Civ Pro Final Fall 2014

With Answer Key

PART I

This first section of the exam contains two essay questions.

Question 1 (worth 43% of final exam grade)

Question 1
Worth up to 43 points

In 2010 a private recreation center in Iowa ordered an Aquaslide product from a local distributor. The order was forwarded to Purity Swimming Pool Supply in Hammond, Indiana. A slide was delivered from a Purity warehouse to the recreation center, and was installed by recreation center employees. On July 15, 2012, Jerry A. Beeck, a member of the rec center, was injured while using the slide.

Soon thereafter, accident investigations were undertaken by representatives of the recreation center's insurance company. On October 31, 2012, Aquaslide first learned of the accident through a letter sent by a representative of the rec center's insurer to Aquaslide, advising that "one of your Queen Model slides" was involved in the accident. Aquaslide forwarded this notification to its insurer. Aquaslide's insurance adjuster made an on-site investigation of the slide in May, 2013, and also interviewed persons connected with the ordering and assembly of the slide. An internal memo from the insurance company's files dated September 23, 2013 indicated that Aquaslide's insurer was of the opinion the "Aquaslide in question was definitely manufactured by our insured." The complaint was filed October 15, 2013. Having been told both by the insurance company for the rec center and by its own insurer that it had manufactured the slide, Aquaslide answered the complaint on December 12, 2013, and admitted that it "designed, manufactured, assembled and sold" the slide in question.

The statute of limitations on plaintiff's personal injury claim expired on July 15, 2014. About four months later, on November 5, 2014 Carl Meyer, president and owner of Aquaslide, visited the site of the accident prior to the taking of his deposition by the plaintiff's lawyer. From his on-site inspection of the slide, he determined it was not a product that his company had made. Thereafter, Aquaslide moved the court for leave to amend its answer to deny manufacture of the slide. How should the court rule?

Question 2 (worth 42% of final exam grade)

In 2005, Houston artists Dan Havel and Dean Ruck used wooden house boards to create a jagged, portal-like conical sculpture that drew the viewer from the front to the back of a house located in the city's eclectic Montrose neighborhood. The sculpture, entitled *Inversion*, has a registered copyright. *Inversion* was torn down later that year, but photographs—also copyrighted—remain. Here is an image of the sculpture:

Roughly seven years later, employees at a London-based British advertising agency, McGarry Bowen UK, stumbled on some of these images on the internet while working on a pitch to present to Honda Motor Europe Ltd. to create a commercial for the European debut of a CR-V model Honda vehicle. McGarry Bowen UK provides advertising and marketing services to companies selling goods and services in Europe.

As the pitch-development work unfolded, the McGarry Bowen UK creative team members narrowed the concept to a portal. One of these portal concepts closely resembled Dan Havel and Dean Ruck's *Inversion*, both in material (wooden boards) and style (long, conical, and with a trumpet-head like opening). Two McGarry Bowen UK employees primarily originated and developed the portal idea. McGarry Bowen UK used the *Inversion* images in its final presentation to Honda Europe and received the production contract.

On July 17, 2012, Jim Kelly, McGarry Bowen UK's CEO, circulated an email entitled "Houston Hole house video" to five McGarry Bowen UK employees. The email contained a hyperlink to a video depiction of *Inversion* on the website www.arteryhouston.org. The www.arteryhouston.org website is administered by Artery Media Project, "a Houston based organization created to support the promotion of interdisciplinary works of art focusing on local Houston artists." According to the organization's founder, the link Kelly circulated in 2012 would have accessed a "video depicting the creation and final installation of Dan Havel and Dean Ruck's sculpture, *Inversion*." The website "prominently displays a copyright notice on all of its pages, noting expressly 'all rights reserved,'" and the "website makes clear

that we are based in Houston, including by providing our mapped Houston address and, of course, through use of the name of the website."

Presumably concerned about the copyright, the commercial's producer, who also worked for McGarry Bowen UK, called Dean Ruck in Houston. The parties dispute the result of the phone and email communications that ensued. Ruck believed that the commercial might feature the general concept of a portal stretching through a wooden house structure but would not use *Inversion* images or anything too similar. The commercial's producer, on the other hand, believed that Ruck consented to the agency's use of his copyrighted material as long as the commercial did not use an actual image of *Inversion*.

McGarry Bowen UK's production team used the photograph and built a replica of *Inversion* to use in filming the commercial. When Ruck learned that McGarry Bowen UK had built what was close to an *Inversion* replica, he promptly notified the agency that he disputed its right to do so. Ruck told the agency that it had misinformed him in the earlier call and emails. The producer and Ruck exchanged a few more emails but were unable to resolve their disagreement. The television commercial began airing in Europe in October 2012. Several months later, Ruck and Havel sued McGarry Bowen UK in Texas federal court, alleging copyright infringement and state-law fraud. Defendant moved to dismiss for lack of personal jurisdiction. Assume that the Texas long arm statute has been interpreted to reach to the full extent of due process. How should the court rule?

(closely based on *Havel and Ruck v. Honda Motor Europe*, No. H-13-1291, opinion by the Honorable Lee Rosenthal)

[redacted]

PART II

This second section, worth 15% of the final exam grade, contains 15 multiple choice questions. Each multiple choice question is worth one point each. You should mark your answers to the multiple choice questions on the scantron answer sheet provided.

1. Plaintiff sues her employer for job discrimination in federal court. Two weeks later the employer moves to dismiss for failure to state a claim on which relief can be granted, citing the plausibility pleading standard of *Bell Atlantic v. Twombly* and *Ashcroft v. Iqbal*. Which of these is the strongest argument for denying the motion?

A. The motion should be denied if it relies on evidence beyond the pleadings.

B. The motion should be denied if, assuming that evidence would eventually be introduced to support the allegations, the allegations raise a plausible right to relief.

C. The motion should be denied if it is not supported by any competent evidence.

D. The motion should be denied if it is not supported by any evidence.

2. Two weeks after defendant is sued in federal court, she files a preanswer motion to dismiss for lack of subject matter jurisdiction. A month later, before the Court has ruled on the motion, defendant realizes that she should have filed a motion to dismiss for improper venue. Which of the following is correct?

A. **She has waived her right to seek dismissal for improper venue.**

B. She has not waived her right to seek dismissal for improper venue because of the exception in Rule 12(h)(3).

C. She has waived her right to seek dismissal by preanswer motion but can still ask the court to dismiss for improper venue whenever she files her answer.

D. She has waived her right to seek dismissal by preanswer motion but can still ask the court to dismiss for improper venue in her answer, as long as she files her answer no later than 14 days after the court rules on her subject matter dismissal motion under Rule 12(a)(4).

3. Paul sues David in federal court. David timely files an answer and counterclaim. A month later, David moves for entry of a default judgment on the ground that Paul failed to respond to the counterclaim. How should the court rule?

A. The court should enter a default judgment in favor of David on his counterclaim against Paul only if David properly and timely served an official summons on Paul under Rule 4.

B. The court should enter a default judgment in favor of David on his counterclaim against Paul only if David can show that Paul is subject to personal jurisdiction in the forum.

C. The court should enter a default judgment on the counterclaim against Paul and he need not serve Paul with an official summons and need not demonstrate Paul is subject to personal jurisdiction in the forum.

D. The court should enter a default judgment against Paul on the counterclaim and dismiss the entire action.

4. Plaintiff sues defendant for negligence in federal court. Paragraphs 6-10 of the complaint spell out how defendant's conduct fell below the standard of care. Defendant timely files an answer admitting all of the allegations in paragraphs 6-10, denying all other allegations. Thereafter, Plaintiff moves for partial summary judgment as to defendant's negligent conduct. How should the court rule?

A. It should deny the motion on the ground that only defendants can move for summary dismissals before trial.

B. It should deny the motion because the plaintiff bears the burden of proof on all of the elements of her claim (duty, negligence, causation and damages); summary judgment is not appropriate as to a single element only.

C. It should grant the motion.

D. It should grant the motion but only on condition that the defendant does not later seek to amend its answer to deny the allegations.

5. Plaintiff brings suit in federal court against defendant, who timely files an answer. A month later, defendant seeks to amend her answer to add an affirmative defense that the plaintiff's claims are barred by the statutory defense of comparative liability. Which of the following is the strongest argument the plaintiff can make against the proposed amendment?

A. The court should deny the amendment because the statutory defense is not included in the list of affirmative defenses under Rule 8(c)

B. The court should deny the amendment if it finds that the defendant waited too long to seek to amend under Rule 15(a)(1)(A); that is, defendant had only 21 days after serving her answer to move to amend.

C. The court should deny the amendment if it finds that the defendant waited too long to seek to amend. Under Rule 15(a)(1)(B); that is, defendant had only 21 days after service

of plaintiff's responsive pleading or 21 days after service of a motion under Rule 12(b), (e) or (f0, whichever was earlier.

D. The court should deny the amendment if it finds that justice does not require allowing the amendment under Rule 15(a)(2).

6. Plaintiff sues defendant in the United States District Court for the Southern District of Texas. Her sole claim for relief is for intentional infliction of emotional distress. Assume that currently, under Texas law, there is no such cause of action but that a case is pending before the Texas Supreme Court in which the sole issue is whether such a cause of action should exists in Texas. Defendant moves to dismiss for failure to state a claim on which relief can be granted and also seeks sanctions against plaintiff under Rule 11. What is the strongest argument that plaintiff can make against the imposition of monetary sanctions?

A. Sanctions are not appropriate if the plaintiff can show that his factual contentions have evidentiary support or will likely have evidentiary support.

B. Sanctions are not appropriate if the plaintiff can show that his lawyer, not he, suggested suing for intentional infliction of emotional distress.

C. Sanctions are not appropriate because only the court can order a party to show cause why its conduct has not violated Rule 11.

D. Sanctions are not appropriate against the plaintiff since the Texas Supreme Court may rule that the cause of action exists.

7. Plaintiff, who lives in Houston, files suit in the United States District Court for the Southern District of Texas claiming that while he was working in Florida the defendant discriminated against him in violation of federal law. At the time of the suit, Defendant had moved to Oklahoma, where he intended to reside permanently. Other than plaintiff and defendant, all other witnesses in the case live in Florida. Defendant moves for a change of venue to Oklahoma or, alternatively, to Florida. What is the most likely result?

A. The action may be dismissed since it was commenced in an improper forum, or transferred to Oklahoma or Florida.

B. The action must be dismissed since it was commenced in an improper forum.

C. The action may be transferred to Oklahoma, only.

D. The action may be heard in the Texas federal court since it was commenced in a proper forum.

8. Plaintiff, a citizen of Texas, filed suit against defendant in Harris County district court in Houston, alleging employment discrimination under federal law. Defendant, also a citizen of Texas but living in Dallas, Texas, filed a petition for removal to the in the United States District Court for the Northern District of Texas Which of the following is correct?

A. The action was properly removed.

B. The action was improperly removed; under 1441(b), the forum defendant rule, the case was not removable because defendant is a Texas citizen.

C. The action was improperly removed to the wrong district court.

D. The action was improperly removed because the Notice of Removal failed to set forth the amount in controversy.

9. Plaintiff, from Texas, brings suit in federal court against defendant, from New York, on a state cause of action for $100,000. Defendant impleads Tom, also from New York, claiming that Tom owes him statutory indemnity for any liability he may be found to owe plaintiff. Which of the following is correct?

A. Defendant can maintain his indemnity claim against Tom in the same suit.

B. Defendant cannot maintain his indemnity claim against Tom in the same suit because there is no diversity of citizenship between the parties.

C. Defendant can maintain his indemnity claim against Tom in the same suit, but only if the amount-in-controversy exceeds $75,000.

D. Defendant can maintain his indemnity claim against Tom in the same suit, but only if the source of statutory indemnity is federal law.

10. If one party seeks discovery of a written statement of a non-party witnesses that has been secured by an adverse party's counsel in the course of preparation for possible litigation after a claim has arisen, which of the following is true under Rule 26?

A. A written witness statement is discoverable by the party seeking the statement, without regard to whether it is a verbatim statement of the witness or includes mental impressions, conclusions, opinions or legal theories of the adverse party's counsel.

B. **A written witness statement is discoverable by the party seeking the statement if that party shows that it has substantial need for the statement to prepare its case and cannot, without undue hardship obtain its substantial equivalent by other means.**

C. If the written statement includes mental impressions, conclusions, opinions or legal theories of the adverse party's counsel, then the statement is discoverable by the party seeking the statement on a showing of extraordinary circumstances, but without regard to whether the party has substantial need for it.

D. If the witness statement was communicated in confidence to the adverse party's counsel, then it is exempt from discovery under the attorney-client privilege.

11. Plaintiff, a citizen of Kansas, filed an action in the United States District Court for the District of Kansas against D1, a Texas corporation, and D2, a Louisiana corporation, alleging that defendants were both liable for negligence and (2) that plaintiff's actual damages were $70,000. Which of the following is true?

A. The case can remain in federal court because the claims against D1 and D2 can be aggregated to $150,000, thereby exceeding the minimum amount in controversy.

B. The case can remain in federal court only if the plaintiff can show that her claims against D1 and D2 arise out of the same transaction or occurrence or series or transactions or occurrences, and any common question of law or fact will arise in the action.

C. The entire case should be dismissed.

D. The court has discretion to decide to retain the case if it finds that it would be in the interest of justice to do so.

12. Plaintiff, a New York citizen, files suit against defendant, a Delaware company with its principal place of business in New York, in the United States District Court for the Southern District of Texas. (Plaintiff has substantial other business dealings in Texas.) The suit concerns a contract plaintiff alleges defendant breached that was to be performed entirely in Oklahoma and New York. Assume there is a valid forum selection clause in which the parties agreed in advance that any dispute between them would be litigated in a court in New York. Defendant files a motion to dismiss or, in the alternative, to transfer the case to the Southern District of New York under 28 U.S.C. §1406. Which of the following is correct?

A. The Southern District of Texas was not a proper venue, but after *Atlantic Marine* the proper statutory section to invoke was §1404.

B. The Southern District of Texas was not a proper venue, but even after *Atlantic Marine* the proper statutory section to invoke was § 1406.

C. Because the Southern District of Texas was not a proper venue, the proper procedural ground for this motion was the federal doctrine of forum non conveniens.

D. Because the Southern District of Texas was not a proper venue, the only proper procedural ground for this motion was to seek dismissal under Rule 12(b)(3).

[note: question 13 not counted because of mistake in answers (references to Texgumbo should be have been to Bubba's)]

13. Texgumbo, Inc. is owned by Guy Lemont. Texgumbo is a Texas corporation. Its owner and chief executive officer is Guy Lemont. His office, and the company's main financial and distribution center, is in Houston, Texas (S.D. Tex). It has retail stores in Houston, Dallas (N.D. Tex), San Antonio (W.D. Tex), Austin (W.D. Tex) and El Paso (W.D. Tex).

Texgumbo gets most of its key ingredients from Bubba's Supply, Inc, a Louisiana corporation with its principal place of business in New Orleans, LA (E.D. La). Texgumbo has ordered $200,000 worth of supplies from Bubba's every year for the past two years. After Lemont discovers that Bubba's has been misrepresenting the quality and volume of almost all of its shipments to Texgumbo over the last two years, he decides he wants to file suit against it for fraud and breach of contract. Which of the following statements is true?

A. In addition to the E.D. La, venue is proper in the S.D. Tex, N.D. Tex., W.D. Tex. because Texgumbo's contacts would be sufficient to subject it to personal jurisdiction if that each of these districts were a separate state.

B. In addition to the E.D. La, venue is proper in any judicial district in Texas because Texgumbo is incorporated in Texas and, therefore, subject to general jurisdiction anywhere in the state.

C. In addition to the E.D. La, venue is proper only in the W.D. Tex because it is the district in which Texgumbo has the most significant contacts.

D. Venue is proper in the S.D. Tex, N.D. Tex, and W.D. Tex only if the court concludes that a substantial part of the events giving rise to the claim arose in those districts.

14. Polly and David are neighbors. In January 2011 David runs his car over Polly's flowerbed. Polly is frustrated but doesn't bring suit against him. About three years later, in February 2014, David runs over her flowerbed again. The statute of limitations in Texas for negligence claims is two years. If Polly brings suit in February 2014 against David for both incidents, and David moves to dismiss the claims against him relating to the January 2011 incident, what result?

A. The court should deny the motion to dismiss unless David received notice of her action such that he would not be prejudiced in defending against it on the merits.

B. The court should deny the motion to dismiss if the court finds that Texas law allows relation back.

C. The court should deny the motion to dismiss if the court finds that the January 2011 incident and the February 2014 incident arose out of the same conduct transaction, or occurrence.

D. The court should grant the motion to dismiss as to the January 2011 incident.

15. Plaintiff, a Texas citizen, sues D1, a New York citizen, and D2, also a New York citizen, in the United States District Court for the Southern District of Texas. Plaintiff asserts a cause of action for breach of contract against both defendants, seeking damages of $10 0,000 against each defendant. D2 wants to assert an unrelated counterclaim against plaintiff for negligent destruction of his personal property. The counterclaim's amount-in-controversy is $50,000. Which of the following is true?

A. If the court disallows the counterclaim, D2 will be barred from asserting it against the plaintiff in state or federal court.

B. If the court disallows the counterclaim, D2 can bring it against the plaintiff in state court, but would never be able to bring that claim against the plaintiff in federal court.

C. The court should allow the counterclaim.

D. The court should allow the counterclaim only if D1 does not object.

MC Answer Key

1. B
2. A
3. C
4. C
5. D
6. D
7. A
8. C
9. A
10. B
11. C
12. B
13. D
14. D
15. B