHh!"