

AGN: _____

MIDTERM: CIVIL PROCEDURE

Fall 2023—2.0 hours

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

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

Time and length. This examination is seven (7) pages long. I am also providing you with an 28-page supplement with relevant sections of the Constitution, statutes, and FRCP. Make sure you have all pages of this exam and the supplement 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.

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

AGN; avoid other personally identifying information. Indicate your 4-digit AGN number on this exam and on the supplement. Do not put your real name or any other personally identifying information on the examination or other materials except for your AGN. Violating this rule may violate the College of Law Academic Integrity Policy.

Please do not contact me. You should 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 the Registrar's office and they will contact me if appropriate.

Time and scoring. The suggested times below add up to 75 minutes. However, I will give you two (2.0) hours. Scoring is proportional to times suggested below.

- *Essay question (one question, suggested time of 45 minutes):* I suggest you spend approximately (i.e., at least) 45 minutes on the essay question. Write your answer using **Exam4** or other software required by the Registrar. You may not exceed the **1500-word limitation**, which should be more than enough words to answer the essay question. 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 **one bluebook**, writing on one side of the page only, skipping lines.
- *Multiple-choice (10 questions, suggested time of 30 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.* Legibility, proper writing, and organization are expected and are part of your score.
- *How to address essays.*

- Read the call of the question and facts carefully—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.
- 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. 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 QUESTION

Suggested essay time: 45 minutes.

Atticus Dog was a good boy who had been born and had lived in South Florida for many years. He was so happy to live with his mummee and daddee and sisters, that he never wanted to move away. To earn a living, Atticus worked doggedly in South Beach as a “go-fer,” i.e., a person who gets drinks and towels, and does errands for rich people staying at the W/oof South Beach resort Miami Beach, Florida. He especially *loved* fetching treats (and sometimes secretly took a nibble on his own). He also loved walking and running and exercising very much, and frequently posted photos of himself exercising and flexing on his Instagram account “The Bulging Belgian.” (One of his parents was from Belgium.)

In mid-September of 2023, one of the resort guests was Luci Rabbit, a professional “Influencer” from Beverly Hills, California (where she had been born). Luci had many millions of followers on her TikTok and Instagram accounts, where she posted photos and images showing her living her “best life.” But Luci had become bored with the blasé nightlife of Los Angeles, and therefore rented a suite at the W/oof. On September 14, Atticus was at work at the W/oof fetching treats and snacks and balls and other fun things for the wealthy patrons. While Atticus bent over to serve a drink, his iPhone fell out of his pocket, hit a table, and accidentally broadcast one of his photos to everyone in the immediate vicinity who had “AirDrop” open. The image was an unflattering photo of Atticus flexing in front of the mirror with his tongue hanging out. At that time, Luci was lounging by the pool playing “Angry Buns” and the photo from Atticus’ phone was downloaded to her phone without her realizing it.

Several weeks later back at home in California, Luci reviewed the photos from her South Beach trip. For the first time, she saw the strange “flexing tongue” photo. Even though she had no idea where it came from, she thought it was so funny, so she posted it to her Instagram account with the text “This showed up on my phone: Loser on Patrol? Like to dislike!!!” The photo received millions of “likes.” Eventually, people from South Beach realized that the subject of the photo was Atticus. As a result, Atticus lost his job at the South Beach W/oof. No longer having a job, he moved to Belgium to connect with his ancestral roots. He also threw away his phone.

Later, on October 3, 2023, Atticus’ lawyer filed suit against Luci Rabbit in the United States District Court for the Southern District of Florida, seeking damages in excess of \$100,000 for invasion of privacy. Service of the summons and complaint were made in Los Angeles, California.

QUESTION: You are the clerk for the District Judge handling the case. Luci has filed a timely motion to dismiss for lack of personal jurisdiction. Discuss whether the Court should grant the motion.

Further information:

- Assume that Atticus and Luci are human beings.
- Assume for the essay that service was proper. You need not discuss service.
- Beverly Hills, California is found in the U.S. District for the Central District of California.
- Regardless of actual Florida law (which uses an enumerated long-arm), please assume for purposes of this question that the Florida long-arm statute states: “Florida courts may exercise personal jurisdiction to the full extent permitted by the Constitution of the United States.”

MULTIPLE-CHOICE QUESTIONS

Suggested total time for 10 multiple-choice questions: 30 minutes.

Read these rules carefully before proceeding:

- *Finish the essay 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, to avoid the possibility of inadvertently using multiple-choice facts in your essay answer.
- *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 multiple-choice answer seems to be correct, then choose the best answer.
- *Long-arm statute:* Unless a question states to the contrary, assume that 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 subject matter jurisdiction?
 - A. Yes, because Luci copied and distributed Atticus’ photo, which is a question of federal copyright law.
 - B. No, because Atticus is stateless.**
 - C. Yes, because the suit is a dispute between citizens of different states.
 - D. No, because it is unlikely that an unknown person like Atticus can get over \$75,000 in damages.

EXPLANATION: B is correct, Atticus is a US citizen domiciled abroad at the time the complaint is filed, making him stateless. No SMJ because the claim arises under state law. A is wrong because Atticus, as the master of his complaint, did not plead copyright. C is not true because a citizen of a state must be a US citizen domiciled in a state. D is wrong because it is entirely possible for Dog to get over the AIC.

2. Regardless of where Atticus filed, where might venue lie in Atticus’ civil action?
 - A. The Central District of California and the Southern District of Florida.**
 - B. The Southern District of Florida only because that is where Luci obtained the photo.
 - C. Every judicial district because Atticus is domiciled abroad.

- D. The Central District of California, because that is where Luci was when she posted the photo.

EXPLANATION: A is correct. CD Cal would work because that is where D resides (1391(b)(1)) and where she was when she posted the photo (1391(b)(2)). S.D. FL is also ok because that's where she got the photo, making the SDFL a place with a factually substantial connection to the claim (like in the Puerto Rico boat case). B and D are wrong because venue is possible in two districts. C is wrong because plaintiff's domicile is not normally relevant to venue under 1391(b)(1).

3. Assume for this question only that Atticus' lawsuit was served by registered mail sent to Luci in California. Further assume that Florida law does not permit service of the summons and the complaint by mail, but California law does. Was service proper?

- A. Service was proper under the FRCP but not under the Constitution.
- B. Service was proper under the Constitution but not under the FRCP.
- C. Service was proper under both the Constitution and the FRCP.**
- D. Service was improper under both the Constitution and the FRCP.

EXPLANATION: C is correct. *Mullane* noted that service by mail was reasonable, so the Due Process clause is satisfied. FRCP 4(e) permits service as provided by state law in either the state where the suit is filed (FL) or the state where service is made (CA). Since CA law permits service by mail (at least in the assumption in this question), service is ok under both the Constitution and FRCP. For this reason, the remaining answers are incorrect.

4. Assume for this question only that Atticus never moved to Belgium. Before any suit was filed, Atticus Dog died and the suit was filed on his behalf by his older brother Shelly Turtle in his capacity as executor for Atticus' estate. Shelly had lived at home in Florida with Atticus at the time the photos were posted by Luci, but he was so despondent after Atticus' death that Shelley moved to the Bay area of San Francisco, California due to its "green" climate. He then filed suit against Luci on behalf of Atticus' estate. Does the court have diversity jurisdiction?
- A. No, because Shelly was not diverse from Luci at the time the suit was filed.
 - B. Yes, because Atticus was diverse from Luci at the time he died.**
 - C. No, because Shelly was not diverse from Luci at the time the cause of action arose.
 - D. Yes, because Atticus was diverse from Luci at the time the cause of action arose.

EXPLANATION: B is correct. See 1332(c)(2). The citizenship of an executor is that of the decedent. If Atticus never moved from Florida, he remained a citizen of Florida at the time of his death. That means that Shelly, as executor, is also a citizen of Florida. Also, the relevant time of diversity is the time of filing, at which Shelly was and remained a citizen of Florida. The time the claim arose is irrelevant. The other answers are wrong for the reasons noted above.

5. Assume for this question only that Atticus had filed his lawsuit in state court in Florida. Could Luci remove the case to federal court?
- A. Yes, because Luci is a citizen of California.**
 - B. No, because Luci is a citizen of California.
 - C. Yes, because Atticus is not a citizen of California.
 - D. No, because a case cannot be removed solely on the basis of diversity jurisdiction.

EXPLANATION: A is correct. The "in-state defendant" rule applies when any D is a citizen of the forum state and the civil action is based solely on diversity. Here, the in-state citizen is P, not D. B and C are therefore irrelevant. D misstates the law: a case can indeed be removed on diversity, so long as it doesn't violate the in-state D rule (or other provisions).

6. Assume for this question only that Atticus' factual allegations, as contained in paragraphs 10-14 of his complaint, were as follows below:

10. Luci Rabbit had unlawful possession of a photo of me sticking out my tongue.

11. Luci Rabbit, without permission or justification, intentionally or recklessly invaded my private affairs or concerns.

12. Atticus Dog actually does, and a reasonable person would, regard this invasion as highly offensive.

13. Atticus Dog has suffered extreme emotional and physical distress and anguish.

14. Luci Rabbit is liability for invasion of privacy.

Further assume that the relevant substantive law states: that the elements of invasion of privacy are: 1) Defendant's conduct must be intentional or reckless; 2) the Defendant must have invaded, without lawful justification, the Plaintiff's private affairs or concerns; and 3) a reasonable person would regard the invasion as highly offensive, causing distress, humiliation or anguish. If Luci moves to dismiss Atticus' complaint for failure to state a claim, what argument should she make?

- A. The complaint is too indefinite to formulate a response.
- B. Luci did not take any actions to invade Atticus' privacy.
- C. Atticus' claim is not plausible.**
- D. Atticus's claim is not possible.

EXPLANATION: C is correct. This question seems hard but is really an extended "receive the rule" question; it is, however, a good example of some of the thinking you might have to do later on the final should I ask a *Twigbal* question. Per the elements of invasion of privacy as noted, Atticus has failed to plead any action by the D constituting an "invasion" of Atticus' private affairs or concerns. In fact, he didn't even plead that Rabbit *posted* the image online; as stated above, Dog simply alleges that Rabbit's *possession* of the photo was somehow an invasion of privacy, and there are no facts pleaded from which we could plausibly infer an invasion. At least, that is the best argument that Luci will make, and note the phrasing of the Q: "what argument should she make?" A (motion for a more definite statement) is a possible argument but not as good as a potential dismissal. B is a denial, which would require her to answer and could not immediately end the suit. D seems rooted in the old *Conley* "possibility" standard, which was abrogated by *Twombly*.

7. Assume for this question only that Atticus filed his complaint in California state court and that Luci Rabbit timely removed the civil action to California federal court in the Central District of California. Immediately after removing, Luci answered the

complaint and included a defense based on the federal Communications Decency Act (“CDA”). The CDA, known as “Section 230,” provides an immunity to interactive service providers who post content provided by other persons. Luci argues that her Instagram feed makes her an interactive service provider, that the content was provided by Atticus, and that she is immune. Atticus’ lawyer timely moves to remand. Should the court grant Atticus’ motion?

- A. No, because the parties are diverse and Luci is invoking federal law.
- B. No, if the court agrees that Luci is not an interactive service provider.
- C. Yes, because the civil action does not include any federal issue.
- D. Yes, because the civil action does not include a federal question.**

EXPLANATION: D is correct. Under the *Mottley* well-pleaded complaint rule, a federal question must be found in the P’s complaint, which here is for a state privacy tort. The only federal issue was introduced by Luci *after* remand in her answer by her pleading of an affirmative defense under the CDA. Even though the removed case has diversity SMJ, Luci is a domiciliary of California, and without some additional basis beyond diversity, she is barred by the in-state defendant rule from removing. Atticus’ motion should be granted. A is true but irrelevant because the federal issue is not in the WPC. B is irrelevant, as whether Luci’s CDA defense works or not is irrelevant to whether the case invokes FQ SMJ. C is factually wrong: the answer does include a federal issue, the CDA as a defense.

8. Suppose that in cases involving “online” torts, the Florida long-arm statute only allowed personal jurisdiction over “online actions with substantial acts or omissions in the State of Florida.” What is Luci’s best argument that the long-arm would not be met?
- A. She has no contacts with Florida.
 - B. The exercise of personal jurisdiction against her in Florida would be compellingly unreasonable due to the burden of her traveling, the fact that Florida has a small interest in events happening in California, and that witnesses and evidence would be based primarily in California.
 - C. She was not personally served in California.
 - D. She did not see or upload the photo to Instagram until after she returned to California.**

EXPLANATION: D is correct. Luci should argue that her own substantial acts or omissions occurred after she went home to CA; indeed, she didn’t even know about the photo until getting home. A is wrong because 1) she does have FL contacts (she went there), and 2) contacts is relevant to the DP clause, not to the LAS quoted above.

B is wrong for similar reasons, as it alludes to the reasonableness factors in the MC test, which is a constitutional issue, not a statutory LAS issue. C is irrelevant to the question asked.

9. Assume for this question only that Atticus' job at W/oof was at a resort in Puerto Vallarta, Mexico, and that this is where Atticus accidentally "AirDropped" his photo to Luci. The other facts from the essay remain the same. Where does venue lie?
- A. In the Southern District of Florida.
 - B. In the Central District of California.**
 - C. In any district where Luci is subject to personal jurisdiction.
 - D. In any district where Luci's followers viewed the photo.

EXPLANATION: B is correct. CD CAL remains good venue since Rabbit is domiciled there under 1391(b)(1). But by moving the place of Dog-to-Rabbit photo Airdropping, we have taken Florida out of the equation for purposes of 1392(b)(2) venue (districts where substantial errors or omissions take place). A is incorrect for the same reason. C is wrong because it alludes to "fallback" venue under 1391(b)(3), which is only invoked when residence-based venue or event/omission-based venue fail. Here, residence-based venue remains available. D is just bizarre and expansive and would seem to require an extremely expansive view of PJ (1391(b)(3), which isn't available anyway as noted), or an extremely expansive view of where "events" take place under 1391(b)(2), which is untenable because it would arguably allow venue in any internet case.

10. Assume for this question only that Luci's motion to dismiss for lack of personal jurisdiction was denied. Afterwards, Luci filed a motion to dismiss for lack of venue based on Atticus filing in the wrong district, and for improper process due to Atticus' summons being covered in slobber. How should the court rule?
- A. Both motions should be denied.**
 - B. The motion for lack of venue should be denied and the motion for insufficient process should be granted.
 - C. The motion for insufficient process should be denied and the motion for lack of venue should be granted.
 - D. Both motions should be granted.

EXPLANATION: A is correct and a basic illustration of the initial response rule. Luci moved to dismiss for PJ, and pursuant to FRCP 12(g), was required to include in her pre-answer motion any other Rule 12 defenses that were available to her. Any insufficient process argument—here, the argument that the summons was improperly

covered in slobber--would have been available to Luci at the time she served her MTD for lack of PJ. Further, after filing and losing her pre-answer MTD, she was required to answer because FRCP 12(g) permits only one pre-answer motion, at least for defenses like this that were available at the time the initial PAM is served. Finally, FRCP 12(h)(1) indicates that “disfavored” defenses (PJ, venue, process, service of process) are waived if not made in the initial response (whether answer or PAM), if they were available at the time they are served (subject to an interesting exception we’ll discuss when we get to Rule 15).