# CIVIL PROCEDURE
# PROFESSOR PERRITT
# FALL, 2011
# FINAL EXAMINATION
# MODEL ANSWER

## Question I

A. Luke must answer the first question, "yes," but he may refuse to answer the second question. He has a very good argument that the conduct and results of the face-recognition experiment qualify for attorney-work-product protection under Fed.R.Civ.P. 26(b)(3). The experiments were conducted in anticipation of litigation, else Luke and Travis would not have been working together. Real Stars is unlikely to be able to satisfy the criteria for obtaining access to the work product by showing substantial need for the experiment results and its inability to obtain their substantial equivalent by other means without undue hardship. Real Stars has just as much access to the face recognition software on Facebook as Luke, although it may argue that it cannot conduct equivalent experiments without getting Luke to pose for photographs matching the body positions shown in the video games. Real Stars is unlikely to qualify for overcoming the work product status, (a) because it does not have substantial need; there are all kinds of ways it can show that it did not misappropriate Luke's likeness; and indeed, it does not have to show anything; Luke has the burden of proof to establish misappropriation, and (b) because there are likely all manner of photographs of Luke playing football available, including on Luke's own Facebook page, probably.

   One barrier Luke will have to overcome is the limitation of work product protection to "documents and tangible things." Real Stars is not asking for documents or tangible things; it is asking, orally, "what were the results." Luke will have to sustain the position that Rule 26(b)(3) extends to oral descriptions of work product. The case law is mixed, although there is some in his favor, and the rationale of [case] supports a broad interpretation of the protection.

   Real Stars also may argue that Luke has waived work product protection because Facebook he and Travis "disclosed" the results of the experiment to Facebook. It is, however, unlikely in the extreme that any human being at Facebook is consciously aware of the experiment, and the results of their experiment is not accessible by any other user of Facebook.

As to the procedure to be followed: Travis has done the right thing by instructing Luke not to answer. If he answers, he will waive the work product status. Notwithstanding the objection and the refusal to answer, the deposition continues, unless either party adjourns it. Luke can expect that Real Stars will move for an order to compel Luke to answer, under Fed.R.Civ.P. 37(a), although he must confer with Travis as a prerequisite to presenting the motion. The court is likely to deny the motion, for the reasons detailed above, and is authorized to grant a protective order instead.

Attorney-client privilege is unlikely for this information because it was not information communicated from Luke to Travis in order to obtain legal advice; rather it was a phenomenon that both observed.

B. Fed.R.Civ.P. 33 obligates a party served with interrogatories either to answer them or to make a specific objection. Luke can argue that "None of your business," is an objection signifying that the information sought is outside the scope of discovery under Fed.R.Civ.P. 26(b)(1). It is not discoverable, because it is not relevant to any claim or defense. Luke has sought only damages measured by the defendants' profits; his earnings from his modeling have nothing to do with that.

Amy may move for an order to compel, as explained in the answer to subquestion (A). Whether she succeeds depends on whether the objection qualifies as an objection under Rule 33. If it does not, Luke has waived his objection, and he will be ordered to provide the information requested.

C. Assuming that Cyndee is not an employee of Real Stars, she is a non-party. She may nevertheless be desposed under Rule 30, but is obligated to attend only if she is properly served with a subpoena under Fed.R.Civ.P. 45. Luke should obtain a subpoena from the court where the subpoena is to be taken, the United States District Court for the Central District of California. If she fails to attend or to participate in the deposition, she is subject to contempt penalties imposed by the Central District.

If she is an employee of Real Stars, it does not make any real difference because that does not make her a "party."

D. Luke's only claims are state-law claims. The federal court hearing the action has the power to hear state law claims under its diversity jurisdiction (See answer to subquestion (E)). Erie says that the federal court must apply state law to these claims, following the choice-of-law rules of the state in which it sits. Arkansas's choice of law rule is lex locus delicti—the law of the place of the wrong. Whether Arkansas law (as Luke prefers) or California law (as the defendants prefer) applies depends on the "place of the wrong." The last element of the misappropriation tort is "invasion of privacy." Since Luke is in Arkansas, that's where his privacy was invaded. The defendants will argue that the invasion actually occurred in California where any alleged likeness of Luke was

incorporated into the videogame. Moreover, Luke claims damages in the form of profits earned by Real Networks, which were earned in California.

But this may turn out to be a false conflict, because the only difference between Arkansas and California law is how the First Amendment to the United States Constitution has been intererpreted by the courts of those states. The interpretation of the federal Constitution is a federal law question, as to which federal law must be applied. There is no federal common law, under *Erie*, but this is not common law; it's caselaw interpreting the federal Constitution. So Luke can draw upon any federal (or state) case in trying to persuade the federal court in Arkansas to adopt his preferred interpretation of the defendant's First Amendment defense.

Luke could improve the chances of Arkansas law applying by switching his damages theory to his lost potential profits, which are lost in Arkansas. That would undercut his refusal to answer the interrogatory in subquestion (B), but it should not be that big a hardship for him to disclose his earnings from modeling.

E. Luke has a strong argument that the court has diversity jurisdiction under 28 U.S.C. § 1332, and weak (nearly frivolous) arguments for federal-question and supplemental jurisdiction.

The question states that Luke is a citizen of Arkansas, and that Real Stars' place of incorporation and principal place of business are in California. That makes Real Stars a citizen of California under § 1332. So if Real Stars were the only defendant, the parties would be diverse and all that would remain would be for Luke to establish the jurisdictional amount of $75,000.

But Amy is also a defendant, and she may be a citizen of Arkansas, thereby defeating complete-diversity and ruining subject matter jurisdiction, not only as to her, but also as to Real Stars. Where Amy is a citizen is a question of federal law, but the federal definition of citizenship for an individual turns on state-law definitions of domicile, under the *Mas* case. Her original domicile was Illinois, where she was born. The question is whether she has changed it to Arkansas. (It doesn't matter whether she changed it to Massachusetts, because all that is at issue not is whether she is a citizen of Arkansas.)

She may have done that if she formed the intent to remain in Arkansas as her new domicile while she has been living here. That is a fact question. She will claim that she has formed such an intent, thereby defeating diversity jurisdiction. Luke will claim that she has not, thereby establishing diversity jurisdiction. Discovery is available to assist in resolving jurisdictional facts. Luke has the burden of proof to establish jurisdiction, so he needs some evidence as to Amy's domiciliary intent. The best thing for him to do is to take Amy's deposition. He may need leave of court to do that if the 26(f) discovery plan has not yet been formulated and adopted by the court. At the deposition, he should ask

her about the motivation for the six-month rental in Arkansas, where she pays taxes, where she registers to vote, other property that she owns, and other facts that might cast doubt on her claim that she wants to make Arkansas her domicile.

Luke could, of course, restored complete diversity by dropping Amy as a defendant, but that's not what the question asks.

As to the $75,000 jurisdictional amount, Luke should have little difficulty satisfying this requirement. He has pleaded it in good faith. He seeks damages in the form of the defendant's profits from the use of his likeness, which plausible may exceed $75,000. The evidence may show later that the profits are less than that, but it does not matter. The jurisdictional amount is determined from the pleadings, unless there is a legal certainty that the plaintiff cannot recover that much. This is an intentional tort claim, where punitive damages also may be available.

Now, as to any federal-question or supplemental jurisdiction arguments. There is no federal question jurisdiction, the plaintiff's prima facie case is premised entirely on state law. That there may be a federal First Amendment defense, and that it may be outcome determinative is irrelevant. That was precisely the posture of L&N RR v. Mottley, which held that the federal defense does not create federal question jurisdiction

Luke and Travis might be tempted to consider supplemental jurisdiction over the claim against Amy, if she is found to be a citizen of Arkansas. Under that theory, the anchor claim would be the state-law claim against Real Stars. There surely is a common nucleus of operative fact because the claims against both defendants are identical. The problem is that § 1367(b) takes away whatever supplemental jurisdiction § 1367(a) otherwise confers. The claim against Amy is (a) a claim by the plaintiff, (b) against someone made a party under Rule 20, and (c) exercise of jurisdiction would be completely inconsistent with the complete diversity requirement embedded in diversity jurisdiction.

# QUESTION II

A. The likelihood of being able to establish personal jurisdiction is quite low. Although the state of Montana has asserted personal jurisdiction over the facts, such an assertion is unconstitutional. Slippery Banana has sold at least one eSlate to a resident of Montana, Marlboro Man (assuming he is a resident of Montana), and this sale potentially subjects Slippery Banana to jurisdiction in the Montana courts because this constitutes "transacting any business" in Montana under Rule 4B(1)(a)." Also, Slippery Banana committed an act—selling the eSlate to Zach Knewsome—which resulted in "accrual within [Montana] of a tort action. The tort of negligent design was not complete until damages occurred in Montana. The problem with the transacting business branch is that it confers jurisdiction only over claims "arising

from" the transaction, a question addressed more fully in the specific jurisdiction section of the constitutional analysis *infra*. Moreover, it is arguable that offering eSlates to Montana residents through the Slippery Banana website constitutes doing business in Montana, although that suffers from the same weakness.

So there is an assertion of jurisdiction, but to be valid it must not exceed the limits of the 14th Amendment to the United States Constitution. The Scalia pedigree categories of personal service within the borders and in-rem attachment within the borders are not in play, so the relevant framework is the minimum contacts/fair plan and substantial justice evaluation under *International Shoe*. That analysis begins with an inventory of contacts intentionally directed at the forum state by the defendant. There are only two such contacts: (1) the availability of the website, and (2) the sale of the eSlate to Marlboro Man. The sale of the flammable eSlate to Knewsome does not count because it was directed at Florida, not Montana. The presence of the eSlate in the forum state when it caught fire does not count because it was not directed to the forum state by Slippery Banana but by Knewsome, and that does not satisfy the targeting requirement of *World Wide Volkwagen*. The so-called stream of commerce theory does not work because only contacts purposely directed to the forum state by a stream count, and any stream used by Slippery Banana were directed at the whole world in general and only to CA, NY, IL, and FL specifically.

The availability of the website is a weak reed because there is nothing on it that targets Montana in particular, and the prevailing caselaw says that mere availability of a website, even an interactive one like this, is not sufficiently intentional absent some form of targeting of sales or other activities.

These contacts surely are not enough to satisfy the systematic and continuous requirement for general jurisdiction, so the question is whether specific jurisdiction (which is all that is asserted by the statute anyway) is constitutional. It is not, although the plaintiff may have some weak arguments. The only argument that the claim arises out of an intentional contact is that Susan's fire would not have happened but for Marlboro Man's purchase of his eSlate. She heard about it and probably saw it, and that caused her to ask Knewsome to buy one for her. That might satisfy a very broad related-to version of the specific jurisdiction test, but it far beyond any precedent for an arising-out-of -test.

Susan would have a stronger argument if she registered her new eSlate from Montana and gave her Montana address. That would likely have given rise to a warranty contract which was to be performed in Montana over the life of the warranty, bringing it closer to the California life insurance case and to *Burger King*. Even then, however, her claim for negligent design would not arise out of the warranty contract.

Fair Play and Substantial Justice is not likely to be a problem, but there is no clear authority for the proposition that lots of fair play and lots of justice can make up for insufficient contacts. It is no great hardship for Slippery Banana to come to Montana or hire a Montana lawyer to defend the suit. Montana has an interest in remedying the damage caused by Susan's eSlate, the necessity of this forum for Susan is not particularly compelling, but it does not cut against her. Most of the evidence on the design of the eSlate is outside Montana, but could easily be made available to the Montana court, and there is nothing particularly weird about substantive Montana law.

If personal jurisdiction were found to be constitutional here, it would be remarkable, and quite unlikely to survive on appeal.

B. Venue is proper under several provisions of the Montana venue statute. Slippery Banana is most likely not a Montana corporation (the question does not say). So, under § 25-2-122(3) venue is proper in the county in which the tort was committed or in the county where the plaintiff resides. Both are Big Horn county, within the geographic area covered by the forum. The tort was committed in Big Horn county because that's where the damages occurred, and damages are an element of negligent design. Subsection (2) produces the same result.

28 U.S.C. § 1391 is irrelevant because this action was filed and is pending in state, not federal court.

C. To survive Slippery Banana's motion for summary judgment, Susan must point to evidence in the record, beyond the pleadings, that supports her claim for negligent design. The burdens of production and persuasion remain with her on the merits, see *Celotex*, although Slippery Banana has the burden of establishing the absence of disputed issued of material fact—more an argumentation burden than a proof burden. Slippery Banana has admitted that Susan's eSlate caused the fire, so the proximate causation element already has been resolved in her favor.

Res ipsa loquitur was an ideal theory for Susan because it permits the fact finder to infer duty and breach from causation. But the theory is not available in Montana and if she presses it, the court will decide this against her in the summary judgment proceeding as a matter of law. That means that Susan's burden runs to each element of the tort still at issue, basically encompassing the duty and breach elements of negligence:

1. Forseeability of the harm: that the eSlate might catch fire;
2. Possibility of reducing this risk by adopting an alternative design;
3. Reasonableness of the alternative design;
4. Unsafe eSlate because of the omission of the alternative design.

The only thing in the record, beyond the pleadings and Slippery Banana's admission of causation is the affidavit from the manager of the Apple store. At most, this provides evidence of the existence of an alternative design: the design embodied in an iPad. She has absolutely nothing on elements #1 (foreseeability) and #4 (unsafe condition of the eSlate). The affidavit goes only part of the way on elements #2 (possibility of reducing risk) and #3 (reasonableness of alternative). The affidavit shows only the existence of the alternative design. It is not probative at all on the question whether Slippery Banana could have used the iPad design (probably not because Apple certainly has intellectual property protection for its design and would not be likely to license it to a competitor). Nor is it probative of the reasonableness of the iPad design for the eSlate. Reasonableness involves an assessment of cost and an evaluation of a cluster of technology issues, all relating to Slippery Banana's intended market, its engineering analyses, and its finances. Nothing on any of this is in the record.

Slippery Banana is entitled to summary judgment.

D. Now, Susan has a chance to prevent the outcome in subquestion (C) by doing some more discovery. Ideally, if she had a big budget, she would retain one or more experts, designate them as witnesses, and put their reports into the record. (She would not designate them as witnesses unless their reports were favorable to her legal theory.)

But she does not have a big budget, and experts are very expensive, certainly the most expensive part of a typical civil case. Depositions also are expensive, including lawyer time, the cost of a court reporter, and possibly travel expenses, depending on where the deposition is taken.

The cheapest forms of discovery are Montana Rule 33 interrogatories, Montana Rule 34 requests for production, and Montana Rule 36 requests for admission. Slippery Banana is unlikely to admit anything useful to Susan on the negligent design issues, so that leaves interrogatories and requests for production. Requests for production might turn out to be more expensive than interrogatories if Slippery Banana is slippery enough to designate some remote place for inspection of the responsive documents. Rule 34 entitles Susan to designate a "reasonable place," but Slippery Banana might be aggressive in insisting that the only "reasonable" place is its facility in Florida, or conceivably an engineering facility in Asia or somewhere else if it has one there.

So: the best route is Rule 33, although we might as well attempt a Rule 34 request, designating my law office as the place for production, and see how Slippery Banana responds.

Here are the specific interrogatories and requests, bearing in mind that Rule 33 limits us to 25 interrogatories unless the discovery plan provides otherwise:

**Interrogatories**

1. Were you aware that the batteries used in the eSlate presented a greater risk of overheating than other batteries, such as those used in the iPad?
2. What tests did you perform on the eSlate batteries to evaluate their tendency to overheat and what were the results?
3. What test data did you evaluate with respect to batteries for tablet computers?
4. Why did you reject alternative battery designs for the eSlate? Be specific as to cost, engineering, and marketing considerations.
5. How many other instances are there of eSlates overheating? Identify each instance, with date, location, and name of customer.
6. How many other instances are there of eSlates causing fires? Identify each instance, with date, location, and name of customer.
7. What steps have you taken to recall eSlates or to reduce the risks exposed by the instances identified in the responses to the two preceding interrogatories?

**Requests for production**

1. Engineering evaluations and test results concerning battery design for the eSlate
2. Internal and external correspondence, including memoranda, email messages, and text messages, concerning battery design for the eSlate

The strategy here is to box in Slippery Banana—to force it to reveal decisions that can be second-guessed by the fact finder at trial, or alternatively to reveal a level of ignorance that can be challenged as breaching its duty of care.

Almost any likely response should enable Susan to survive summary judgment. Slippery Banana would be entitled to summary judgment only if its responses showed that it carefully evaluated all the alternatives, that Apple would not permit it to use the iPad design, and that all the alternatives would have cost, say, ten times as much, thus driving the price of eSlate above what anyone would pay, or that they would have cause the eSlate to weigh, say, 25 pounds, which no one would have bought either. Both of those polar extremes are inconsistent with the facts given in the question.