

**STETSON UNIVERSITY COLLEGE OF LAW  
Gulfport, Florida**

**GENERAL INSTRUCTIONS**

**I DIRECT THE ATTENTION OF ALL STUDENTS TO THE FOLLOWING:**

1. The answers and the pledge are to be identified by examination number only.
2. During the course of the examination, the examination and answers may not be removed from the rooms prescribed for taking the examination.
3. This examination ends at the expiration of the time allotted, or when the examination is turned in, whichever comes first.
4. The instructor will be permitted to grade only answers that have been submitted during the examination, in the manner indicated by the instructor.
5. From the conclusion of the time prescribed for the examination, students are forbidden from communicating with the instructor with reference to this examination until grades have been turned into the Registrar's Office except that students may communicate with the instructor at any time concerning matters related to the Code of Student Professional Responsibility.

**TIME FOR EXAMINATION: FOUR HOURS**

**SPECIAL INSTRUCTIONS**

1. This is a LIMITED OPEN BOOK examination. You have previously been advised as to which materials you may use during the examination. If you had a question about whether a particular item was allowed in the examination, you should have raised that question before the examination. If you are in doubt, do not bring the item to the exam.
2. This examination consists of twelve (12) pages. You should check now that you have all pages.
3. The examination is in two Sections. Section I of the examination requires you to provide essay answers. The Section is based on a single fact pattern and contains three (3) separate questions, with sub-parts, requiring answers. Section I is worth a total of eighty (80) points. My suggestion is that you allot a total of three hours and twenty-five minutes to Section I. I provide point breakdowns and recommended times for each

question in Section I with the questions themselves. Section II of the examination consists of five (5) multiple choice questions. Each multiple choice question is worth four (4) points. I suggest you allot thirty minutes to Section II.

4. Please use a blue book or blue books or a computer to answer the essay questions in Section I. Write your exam number on each blue book you use. If using the blue books, please indicate how many you have used to answer the question (*e.g.*, Book 1 of 2).
5. Please use the answer sheet provided with your examination materials to answer the multiple choice questions in Section II. Make sure to write your examination number on the answer sheet. If you believe that any of the multiple choice questions are ambiguous or you perceive a mistake or flaw in the question, you should still answer the question. Then, explain concisely on the back of the answer sheet why you think the question is flawed. I would not suggest that you use this challenge option often because it takes time away from the rest of the exam.

**END OF INSTRUCTIONS – GOOD LUCK!!**

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## **SECTION I:**

Thomas Construction, Inc. (“Thomas”) is a contractor specializing in the construction of railroads. Thomas is a corporation incorporated in Delaware with its principal place of business in Dallas, Texas. The Sodor Railway Company (“Sodor”) approached Thomas about building a new line on Sodor’s Florida railroad. The new line was to go from Tampa to Orlando. Sodor is a corporation organized under Florida law with a principal place of business in Tampa, Florida. As described below, Thomas was interested in getting involved in the project.

Percy Railway Finance Company (“Percy”) is a corporation organized under the laws of New York with its principal place of business in New York. Percy is a company that provides financing for railroad projects in various locations, mainly in the Northeastern part of the United States and in Canada. The way the business works, Percy provides money to the operators of a railroad and then receives a portion of the revenue generated by the railroad over a specified period of time. Percy owns no railroads or railroad equipment.

Before Sodor approached Thomas about getting involved in the Tampa-Orlando project, representatives of Sodor traveled to New York to meet with representatives of Percy. Sodor needed to obtain additional funding in order to complete its project and it thought that Percy would be interested in the project. Percy was, in fact, interested. It thought that it would be a good idea to start to get involved in projects in the South. So, Percy agreed to pay for up to 40% of the project. It did so by transferring a sum equal to 40% of the project’s anticipated cost into a special account that Sodor opened for that purpose in New York City. Sodor, in turn deposited the remaining 60% of funds into the account. All project expenses were to be paid out of that account, over which Sodor had the sole authority to disperse funds. In exchange for the financing, Sodor agreed to pay Percy 1% of revenues generated by the Tampa-Orlando railway for a period of ten (10) years.

An additional feature of the Sodor/Percy relationship was that the two parties would jointly enter into the major contracts associated with the project. One of those contracts was the agreement that Thomas entered into to build the Tampa-Orlando rail line. The contract was signed by the parties at the Thomas headquarters in Dallas, Texas. Under the contract, Sodor and Percy were each responsible for payment of the contract price, \$500,000. The contract payments were to be made to Thomas’ bank account in Texas. Even though Percy was jointly responsible with Sodor to pay Thomas, Sodor was to be responsible for the day-to-day management of the project. Thomas’ obligations under the contract were to plan the construction of the railway line and then to be in charge of its on-site construction.

Thomas began work on the line immediately after the contract was signed. There were many problems encountered in connection with the construction. However, Thomas worked heroically to complete the project on schedule. Sodor was not so impressed with the work. It decided that the work on the project was so far below what was acceptable in the industry that it was not going to pay Thomas the \$500,000 owed under the contract.

Based on this total failure to pay, Thomas filed a lawsuit against only Sodor in the United States District Court for the Middle District of Florida. Thomas sought \$500,000 in damages in a breach of contract suit. Thomas did not name Percy as a defendant (it wanted to try to maintain a good relationship with the company in the future). Sodor filed an answer in which it also included a counterclaim against Thomas. The counterclaim was for negligence in the construction of the Tampa-Orlando line. Specifically, Sodor claims that Thomas misjudged the type of soil on which it built the rail line. As a result, the rails are sinking. Sodor seeks damages in excess of \$1,000,000, which is what Sodor claims to be the cost of repairing the railway.

**Question 1 (20 Points; Time Suggested: One Hour)**

Thomas is insured by Henry & Gordon Insurance (“H&G”). H&G is a partnership doing business in Florida. H&G has two partners, Henry, a citizen of Delaware, and Gordon, a citizen of Florida. H&G has refused to pay any claims related to Sodor’s assertion of negligence. Thomas believes that H&G should live up to its obligations under the insurance agreement. H&G, on the other hand, believes that a law passed by Congress entitled the Non-Negligence in Railway Insurance Act (the “NRIA”) relieves it of any obligation to ensure Thomas.

You are a lawyer at the firm representing Thomas in the litigation with Sodor. A partner at the firm has asked you whether Thomas can sue H&G for breach of the insurance contract in the Thomas versus Sodor case. In your response to the partner you should address only two points: (a) whether the Federal Rules of Civil Procedure allow this claim to be brought and (b) whether there is subject matter jurisdiction over the claim.

**Question 2 (44 Points; Time Suggested: One Hour and Forty-Five Minutes)**

About one year after filing its answer and counterclaim and shortly before trial with Thomas, Sodor filed a motion for judgment on the pleadings the case for failure to join a party under Rule 19. Specifically, Sodor claims that Thomas should have joined Percy as a defendant in the case. Sodor makes a three step argument:

- First: Sodor claims that Percy is a party that should be joined if feasible under Federal Rule of Civil Procedure 19(a).
- Second: Sodor claims that Percy is not subject to personal jurisdiction in Florida under both the Florida Long Arm Statute (attached as Exhibit A) and the United States Constitution. By the way, to the extent it is of interest to you, you should assume for the purpose of this examination that the long arm statutes of both New York and Texas provide that these states will exercise jurisdiction to the full extent allowed by the U.S. Constitution.
- Third: Sodor claims that because Percy should be joined under Rule 19(a) but cannot be due to the problem with personal jurisdiction, the claim brought by Thomas should be dismissed under Rule 19(b).

As the lawyer for Thomas at the firm, you have been asked to prepare a memorandum for a partner addressing Sodor's motion. The partner first has asked you whether Sodor has waived the Rule 19 objection because the defense was not asserted in Sodor's answer. The partner has then asked that you address each of Sodor's three arguments as listed above. No matter how you come out on any one issue, you should address each of them.

**Question #3 (16 Points; Time Suggested: Forty-Five Minutes)**

Assume that the case proceeds to a jury trial between Thomas and Sodor with respect only to Sodor's counterclaim of negligence in connection with the construction of the rail line. At trial, the key issue was whether the soil on which the rail line was built was, in fact, too soft to support a railroad. It was Sodor's burden to prove that the soil was too soft.

At trial, Sodor introduced only one piece of evidence on the soil issue: a soil survey report that had been prepared by a Sodor employee at about the time the line was built. That report indicated that the soil on which Thomas was building the railway was softer than it should have been. You should assume that this report was properly admitted into evidence.

On its side, Thomas introduced the testimony of six experts in geology who all testified that the soil was solid enough to support a railway. In addition, Thomas presented the testimony of its own employees who testified that they did not run into any problems with the soil during construction.

In response to a specific question on the verdict form, the jury found in favor of Sodor that the soil was too soft. Thomas, which had moved for a judgment as a matter of law at the close of all the evidence, has filed a Renewed Motion for Judgment as a Matter of Law arguing that the jury's decision concerning the soil was not supported by the evidence. In the alternative, Thomas has also filed a Motion for New Trial. Sodor has opposed both motions.

You are the judge assigned to the case. What is your decision on both of Thomas' motions? You should assume that both motions have been timely filed.

**END OF SECTION I**

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**SECTION II : (20 Total Points (4 points per question)); Suggested Time: 30 Minutes)**

George, a citizen of Virginia, is a surveyor whose job it is to mark the boundaries of land for certain purposes. Martha, a citizen of Maryland, is a landowner who was planning to turn her large estate into a winery. In furtherance of her winery plan, Martha entered into a written contract with George. Under the contract, George was to mark the boundary lines of Martha's property at the northeastern tip of the estate. In exchange for this work, Martha was required to pay \$100,000 to George. George completed the work on time and Martha promptly paid him. Martha then planted her grapes. Unfortunately, problems grew long before the fruit.

Abigail owned the property along the northeastern portion of Martha's estate. Shortly after Martha planted her grapes Abigail noticed them for the first time. Abigail immediately notified Martha that she believed that the plants were on Abigail's property. Martha concluded that Abigail was correct about the plants. Therefore, Martha removed the plants, in the process causing some damage to the land.

Martha believed that the reason the grapes ended up on Abigail's property was that George's survey of Martha's property was not done properly. She now wishes to sue George for breach of contract.

**Question #1**

Which of the following statements is MOST ACCURATE assuming Martha wishes to sue George in a United States District Court in Maryland?

- A. Martha must seek a waiver of formal service from George before serving George with a summons and complaint.
- B. If Martha sought to obtain a waiver of formal service from George, George would have to agree to waive formal service.
- C. If Martha sought to obtain a waiver of formal service from George and George did not respond within thirty days (or other reasonable time) from the date the waiver was sent, Martha would be within her technical rights under the Federal Rules of Civil Procedure to seek a default judgment against George.
- D. If Martha sought to obtain a waiver of formal service from George and George agreed to waive formal service within the appropriate time, George could still assert a defense that he is not subject to personal jurisdiction in Maryland.
- E. Under the Erie doctrine, in order to assess options A through D above, one would need to know more about the law the State of Maryland, which you should assume would apply in this matter.

## **Question #2**

Assume that Martha did sue George in a federal court in Maryland. After completing all required disclosures under the Federal Rules of Civil Procedure, George (1) served 100 document requests on Martha, (2) served 20 interrogatories on Martha, (3) served 6 interrogatories on Abigail after serving the interrogatories on Martha, and (4) noticed his intent to take Martha's deposition at a time before the responses to the interrogatories and document requests were due. Which of the following objections is the **MOST WELL-FOUNDED?**

- A. The service of each of these discovery items is unwarranted until such time as George has at least considered the material Martha has provided him as part of the required disclosure process.
- B. It is inappropriate to use an intrusive discovery device such as the deposition George plans to take of Martha until George has exhausted less intrusive devices such as interrogatories, document requests, and requests for admissions.
- C. The interrogatories served on Abigail are inappropriate because Abigail is not a party.
- D. The interrogatories served on Abigail are inappropriate because, when combined with the 20 interrogatories served on Martha, George has exceeded the total number of interrogatories (25) that George is allowed in the case.
- E. The document requests George served on Martha are in excess of those allowed under the Federal Rules of Civil Procedure.

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### **Question #3**

Martha has served the appropriate subpoena and notice indicating her intention to take the deposition of George's business partner John. George is concerned that Martha's lawyer is going to ask John some very embarrassing questions concerning George's drinking habits. It seems that George is a sober alcoholic who, several years ago, had a few run-ins with the law as a result of too much to drink. George would really like to keep these events out of the public eye. Which is the **BEST** strategy for George's lawyer to use to address George's concern?

- A. George's lawyer should send a strongly-worded letter to Martha's lawyer warning against asking questions concerning George's alcohol use and drinking history and threatening Rule 11 sanctions of the lawyer asks such questions.
- B. George's lawyer should seek a court order before the deposition attempting to preclude an inquiry into George's drinking habits and history.
- C. At the deposition, George's lawyer should object to questions concerning drinking habits and history in order to preserve the objections for trial.
- D. At the deposition, George's lawyer should object to the questions about alcohol use and instruct the witness not to answer the questions on the grounds that the information is not relevant and is embarrassing to George.
- E. Because George is not the deponent (in other words, the person whose deposition is being taken), he is powerless to take any actions under the Federal Rules of Civil Procedure with respect to the deposition of his business partner John.

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**Question #4**

Martha's attorney filed a motion for summary judgment. In her motion, Martha's attorney asserted a legal argument that George's lawyer believes is unsupported by existing law or a nonfrivolous argument for the extension, modification or reversal of existing law or the establishment of new law. Which of the following statements is **MOST ACCURATE** in this situation?

- A. George must respond to the summary judgment motion and, when the motion is denied, then request that the court impose sanctions on Martha's attorney.
- B. George should respond to the summary judgment motion and as part of that response raise his argument that Martha's legal argument is unsupported by existing law or a nonfrivolous argument for the extension, modification or reversal of existing law or the establishment of new law.
- C. George should immediately file a Rule 11 motion with the court seeking sanctions against Martha and her attorney.
- D. George should serve a Rule 11 motion on Martha's attorney seeking sanctions against Martha and her attorney. After waiting three weeks, George should then file the motion with the court no matter what has happened in the interim so that the court will have an opportunity to rule on the alleged violation of Rule 11.
- E. George should serve a Rule 11 motion on Martha's attorney seeking sanctions against Martha and her attorney. After waiting three weeks, George should then file the motion with the court if Martha has not withdrawn the allegedly frivolous legal argument.
- F. George may not seek sanctions against Martha for the assertion of the purportedly frivolous legal argument. Therefore, George should serve a Rule 11 motion on Martha's attorney seeking sanctions against the attorney. After waiting three weeks, George should then file the motion with the court if Martha has not withdrawn the allegedly frivolous legal argument.

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**Question #5**

Assume that Martha's summary judgment motion was denied and that the Martha v. George case went to trial. At trial, the judge found in favor of George. Specifically, the judge held that the area on which the grapes were planted was not owned by Abigail. Therefore, the judge ruled that George had not breached his contract with Martha because he had accurately marked the boundaries of Martha's property. Martha did not appeal the decision.

After the time for appeal in the Martha v. George case had expired, Abigail, a citizen of New York (her property in Maryland is a vacation home) brought suit against Martha for damage caused to the property on which the grapes had been planted. In her answer, Martha asserted a defense of res judicata, specifically issue preclusion. Martha argued that the judge had already determined that the land at issue belonged to Martha. Therefore, Martha argued, Abigail's claim must fail. What is the MOST LIKELY outcome of Martha's issue preclusion argument?

- A. Martha will likely prevail because the same issue was decided in the earlier case as is present in this case, that issue was actually determined and was essential to the earlier judgment. Therefore, it would be grossly inefficient to litigate the issue again. This is especially so because Abigail knew of the Martha v. George case and did nothing to intervene under Rule 24 to protect her rights.
- B. Martha will likely prevail if the judge in the Abigail v. Martha case concludes that the judge's decision in Martha v. George was not against the great weight of the evidence.
- C. Abigail will likely prevail if Martha did not plead the res judicata issue "with particularity." This is so because res judicata is an affirmative defense.
- D. Abigail will likely prevail because Martha's defense should have been raised in a pre-answer motion in the first instance.
- E. Abigail will likely prevail because she was not a party to the earlier case.

**ON MY HONOR, I HAVE  
NEITHER GIVEN NOR  
RECEIVED AID ON THIS  
EXAMINATION.**

**EXAM NO. \_\_\_\_\_**

**END OF EXAMINATION – HAVE A WONDERFUL BREAK!!!**

**EXHIBIT A BEGINS ON THE NEXT PAGE**

## EXHIBIT A

FLORIDA STATUTES 2000

\*\*\* THIS DOCUMENT IS CURRENT THROUGH THE 2000 LEGISLATIVE SESSION \*\*\*

TITLE VI CIVIL PRACTICE AND PROCEDURE

CHAPTER 48 PROCESS AND SERVICE OF PROCESS

Fla. Stat. § 48.193 (2000)

48.193 Acts subjecting person to jurisdiction of courts of state.

(1) Any person, whether or not a citizen or resident of this state, who personally or through an agent does any of the acts enumerated in this subsection thereby submits himself or herself and, if he or she is a natural person, his or her personal representative to the jurisdiction of the courts of this state for any cause of action arising from the doing of any of the following acts:

(a) Operating, conducting, engaging in, or carrying on a business or business venture in this state or having an office or agency in this state.

(b) Committing a tortious act within this state.

(c) Owning, using, possessing, or holding a mortgage or other lien on any real property within this state.

(d) Contracting to insure any person, property, or risk located within this state at the time of contracting.

(e) With respect to a proceeding for alimony, child support, or division of property in connection with an action to dissolve a marriage or with respect to an independent action for support of dependents, maintaining a matrimonial domicile in this state at the time of the commencement of this action or, if the defendant resided in this state preceding the commencement of the action, whether cohabiting during that time or not. This paragraph does not change the residency requirement for filing an action for dissolution of marriage.

(f) Causing injury to persons or property within this state arising out of an act or omission by the defendant outside this state, if, at or about the time of the injury, either:

1. The defendant was engaged in solicitation or service activities within this state; or

2. Products, materials, or things processed, serviced, or manufactured by the defendant anywhere were used or consumed within this state in the ordinary course of commerce, trade, or use.

(g) Breaching a contract in this state by failing to perform acts required by the contract to be performed in this state.

(h) With respect to a proceeding for paternity, engaging in the act of sexual intercourse within this state with respect to which a child may have been conceived.

(2) A defendant who is engaged in substantial and not isolated activity within this state, whether such activity is wholly interstate, intrastate, or otherwise, is subject to the jurisdiction of the courts of this state, whether

or not the claim arises from that activity.

(3) Service of process upon any person who is subject to the jurisdiction of the courts of this state as provided in this section may be made by personally serving the process upon the defendant outside this state, as provided in s. 48.194. The service shall have the same effect as if it had been personally served within this state.

(4) If a defendant in his or her pleadings demands affirmative relief on causes of action unrelated to the transaction forming the basis of the plaintiff's claim, the defendant shall thereafter in that action be subject to the jurisdiction of the court for any cause of action, regardless of its basis, which the plaintiff may by amendment assert against the defendant.

(5) Nothing contained in this section limits or affects the right to serve any process in any other manner now or hereinafter provided by law.

HISTORY: s. 1, ch. 73-179; s. 3, ch. 84-2; s. 3, ch. 88-176; s. 3, ch. 93-250; s. 281, ch. 95-147.

**END OF EXHIBIT A**