

**EXAMINATION
CIVIL PROCEDURE I – LAW 6213
Section 13 – Siegel
Spring 2019**

INSTRUCTIONS

1. This is an open book examination. You may use any written materials that you have brought with you (including handwritten, typewritten, printed, or published materials). The use of computers to type answers is permitted.
2. You have **THREE HOURS** to complete the exam.
3. The exam consists of this cover page and thirteen exam pages numbered 1 through 13. Make sure you have all the pages.
4. There are **THREE ESSAY QUESTIONS** and **FIFTEEN MULTIPLE CHOICE QUESTIONS**. All students must answer all questions. Recommended times are:

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|----------------------------|------------------------------------|
| Essay Questions: | 40 minutes each, 120 minutes total |
| Multiple Choice Questions: | 4 minutes each, 60 minutes total |

Essay Question One has subparts A, B, and C.
Essay Question Two has subparts A and B.
5. Do not put your name anywhere on your answers. Do not indicate whether you are taking the class pass/fail. Do not write “Thank you for a great class” or anything similar on your exam.
6. If you are writing your answers by hand, remember to *write legibly*.
7. If, with regard to any question, you think additional facts are needed to answer the question, state clearly what facts you think are missing. Then make a reasonable assumption about the missing facts and answer the question based on your assumption. Do not change the given facts.
8. Using good judgment, address all the issues presented and assigned by the questions, even if your answers to some issues would, in real life, eliminate the need to address other issues.
9. Unless otherwise specified, assume all events occurred in the United States and answer all questions on the basis of current law.
10. Good luck.

ESSAY QUESTION ONE

Peter, a citizen of Arizona, is trying to sell his house, which is located in Chandler, Arizona. Based on sales of comparable houses in the past, Peter's house should be worth about \$500,000. However, it recently became known that Google, Inc. is testing self-driving cars on the streets of Chandler with no one at the wheel. Potential buyers are so nervous about possible danger from the self-driving cars that Peter cannot find a buyer for his house at any price above \$300,000.

Peter sues Google in Arizona state court. Peter seeks no damages, but he claims that Google's activities are a public nuisance, and he seeks an order that Google not test its self-driving cars in Chandler. Google, a corporate citizen of California and Delaware, removes the case to federal court based on diversity. In its answer, Google denies that its cars are a public nuisance.

You are Google's general counsel. During discovery, Peter serves a request for all internal company e-mails that discuss the safety of the company's self-driving cars. The company has millions of internal e-mails, thousands of which would be responsive to this request. Some of the e-mails exist only on obsolete e-mail systems. You estimate that it would cost \$2,000 to produce the readily accessible e-mails and \$500,000 to produce the e-mails from the obsolete systems. The President of Google says to you, "This is outrageous! Search all our e-mails? Can the plaintiff really make us do all that work? Can we at least make him reimburse us for the cost?"

Part A. Answer the last two of the above-listed questions from the President. Explain.

After discovery ends, the President says to you, "I think we should move for a jury trial. Jurors love exciting, dynamic business leaders such as me. Can you get us a jury trial?"

Part B. Address all issues presented by the President's question. Explain.

The case is tried, and Google wins on the ground that its self-driving cars are not a public nuisance. The appeal time expires and Peter does not appeal. However, a month later, Paul, another resident of Chandler who is having problems selling his house, sues Google in Arizona state court on the same claim as Peter, namely, that Google's testing of its self-driving cars in Chandler amounts to a public nuisance. Paul seeks only money damages, in the amount of \$50,000, which is the amount by which his home value has allegedly declined. The President of Google says, "What? How is this even possible? Can you get rid of this quickly, based on preclusion?"

Part C. Answer the President's final question. Explain.

ESSAY QUESTION TWO

Pilar, a citizen of Georgia, is using a power saw in her home wood shop when the blade leaps out of the saw and severely gashes her arm. Pilar's wife rushes her to their family doctor, Dr. Torpe. Although proper care would likely have prevented any permanent injury, Dr. Torpe commits malpractice, and Pilar permanently loses the use of her arm. Pilar sues Durable Instruments ("Durable"), the manufacturer of the saw, in Georgia state court for \$2 million on the claim that the saw's negligent design caused her to lose the use of her arm. Pilar chooses *not* to sue Dr. Torpe.

Durable, a corporate citizen of Wisconsin, denies liability and removes the case to federal district court in Georgia on the basis of diversity. It serves a summons and third-party complaint on Dr. Torpe. Durable notes that Federal Rule 14(a)(1) provides that "A defending party may, as third-party plaintiff, serve a summons and complaint on a nonparty who is or may be liable to it for all or part of the claim against it." Durable claims that therefore, if it is found liable, it should be able to recover from Dr. Torpe the portion of Pilar's damages that were caused by his negligence.

Dr. Torpe moves to dismiss Durable's complaint under Federal Rule 12(b)(6) for failure to state a claim. He claims that under Georgia law there is "no contribution among tortfeasors." He cites a case from Georgia's highest court, decided a year before Pilar filed her suit, which also involved an initial tortious injury that was aggravated by medical malpractice. In that case, the court said: "Because medical malpractice often follows an initial injury, the plaintiff in such a case may collect the full damages for the whole, aggravated injury from the initial tortfeasor, who has no right to demand contribution toward those damages from the doctor whose malpractice aggravated the initial injury. Many states regard this rule as old-fashioned but we believe it is a just rule."

Opposing Dr. Torpe's motion, Durable makes two arguments. (1) Durable argues that Fed. R. Civ. P. 14 allows it to implead Dr. Torpe. (2) Durable cites cases from 40 states, other than Georgia, that have abandoned the "no contribution among tortfeasors" rule. Durable notes that in a case decided after Pilar filed her lawsuit, Iowa's highest court said on this point: "We join an ever-increasing number of states in determining that this antiquated rule should no longer be followed."

You are the law clerk to the district judge handling the case. You determine that in tort cases, Georgia applies the tort law of the state where the tortious injury occurred. Your judge asks you to write a memo discussing the issues raised by Dr. Torpe's motion to dismiss. The judge says, "be sure to tell me, at the end of your memo, whether the motion should be *granted* or *denied*."

Part A. Write the requested memorandum.

Possibly following your advice and possibly ignoring it, the judge grants Dr. Torpe's motion to dismiss. The judge says to you, "Durable will want to appeal this immediately. What will Durable's options be for trying to get an immediate appeal, and what should I do regarding them?"

Part B. Answer the judge's question.

ESSAY QUESTION THREE

Adam is the father of two grown children, Claire and Douglas. Adam is divorced from Barbara, who is Claire and Douglas's mother. After Adam dies unexpectedly, Esme sues Claire and Douglas in Maryland state court. Esme claims to be Adam's daughter by Francine, a woman with whom, Esme claims, Adam had a secret affair. Esme claims that because she is one of Adam's three children, she is entitled to one-third of Adam's estate.

Claire and Douglas deny that Esme is Adam's daughter. They also claim that Adam had a will leaving his estate to Claire and Douglas. Esme asserts that Adam told her that he had no will. She claims that Claire and Douglas must have forged Adam's will.

The parties and all others involved are citizens of Maryland. Under Maryland law, if Esme is Adam's daughter and Adam had no will, Esme is entitled to one-third of Adam's estate. If Adam had a will leaving his estate to Claire and Douglas, Esme is entitled to nothing from Adam's estate.

The case is tried by jury. The parties vigorously contest all the facts. The jury returns a general verdict with answers to questions. The general verdict is for the defendants. In the answers, the jury states that (a) Esme is Adam's daughter, and (b) Adam had a will leaving his estate to Claire and Douglas. Judgment is entered on the verdict. Esme appeals, but the judgment is affirmed.

Five years later, Adam's mother, Yvette, dies. Yvette had been living on the income generated by a trust left to her by Adam's father, Zachary, who died before Adam's death. The document creating the trust provides that Yvette will receive all the income from the trust during her life, and that following Yvette's death, the money remaining in the trust will go to Adam if he is then living, and otherwise the money will be "divided equally among Adam's children."

Esme again sues Claire and Douglas in Maryland state court. She claims that she is entitled to one-third of the money in the trust. Claire and Douglas again deny that Esme is Adam's daughter. They also assert that the phrase "Adam's children" in the document creating the trust should be understood to include only Claire and Douglas, as Zachary would have believed that Claire and Douglas were the only children Adam had. They also raise the defense of preclusion.

Esme moves for summary judgment based on the preclusive effect of the first case. Claire and Douglas move for summary judgment on the same basis.

Both sides make all appropriate arguments. The parties and all others involved are citizens of Maryland. On all matters of preclusion law, Maryland follows the modern, majority rules.

What should the court do? Explain. Conclude your answer by clearly stating whether the motions for summary judgment should be granted or denied and what issues, if any, remain to be decided by trial.

MULTIPLE CHOICE QUESTIONS

Instructions

1. For each question, choose the best answer from the answers provided.
 2. Mark your answers on the Scantron sheet.
 3. Every question has five answer choices. Be sure to read all the answer choices, even if they continue onto the next exam page.
 4. There is no penalty for wrong answers, so answer every question.
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1. Piper is injured during surgery performed by Dahlia in New York. Piper sues Dahlia in federal district court in New York. Jurisdiction is based on diversity. Dahlia's counsel, Lily, interviews three witnesses: Alejandra, the anesthesiologist who kept Piper sedated during the surgery; Barbara, a nurse who assisted Dahlia, and Clara, a medical student who also assisted Dahlia, and who was the only other person in the room with Dahlia and Piper for some parts of the surgery during which Alejandra and Barbara left the operating room. Lily records the interviews, has the recordings transcribed, and makes marginal notes on the transcripts that indicate how Lily believes statements in the interviews are relevant or important. Shortly after these interviews, Clara moves to Germany and refuses to respond to inquiries about the case. Alejandra and Barbara remain at their usual jobs in New York. Piper's counsel serves a discovery request for the transcripts of the three interviews, including the marginal notes. Which of the following is correct?

A. The defendant must produce all three transcripts, including the marginal notes, as they are all within the basic scope of discovery, because they are relevant, not privileged, and proportional to the needs of the case.

B. The defendant must produce all three transcripts, but may redact the marginal notes, which are protected by the work product doctrine.

C. The defendant need not produce the transcripts of the interviews with Alejandra or Barbara, which are protected by the work product doctrine; the defendant must produce the transcript of the interview with Clara, including the marginal notes.

D. The defendant need not produce the transcripts of the interviews with Alejandra or Barbara, which are protected by the work product doctrine; the defendant must produce the transcript of the interview with Clara, but may redact the marginal notes, which are protected by the work product doctrine.

E. The defendant need not produce any of the transcripts, which are protected by attorney-client privilege.

2. Miles, a 40-year-old citizen of Ohio, sues the Walmart Corporation, a corporate citizen of Arkansas and Delaware, in federal district court in a diversity case in which Miles asserts that a truck driver employed by Walmart, in the course of performing his job, negligently ran into Miles's car with a truck. Miles proves that as a result of the accident he was hospitalized for several weeks, suffered great pain, had to undergo several surgeries, was unable to return to his job as a college

basketball coach, at which he was earning \$300,000 a year, and is likely to be confined to a wheelchair for the rest of his life. The defendant does not claim that Miles was contributorily negligent. At the close of the trial, the jury returns a general verdict for Miles with damages of \$10,000. While the jury is still present in the courtroom, Miles asks the court to increase the damages or in the alternative to order a new trial. Walmart asks the court to enter judgment on the verdict. What should the court do?

- A. Order a new trial.
- B. Order a new trial unless defendant Walmart agrees to increase the damages to the smallest amount that the court considers could be a reasonable amount of damages.
- C. Order a new trial unless defendant Walmart agrees to increase the damages to an amount that the court considers to be reasonable, which need not be the smallest such amount.
- D. Explain to the jury that its general verdict for the plaintiff is inconsistent with the amount of damages it awarded and instruct the jury to deliberate further.
- E. Enter judgment on the verdict.

3. Philip, a citizen of Virginia, sues DeRosa's, Inc., a corporate citizen of Maryland, in federal district court in Maryland. Jurisdiction is based on diversity. Philip alleges in his complaint that while he was shopping in the defendant's grocery store, he suffered severe back injuries when he slipped and fell on loose vegetables that were on the floor of the store. He alleges that DeRosa's negligently failed to maintain safe conditions in the store. DeRosa's denies Philip's allegations.

The case is tried by jury. At the trial, Philip testifies that he was injured in the manner described in his complaint. Michael, a DeRosa's employee, testifies that he saw Philip carefully and deliberately lie down on the floor and then scream in simulated pain. Winnie, a customer who was in the store when the incident occurred, testifies to having seen the same thing as Michael. Benjamin, a passerby who was just outside the store looking in through a plate glass window, testifies to having seen the same thing as Michael and Winnie. No witnesses besides Philip testify to having seen Philip slip and fall.

At the close of the evidence, DeRosa's moves for judgment as a matter of law (JMOL) under Federal Rule 50(a). The district court denies the motion. The case is submitted to the jury, which returns a general verdict for Philip with damages of \$125,000. DeRosa's files a timely motion for JMOL under Federal Rule 50(b) or in the alternative for a new trial. What is the likeliest disposition of this motion?

- A. The motion will be denied, because if the district court believed that the defendant was entitled to JMOL, the court would have granted the defendant's motion for JMOL under Rule 50(a).
- B. The motion will be denied, because given the conflicting evidence on the critical facts of the case, the court cannot award JMOL or order a new trial.
- C. The motion for JMOL will be denied because there is conflicting evidence on the critical facts of the case, but given that the two neutral witnesses both supported the defendant's version of the facts, the court may choose to grant the defendant's motion for a new trial on the ground that the verdict is against the weight of the evidence.
- D. The motion for JMOL will be granted because the verdict is against the weight of the

evidence given that the two neutral witnesses both supported the defendant's version of the facts.

E. The motion for JMOL will be granted because no reasonable jury could find for the plaintiff given that the two neutral witnesses both supported the defendant's version of the facts.

4. Martin receives a patent for a drug that cures AIDS. In an effort to make the maximum possible profit from the drug, Martin charges \$500,000 for the required dose. Few patients are able to pay that sum, and there is great demand for the drug from patients who cannot afford the price. Drug manufacturer Nordex markets a variant of Martin's drug for a much lower price. Martin sues Nordex in federal district court for patent infringement. He seeks damages and an injunction against further infringement. Nordex claims that its drug is sufficiently different from Martin's drug that it does not infringe his patent. Nordex also claims that even if its drug does infringe Martin's patent, an injunction against further infringement would be inequitable, because the public interest demands that the drug be available at a lower price. Nordex therefore claims that at most Martin is entitled to damages. Nordex makes a timely demand for a jury trial. Martin, fearful that a jury will be biased against him, makes a timely demand for a bench trial.

Five potential scenarios for what happens next are given below. In which of them is it possible that no error has occurred?

A. The case is tried by a bench trial. The court determines that Nordex infringed Martin's patent, but that an injunctive remedy would be inequitable. The court therefore enters a judgment awarding Martin an amount of damages that the court determines to be appropriate.

B. The case is tried by a bench trial. The court determines that Nordex infringed Martin's patent, but that an injunctive remedy would be inequitable. The court therefore orders that Martin receive only damages. A jury trial, limited to the question of damages, is held, and the jury returns a verdict stating the amount of damages Martin should receive. The court enters judgment on that damages verdict.

C. The case is tried by a bench trial. The court determines that Nordex has not infringed Martin's patent and therefore enters judgment for the defendant.

D. The case is tried by jury. The jury returns a general verdict for Martin with a specified amount of damages. The court agrees that a reasonable jury could have reached that verdict; however, it determines that Martin shall not receive an injunctive remedy because the court believes that such a remedy would be inequitable. The court enters judgment on the jury's damages verdict.

E. The case is tried by jury. The jury returns a general verdict for Martin with a specified amount of damages. The court agrees that a reasonable jury could have reached that verdict; however, it determines that Martin shall not receive an injunctive remedy because the court believes that Nordex has not infringed Martin's patent. The court enters judgment on the jury's damages verdict.

5. Parvina sues David for breach of contract in federal district court. Jurisdiction is based on diversity. In her complaint, Parvina alleges she lent David \$250,000, and that David hasn't repaid any of it. In his answer, David asserts that he has repaid all of the money, and that, subsequent to repaying it, he went bankrupt and his debts were discharged, so that even if he hadn't repaid the

money, he would no longer owe any of it.

The case is tried by jury. The court instructs the jury that David may prevail by proving either of his two stated defenses. The jury returns a general verdict with answers to questions. The general verdict is for Parvina in the amount of \$250,000. In the answers, the jury states that (1) David repaid all of the money, and (2) David never went bankrupt.

Which of the following is NOT a proper option for the court?

- A. Enter judgment for Parvina in the amount of \$250,000.
- B. Enter judgment for David.
- C. Explain to the jury that its general verdict is inconsistent with its answers and order it to deliberate further.
- D. Order a new trial.
- E. Order the parties to give the court their best arguments as to which option the court should choose.

6. Under the federal Copyright Act, a work is copyrighted as soon as it is created; there is no need to register the work to gain copyright protection. The Act prohibits infringing a copyright by making or distributing copies of a copyrighted work without permission of the copyright owner, and infringement includes making or distributing a work that is “substantially similar” to the copyrighted work even if it is not an exact copy. However, copyright infringement occurs only when someone actually *copies* from a copyrighted work. If a second creator *independently* creates a work that happens to be similar to an existing copyrighted work, there is no infringement.

In 2020, Phyllis, an unknown, amateur songwriter, sues Dexter, a popular rock star, in federal district court. Phyllis claims that the music in Dexter’s hit song “Restless,” released in 2019, infringes the copyright in her song “Dreaming.” In her complaint, Phyllis alleges that (1) she wrote “Dreaming” in 2017, (2) the music in “Restless” is substantially similar to the music in “Dreaming,” and (3) the composer of “Restless” actually copied music from “Dreaming.” In his answer, Dexter denies all of Phyllis’s allegations. Dexter states in his answer that he bought “Restless” in 2018 from Carl, a professional songwriter, who subsequently died.

After lengthy discovery, Dexter moves for summary judgment. The evidence in the summary judgment record shows the following: (1) There is some evidence that Phyllis wrote “Dreaming” and saved it on her computer in 2017, but there is also some evidence that the dates on Phyllis’s computer files are faked, and that it is possible that Phyllis did not write “Dreaming” until after “Restless” was released. (2) It is undisputed that Carl composed “Restless.” (3) The music in “Restless” is sufficiently similar to the music in “Dreaming” that “Restless” would infringe the copyright in “Dreaming” if Carl actually copied from “Dreaming,” but the two are not so similar as to give rise to any inference that Carl did so copy. (4) Neither side has any evidence as to how Carl actually composed “Restless.” There is no evidence that Carl ever heard “Dreaming,” or saw its sheet music, or had any other form of access to it, but because Carl has died, neither is there any evidence that he composed “Restless” independently.

Based on the summary judgment record, the trial judge thinks it is more likely than not that Phyllis’s whole story is a lie and that she didn’t even write “Dreaming” until after the release of “Restless.” If the case were tried, Phyllis would have the burden of proof on all issues.

What is the correct disposition of Dexter’s motion for summary judgment?

- A. Granted, because a verdict for Phyllis would be against the weight of the evidence.
- B. Granted, because the plaintiff lacks sufficient evidence to show that there is a genuine dispute as to at least one material fact that she would need to prove to win at trial.
- C. Denied, because on a motion for summary judgment the allegations in the plaintiff’s complaint must be taken as true.
- D. Denied, because summary judgment can be granted only when there is no genuine dispute of material fact, and there is a genuine dispute of material fact as to when Phyllis composed “Dreaming.”
- E. Denied, because a defendant seeking summary judgment, like a plaintiff opposing it, cannot rely on the allegations in the pleadings, but must bring forward evidence of the facts.

7. Reuben sues Levi in federal district court for breach of contract. Jurisdiction is based on diversity. Without answering the complaint, Levi files a motion to dismiss under Federal Rule 12(b)(6) for failure to state a claim. Levi asserts that, even taking all the facts in Reuben’s complaint as true, they do not amount to a breach of contract. Reuben opposes the motion. Both parties file memoranda explaining their position. The district court considers the memoranda and hears oral argument from the parties. A month later, the court denies the motion and issues an opinion explaining that if everything Reuben has alleged is true, his complaint states a claim. The court orders Levi to answer the complaint within 14 days. However, Reuben is discouraged by some of the remarks in the district court’s opinion and decides he might have better luck in state court. Before Levi serves or files his answer, Reuben serves and files a notice of dismissal stating that he voluntarily dismisses the action. What is the result?

- A. The notice has no effect because the case is past the point at which Reuben is entitled to file such a notice. If Reuben wants voluntary dismissal, he must file a motion for it.
- B. The notice is effective and the case is dismissed, but the district court may attach conditions to the dismissal, such as a requirement that Reuben pay the litigation costs that Levi has incurred so far.
- C. The notice is effective and the case is dismissed, but Reuben will be precluded from starting again in state court because the dismissal acts as a judgment on the merits.
- D. The notice is effective, the case is dismissed, the district court has no power to attach conditions to the dismissal, and the dismissal is without prejudice, so Reuben may start over in state court.
- E. The notice is effective and the case is dismissed, but only if Levi consents to the dismissal.

8. The Securities Exchange Act (SEA), a federal statute, prohibits the use of fraud “in connection with the purchase or sale of any security.” The term “security” includes shares of corporate stock.

Eloise is the owner of 1000 shares of the Nova Corporation. Nova is trading at \$50 a share on the New York Stock Exchange, but a rumor circulates that the company is in big trouble and its

share price is likely to collapse. The President of Nova issues a public statement that everything is fine at the company. Relying on that statement, Eloise does not sell her shares. Three days later, the President admits he was lying. Nova's share price falls to \$10 a share.

Eloise sues the President of Nova in federal district court under the SEA. She seeks damages of \$40,000 (\$40 per share x 1000 shares). The President moves to dismiss on the ground that because Eloise did *not* sell her shares, his actions, even if fraudulent, did not occur "in connection with the purchase or sale of any security" insofar as Eloise is concerned. The district court agrees with this argument and grants the motion to dismiss.

Eloise appeals. The judges of the court of appeals believe that the question of whether the SEA applies to a plaintiff who claims that a defendant's fraud caused her *not* to sell shares is a close question that reasonable people could disagree on, but their best judgment is that the district court was correct. What should the court of appeals do?

A. Affirm, because the question presented is a question of fact as to which the standard of review is deferential.

B. Affirm, because the question presented is a question of law as to which the standard of review is deferential.

C. Affirm, because given the court of appeals' view on the question presented, it should affirm regardless of the standard of review.

D. Reverse, because the question presented is a question of fact as to which the standard of review is de novo.

E. Reverse, because the question presented is a question of law as to which the standard of review is de novo.

9. Under the federal copyright law, joint owners of a copyright may reach whatever agreement they want regarding the division of the profits derived from the copyright. But if they never make any agreement on this point, they are, by law, entitled to equal shares in the profits.

Alice and Bart are joint owners of the copyright in a book. For several years, Alice collects the royalties from the publisher and distributes Bart's share to him. However, after Alice and Bart both die in a car accident, Carlos, Alice's widower, inherits Alice's share of the copyright, and Daphne, Bart's widow, inherits Bart's share. Carlos collects the royalties and distributes nothing to Daphne. Daphne sues Carlos in federal district court and demands half of the royalties. Leon, Carlos's counsel, asks Carlos if he has any papers relevant to the case, and Carlos gives Leon a signed agreement between Alice and Bart that states that Alice's share of the royalties shall be 1/3 and Bart's share shall be 2/3. Leon, realizing that Daphne must not know about this agreement, decides he will not seek to use this document as part of the case.

Which of the following is true?

A. Carlos is obliged to disclose this document to Daphne as part of the initial disclosures under Rule 26(a)(1).

B. Carlos is not obliged to disclose this document to Daphne as part of the initial disclosures under Rule 26(a)(1), but would be obliged to produce this document if Daphne served a suitable request under Rule 34, such as, "Produce any written agreement between Alice and Bart."

C. Carlos cannot be made to produce this document, because it is protected by attorney-client privilege.

D. Carlos cannot be made to produce this document, because it is protected by the work product doctrine, unless Daphne can show that she has a substantial need for it and cannot obtain its equivalent without undue hardship.

E. Leon should advise Carlos to destroy this document.

10. Park buys a used Tesla car from Dependable Motors (“Dependable”), a used car dealer, for \$50,000. The car’s odometer shows that the car has 5,000 miles on it. Later, Park discovers that the car actually had 100,000 miles on it and was therefore worth only \$10,000.

Park brings suit against Dependable in federal district court. Park claims that Dependable violated the Federal Odometer Act (FOA), which provides that any person who “knowingly” sells a car with an altered odometer is liable for any resulting damages. Park also claims (under state law) that Dependable breached its contract of sale with him because of the altered odometer. Dependable denies both claims.

The case is tried by jury. There is no evidence proving that any employee of Dependable actually knew about the altered odometer, but some evidence suggests that employees of Dependable *suspected* that the odometer had been altered, but deliberately avoided investigating.

At the close of the evidence, the court holds an instructions conference, at which Dependable’s counsel asks the court to instruct the jury to find for Park under the FOA only if an employee of Dependable *knew* that the car’s odometer had been altered. The court, however, says that it will instruct the jury to find for Park under the FOA if any employee of Dependable *knew or should have known* that the odometer was altered. Dependable’s counsel objects to this instruction on the ground that it is contrary to the FOA, but the court gives it anyway.

The jury returns a general verdict with answers to written questions. The general verdict is for Park in the amount of \$40,000. The answers to written questions state that (a) Dependable violated the FOA, resulting in damages to Park of \$40,000, and (b) Dependable breached its contract of sale with Park, resulting in damages to Park of \$40,000. Judgment is entered on the verdict.

Dependable appeals. On appeal, Dependable argues that the jury instruction regarding the FOA was incorrect. The judges of the court of appeals believe that the question of whether a FOA plaintiff must show that the defendant *knew* that the car’s odometer was altered, or whether it is enough that the defendant *should have known*, is a close question, but that the district judge’s interpretation of the statute was incorrect. Dependable raises no other arguments.

What should the court of appeals do?

- A. Reverse, because the applicable standard of review is de novo.
- B. Reverse, because the defendant’s objection was sufficient under Rule 51.
- C. Affirm, because the defendant’s objection was insufficient under Rule 51.
- D. Affirm, because the applicable standard of review is deferential.
- E. Affirm, because the district court’s error was harmless.

11. Keith, a private citizen, sues Amy, also a private citizen, in federal district court. Amy moves for summary judgment. On Monday, August 17, 2020, the district court grants Amy's motion, explains its ruling in an opinion, and signs a one-page document headed "Judgment," that states "Keith takes nothing by his complaint." On Monday, August 24, 2020, the court clerk enters the judgment on the case's docket. On Monday, August 31, 2020, Keith asks his counsel, "What is the last day I can file a notice of appeal?" What is the correct answer?

- A. Wednesday, September 16, 2020.
- B. Thursday, September 17, 2020.
- C. Wednesday, September 23, 2020.
- D. Thursday, September 24, 2020.
- E. Friday, September 25, 2020.

12. Wallace is injured when he falls down some steps in front of a commercial building. He sues Downtown Properties, Inc., the owner of the building, in federal district court, for alleged negligence in maintaining the steps in an unsafe condition. Jurisdiction is based on diversity. During discovery, Wallace's counsel subpoenas Henry, the building manager, and takes his deposition. He asks, "Since the accident occurred, have you taken any measures to improve the safety of these steps, such as adding a handrail?" The defendant's counsel objects that the answer would not be admissible in evidence, as Federal Rule of Evidence 407 prohibits introducing evidence of subsequent safety improvements as proof of negligence. (This is a correct statement of Rule 407.) Defendant's counsel therefore says Henry need not answer the question. Wallace's counsel says, "Well, (1) the question is still within the scope of discovery, which is not limited to admissible evidence, (2) with limited exceptions that are not relevant here, if an objection is raised to a question at a deposition, the objection is noted for the record but the deposition proceeds and the deponent must answer the question, and (3) a party cannot raise an objection at a deposition unless the party properly preserved the objection by raising it prior to the deposition." Wallace's counsel says that therefore Henry must answer the question.

Which, if any, of Wallace's counsel's points are correct?

- A. (1), but not (2) or (3)
- B. (2), but not (1) or (3)
- C. (1) and (2), but not (3)
- D. None of them
- E. All of them

13. Emerald, a famous screen actress, maintains a wholesome public image. Victor, a journalist, writes a series of stories asserting facts that are inconsistent with that image, such as that Emerald uses illegal drugs and has affairs with married men. Emerald claims that these stories are false and she sues Victor for libel in federal district court. Jurisdiction is based on diversity.

The case is tried by jury. Emerald presents evidence that Victor's stories are false. Victor presents evidence that he had solid sources that reasonably caused him to believe that the stories were true. The judge correctly instructs the jury that because Emerald is a public figure, she has the

burden of proving not only that Victor's stories are false, but that Victor either knew they were false or published them with reckless disregard for whether they were true or false.

The jury returns a general verdict for Emerald with damages of \$1 million. Judgment is entered on the verdict. Ten days later, Victor's counsel files a motion for a new trial. Attached to the motion are affidavits from three of the jurors. The affidavits state the following two points:

(1) The jury misunderstood the instructions about burden of proof and thought that it was obliged to rule for Emerald unless Victor had affirmatively proved that his stories were true.

(2) During deliberations, the jury was trying to recall the details of Victor's stories, and rather than ask for the evidence to be brought into the jury room, members of the jury searched for the stories on their cell phones. They came across some stories which appeared to be Victor's stories and which they thought were part of the evidence in the case, but which were actually fake stories by unknown Internet pranksters, which contained exaggerated, outrageous assertions about Emerald, such as that she enjoys pushing children into the street and that she shoots anyone who asks for her autograph. These stories were not evidence in the case, but they influenced the jury's verdict.

Which of the following is true?

- A. Neither point (1) nor point (2) is a reason why the court may order a new trial.
- B. The court may order a new trial based on point (1) but not point (2).
- C. The court may order a new trial based on point (2) but not point (1).
- D. Both point (1) and point (2) are reasons why the court may order a new trial.
- E. Although at least one of the two points states a reason that could be a sufficient basis for a new trial, the defendant's motion is untimely.

14. Fred buys a Picasso painting from its joint owners, George and Harold, for \$1 million, in Philadelphia, Pennsylvania. Later, Fred decides that the painting is a worthless forgery and tries to demand his money back, but discovers that George and Harold have moved without leaving a forwarding address. After much effort he locates George in Pittsburgh, Pennsylvania. Unable to find Harold, Fred sues only George in Pennsylvania state court for \$1 million, on the claim that George sold Fred a forged painting. George's only defense is that the painting is genuine. The case is tried by jury, and the parties vigorously contest the facts. The jury returns a general verdict with an answer to one question. The general verdict is for George, and the answer is that the painting is a genuine Picasso. Judgment is entered on the verdict. The time to appeal that judgment expires, and Fred does not appeal.

Thereafter, Fred locates Harold in Wilkes-Barre, Pennsylvania. Fred sues Harold in Pennsylvania state court for \$1 million on the claim that Harold sold Fred a forged painting. Harold moves for summary judgment based on the preclusive effect of the determination in the first case that the painting is a genuine Picasso.

On all matters of preclusion law, Pennsylvania follows the modern, majority rules. Pennsylvania law would *not* regard George and Harold as being in privity with each other.

What is the correct disposition of Harold's motion for summary judgment?

- A. Denied, because the finding in the first case that the painting is genuine was not necessary to the decision in that case.

- B. Denied, because the judgment in the first case is not valid, final, and on the merits.
- C. Denied, because Harold is seeking nonmutual offensive issue preclusion.
- D. Granted, because Harold is seeking nonmutual defensive issue preclusion.
- E. Granted, because even though Harold is seeking nonmutual offensive issue preclusion, he satisfies the conditions for it.

15. Oscar, a citizen of Florida, is a trans man; i.e., he identifies as male although that is not the gender he was assigned at birth. Oscar's employer, Best Books, Inc., a corporate citizen of Florida, has a policy against employing trans people. When Oscar's supervisor learns that Oscar is trans, Oscar is fired. Oscar sues Best Books in federal district court for violation of Title VII of the federal Civil Rights Act of 1964 ("Title VII"), which prohibits employment discrimination on the basis of race or gender. Best Books moves to dismiss under Federal Rule 12(b)(6) for failure to state a claim. It argues that Title VII does not prohibit discrimination against trans persons. Oscar opposes the motion and argues that discrimination against trans persons is a form of gender discrimination forbidden by Title VII. The district court agrees with Best Books, grants the motion to dismiss, and enters judgment for the defendant.

Oscar appeals on the ground that the district court's ruling as to the scope of Title VII was erroneous. The judges of the court of appeals believe that the question of whether Title VII prohibits discrimination against trans persons is a close question as to which reasonable people could differ, but their best judgment is that the district court's decision on this point was incorrect. Given that view, what should the court of appeals do?

- A. Dismiss, because the district court's order is not appealable.
- B. Affirm, because Oscar did not preserve the alleged error for appellate review.
- C. Affirm, because the district court's error was harmless.
- D. Affirm, because the standard of review is deferential.
- E. Reverse, because the standard of review is de novo.

END OF EXAM