

AM Essay 1 Example 1

1)

1. May Peter introduce into evidence any of the ten reports? Yes.

Under the Federal Rules of Evidence, the beginning inquiry for all evidence is whether or not it is relevant. Relevance is any tendency to make a material fact more or less likely. All relevant evidence is admissible unless it is excluded under statute; excluded for policy reasons; or is significantly more prejudicial than probative, has the potential to confuse or mislead the jury, is a waste of time, is unduly cumulative, etc.

Here, one of the material issues in trial is whether or not a) the valves were in fact defective under Peter's negligence and strict liability claims, and also b) whether or not Dexter had actual knowledge of the malfunctioning problem. Prior incidents of explosions with other units has some tendency to support the claim that *this* unit also exploded. Moreover, the prior incidents have some tendency to support the claim that Dexter knew of the problem. Therefore the evidence is relevant.

However, despite being relevant, similar past occurrences have the potential to confuse and mislead juries and thus there are special tests for determining whether similar occurrences are admissible. For prior similar occurrences, under the Federal Rules of Evidence, these occurrences are only admissible if, i) the prior occurrence was *substantially similar* -- which includes such factors as similarity of conditions--, and ii) admissible only to show that a dangerous condition existed *outside* of the parties or to show that the defendant was on notice of a dangerous condition.

Among the six *prior* occurrences at issue, the internal investigations by Dexter would be admissible, at *least* to show that Dexter was on notice of a problem. Moreover, these reports might be admissible if the court determined that the underlying conditions leading to the explosion were adequately similar. However, the four explosions that occurred after Peter's heater exploded would not show that Dexter was on prior notice and would be irrelevant for that point. However, if the Court determines heaters were the same type and were under substantially

similar condition, they may be admissible to show that there was in fact a dangerous condition.

Having established that at least some of the reports are relevant, the issue becomes whether or not they are admissible. Assuming that Peter has the original reports or adequate copies, then the "Best Evidence Rule is Satisfied." next is the issue of whether or not the documents are hearsay. Hearsay is an out of court statement offered to prove the truth of the matter they assert, this includes the contents of documents. Hearsay is generally inadmissible unless it fits a hearsay exception or is considered "non-hearsay" or is offered for a non-hearsay purpose. There are two potential hearsay exceptions met: Party Opponent Admissible (non-hearsay) and Business Records. There is a potential non-hearsay purpose of Notice and Effect on the Listener.

When hearsay is offered for a non-hearsay purpose, it is not really offered to show the truth of the comment, but rather another purpose. Here the reports could come in, not to show that the heaters were defective, but to show that the Defendant was on notice of a problem and should have -- or possibly did-- investigate further. The reports meet this exception. Dexter is entitled to a limiting instruction to that effect.

A party opponent admission is a statement made by the other party, offered against the other party at trial. The "party" includes that parties agents and employees if the comments were made in the scope of employment and while the agent/employee was still employed. Here the records are a party opponent admissible because they are offered against Dexter and the records were created by agents of Dexter in the scope of their employment. Thus this exception is met and the evidence can come in as substantive.

A business record is a record made in the regular course of business and is made by employees having personal knowledge of the issues in the record, if it is part of their job to record such things. Here the exception is met if the court determines that investigation reports are made "in the ordinary course of business." These records were made based on the investigations by employees whose job it was to make such investigations. Thus the exception is probably met and the evidence can come in as substantive.

Because at least some of the reports are relevant and they meet hearsay exceptions, they are admissible.

2. Should Peter be allowed to testify about his conversation with Walter? No.

As discussed above, evidence is admissible if relevant and is not hearsay. Here the evidence tends to support a material issue, so it is relevant, however it is also hearsay (out of court statement offered to show the truth of matter asserted). While this could be considered non-hearsay as a party opponent admission (as discussed above) the problem is whether or not these comments were made within the scope of the employment. Moreover this is hearsay within hearsay, and the exception must be met for each part.

First, statements by the Director of Product safety could be a party opponent admission because he is an agent of Dexter, and he was speaking of something that is within the scope of his employment (safety) and made during his employment. But the statement relaying this earlier statement was made by the accountant. While the accountant is an employee, this may not have been known to him in the scope of his employment. If he was present and invited to the meeting because Dexter wanted all employees to know of the problem, it might be considered within the scope. However the facts suggest that he only overheard the statement and thus this would not be within the scope of his duties as an accountant.

AM Essay 1 - Example 2

1) The Court should allow Peter to introduce the reports into evidence. At issue is whether the reports are admissible as relevant evidence and are within a hearsay exception. First, the internal investigation reports are relevant if they increase the probability that something may have occurred. Normally, these internal reports would not be relevant because they do not concern the present claim/explosion however they do involve a similar occurrence. The explosions exhibit an occurrence similar to Peter's which could be used to show an accident caused by a the same condition, existence of the condition, or Dexter's awareness of the condition. The explosions resulting from the safety valve malfunction is therefore relevant evidence and should be admitted. Further, since these reports concern an out of court statement (the report made by the investigators at the time of the prior accidents) and is possibly going to offered for the truth of the matter asserted (namely that Dexter was negligent in the design and manufacturing of its safety valves) the reports are hearsay and generally not admissible. However, these reports may fall within the business records exception. In order for the records to be within this exception, they must be made in the ordinary course of business and regularly kept in this manner. Therefore, if Dexter routinely investigates accidents involving its products it may fall within this exception to the hearsay rule and be admitted as evidence.

2) Peter's testimony would be admissible even though it is hearsay within hearsay under the vicarious admissions which makes it a non-hearsay statement. First both statements are hearsay because they are out of court statements (Walter's statement to Peter and the Director's statement at the staff meeting) and they offered for the truth of the matter asserted, namely that Dexter negligently designed and manufactured its safety valves. However, since Walter and Dexter's Director of Product Safety are both employees of Dexter, the statements were made during their employment and concern a matter within the scope of their employment (this may not be within Walter's accountant's scope of employment but it is with the scope of the Director's employment) they are considered party admissions and are admissible as non-hearsay statements. Although, a court may not admit Walter's statement to Peter – it would be better for Walter to testify to the Director's statement to ensure admissibility.

AM Essay 1 Example 3

1)

1. The court may allow Dexter to admit some of the reports concerning the 10 gas explosions or fires involving Dexter water heaters. The issue is whether evidence of prior occurrences is admissible to prove negligence or fault in the present case. In general, all relevant evidence is admissible. Evidence is relevant if it has any tendency to make a material fact more or less probable. However, even relevant evidence can be specifically excluded by a rule in the federal rules of evidence. Likewise, the judge, in his/her discretion, should exclude evidence if its probative value is outweighed by undue prejudice to the defendant, would be misleading to the jury, would be confusing to the jury, or when the evidence would lead to trial inefficiency. Prior occurrence evidence is only admissible if the prior occurrences occurred under substantially similar circumstances to the the occurrence that led to the current litigation. If the prior occurrence was not under substantially similar circumstances, it loses its relevance to this case. If it is substantially similar, and the judge feels that its probative value is not outweighed by the above considerations, such evidence is admissible to prove, the defendant had notice of the dangerous condition and to prove causation.

In this case, prior to Peter's accident, there had been six explosions involving Dexter water heaters, but only three of those explosions resulted from a malfunction of the safety valve on the heater--the same circumstance that led to Peter's explosion. Additionally, between the time of Peter's accident and the time of trial, there were an additional four explosions, only one of which occurred under substantially similar circumstances--a malfunction of the safety valve. Though these accidents occurred after Peter's accident, the rule will be the same--only those accidents that occurred under substantially similar circumstances will be admissible. Thus, of the 10 total accidents, only four occurred under substantially similar circumstances. To prove Dexter had actual knowledge of the safety valve problem prior to Peter's accident, only the three that occurred before his accident are relevant. The one that occurred after could be relevant to prove causation.

--Note: Dexter will not be able to claim a work product privilege because it disclosed the documents by producing them for discovery, thereby waiving the privilege. Additionally, they will likely be admissible even if technically hearsay because they probably fit the business

records exception.

2. The court should probably not allow Peter to testify about his conversation with Walter. The issue is whether the hearsay statement of Walter should be admissible. Hearsay is an out of court statement offered to prove the truth of the matter asserted. The general rule is that hearsay is inadmissible. There are several exceptions to this rule, as are there several exclusions. One exclusion is an admission by a party opponent. An out of court statement made by a party opponent may be admitted into evidence against that party and can be admitted to prove the truth of the matter asserted. This is true even if the speaker (declarant) did not have actual knowledge of the statement. Additionally, vicarious admissions are admissible under the same rule. Therefore, a statement by an agent of the defendant, who is acting in the course and scope of his employment will be admissible against the principle. Furthermore, if a hearsay statement is contained within another hearsay statement, both statements are admissible if they both fall under an exception or exclusion to the hearsay rule.

In this case, Walter's statement to Peter, "I heard Dexter Director state problems . . ." is hearsay because it is an out of court statement offered to prove the truth of the matter asserted. It is only relevant if the Director did, in fact, say this. It is hearsay within hearsay, because Walter is stating what another out of court statement contained--"Dexter is having problems with the safety valve." The statement by the Director would be admissible as an admission by a party opponent. However, Walter's statement to Peter does not fit into any exception or exclusion to the hearsay rule. Walter's statement is not itself a party admission because he is relaying what another person admitted to. It cannot be used as a vicarious admission of Dexter because Walter's statement to Peter was not made in the course and scope of Walter's employment. Walter is an accountant, a position having nothing to do with product safety, and Walter's statement to Peter was not regarding his own employment. Arguably, Walter's statement could be a statement against interest if, perhaps, Dexter's liability would somehow be detrimental to Walter's employment. This is a stretch, but even if this were true, a statement against interest is only an exception to the hearsay rule if the declarant is unavailable. Therefore, presumably, Walter could testify at trial to what the Director said, but Peter cannot testify as to what Walter said the Director said. The court should require Walter to take the stand.

AM Essay 2 Example 1

2)

Because the will was valid and executed with the proper formalities, it will be distributed in the following manner:

Whiteacre: Whiteacre will pass to Bud's sons Xian and Yancy. At issue here is the treatment of a gift when the devisee died just after the testator. Under Missouri law, a person is treated as predeceasing the testator if the person dies before the testator or within 120 hours of the testator unless the will states a contrary statement ("to Bud if he survives me"). Here, Bud died the day after Darcy and there was no contrary intent in the will, so he is treated as predeceasing Darcy. Because he predeceased her, his gift lapses into the residue unless the anti-lapse statute applies. Under Missouri's anti-lapse statute, a gift to a child or other relative who predeceases the testator does not pass to the residue but rather passes to the devisee's descendants, if any. Here, Bud was Darcy's child and he had two descendants. Therefore, the anti-lapse statute applies, and Xian and Yancy will take Whiteacre as tenants in common.

600 shares of Walmart stock: 300 shares go to Frances (who appears to have survived Darcy), and 300 shares will go to the residue. Here, Gena predeceased Darcy, so the gift will lapse unless the anti-lapse statute described in the previous paragraph applies. Because Gena was not a relative of Darcy, the statute does not apply, and Gena's 300 shares will lapse into the residue of the estate. Frances's gift is safe because she is still alive.

500 shares of Disney stock: The Disney stock will pass to Sally's daughter Rhonda. Again, the issue is the anti-lapse statute. Under Missouri law, the anti-lapse statute will apply to gifts to relatives, not just children. Because Sally has a descendant, the gift will pass to her, and Rhonda will inherit the Disney stock.

\$1 million in deposit accounts: Darcy's descendants will take \$400,000 of the money per capita by representation, and the remaining \$600,000 will pass to the residue. First, to determine the amount a party receives under per capita by representation, one looks to the first level of heirs where there is a surviving heir. Then one counts the amount of surviving heirs within that level of descent and the amount of deceased heirs with issue. Each line of the family then receives an equal share (if 6 children either alive or have descendants, then each child's line gets 1/6 share). Darcy's three children will all be treated as predeceasing her. Arnold died before her, Bud died within 120 hours, and Charlie disclaimed his gift properly (within 6 months, before accepting it),

and under disclaiming rules, he is treated as predeceasing Darcy; it does not matter that he disclaimed so that the gift would be safe from creditors. Therefore, the first level of living heirs is Darcy's grandchildren, of which there are four. The four grandchildren will split the \$400,000 equally (\$100,000 each). The earlier gift to Wilma will not be subtracted from Wilma's share because it was not a valid satisfaction. In order for an inter vivos gift to be in satisfaction of a gift in a will, there must be a provision in the will allowing such treatment, a contemporaneous writing with the gift describing it as satisfaction, and an acknowledgement by the recipient that it is in satisfaction. Because the will is silent, there is no writing, and Wilma did not acknowledge the gift as satisfaction, Wilma will take her entire share (\$100,000).

Residue: The residue (which is now comprised of the 300 shares of Gena's stock that lapsed and \$600,000 of excess deposit accounts) was devised to Frances and Gena. As discussed before, Gena predeceased Darcy, and the anti-lapse statute does not apply to her because she was not a relative of Darcy. Missouri does not apply the no-residue-of-the-residue rule. Therefore, Frances will take the entire residue, so she will inherit quite a large sum.

AM Essay 2 Example 2

2)

Applicable Law

Under Missouri law, if a person named in a will predeceases the testator, the gift lapses (i.e., fails) unless the person is related to the testator and leaves lineal descendants. This is called the anti-lapse statute. Additionally, if the person predeceased the making of the will, the regular lapse rules applies. Furthermore, survivorship requires that the person survive for 120 hours after decedent's death unless the applicable instrument says otherwise. Finally, if a disclaimer is made, the person is considered to have predeceased the testator. To be valid the disclaimer three requirements must be met (1) executed within 9 months of decedents death; (2) in writing; and (3) the person must not have received any benefit from the property.

Another provision of Missouri law says that acts of independent significance may affect the distribution under a will. An act is an act of independent significance if it is done by the testator for purposes other than the distribution of his estate.

Finally, under Missouri intestacy law, an advancement is a payment before death with the intent that it act as an prepayment of money the heir will receive upon the decedent's death. Advancement applies to intestacy distribution while satisfaction applies to distribution under a will. To be valid, the advancement must be denoted as such in either (1) a contemporaneous writing by the decedent or (2) a writing acknowledging the advancement and made by the heir. A satisfaction can be described in these two ways and also in the will itself.

Whiteacre

Passes to Xian and Yancy as tenants-in-common. The anti-lapse statute applies because Bud was alive when the will was executed. Bud is considered as predeceasing Darcy because he did not survive for 120 hours after her death and the will does not contain an contrary provision. Thus, because Bud is deemed to predecease Darcy and he left lineal descendants, the property passes to his heirs Xian and Yancy. The default rule is that the property passes in such a way as

to make the parties tenants-in-common.

500 Shares of Disney Stock

This property passes to Sally's daughter Rhonda. Again, because this gift was made to a living relative at the time the will was executed and this relative predeceased the testator and left lineal descendants, the anti-lapse rule applies. Furthermore, if there was any increase or decrease in stock after the will was executed does not affect the gift because these acts are considered either acts of independent significance in the case of an increase and an ademption in the case of a decrease. Thus, Rhonda takes the entire 500 shares.

600 Shares of Walmart Stock

The Wal-Mart stock passes under the residual clause of the will. The anti-lapse rules do not apply because Frances and Gena were not relatives of Darcy. They were only friends. Furthermore, both predeceased Darcy. Thus, there gifts fail and the property falls to the residual clause.

\$400,000 to Descendants

The property will pass one-fourth each to Zoe, Wilma, Xian, and Yancy. Under per capita with right of representation, the property is distributed first to the first level of descendant with at least one person that survives the testator. In this case, Charlie is considered to have predeceased Darcy because he executed a valid disclaimer. The disclaimer was in writing, he received no benefit, and it occurred only a month and a half after Darcy's death. Charlie is thus considered to have predeceased Darcy. Therefore, the first level of descendant with one person that survives the testator is Darcy's grandchildren.

Furthermore, Wilma's interest is not reduced because of advancement or satisfaction because there was no writing describing the payment as an advancement or satisfaction. Thus,

even though there was intent, an advancement or satisfaction argument fails because there was no writing.

Residue

As discussed above, the anti-lapse rules do not apply to gifts to Frances and Gena. Thus, the residue gift fails because it was only left to friends that predeceased the testator, Darcy. The property will fall to intestacy.

Under intestacy the property is distributed based on per capita distribution with right of representation. But the result is different than the \$400,000 because Charlie's disclaimer is not valid. Charlie must also execute a disclaimer of the intestacy share because the writing probably will not be deemed to cover it since it only mentions estate. Estate will probably be construed as only relating to the property under the will.

Thus, the first level with a living descendant is that of Darcy's Children. Thus, Charlie will take one-third. Wilma will take her father's share, one-third. Xian and Yancy will split their father's share and take one-sixth. Charlie's creditors will have a claim against Charlie's portion, and to avoid this, Charlie will most likely have to execute another disclaimer if time permits.

And as stated above, the gift to Wilma does not act as an advancement because there was no writing.

AM Essay 2 Example 3

2)

Since Darcy has a valid will her estate is distributed according to the will. W/o a valid will the estate is distributed by intestate succession. In addition any property not distributed under the will passes by intestate succession (statutory).

There are several different types of devises in will's specific, demonstrative, general and residue. Specific devises are a devise of a particular piece of property.

Anyone who takes under the will must survive the testator by 120 hours. If the devisee does not survive T by 120 hours the devisee is treated as if the devisee predeceased the testator and the devise fails. When a specific, demonstrative or general devise fails it passes under the residuary provision. The 120 survival requirement can be overcome with a specific provision in the will stating otherwise, but none is present here.

Here the devise of Whiteacre to Bud is a specific devise. Sally still owns Whiteacre upon her death and is survived by Bud. But a devisee must survive by 120 hours. Here Bud did not survive by 120 hours and thus his devise fails. But there is a statutory rule called anti-lapse statute that prevents the devise from failing where the devisee predeceases the testator, is related to the testator (by blood--child, sibling, parent, etc), and the devisee leaves issue. Where this is met the devise goes to the devisee's heirs. Here Bud is a relative (son) and is survived by issue. Thus Bud's issue take Whiteacre. Bud's children X and Y will take whiteacre jointly as tenants in common b/c the antilapse statute applies.

An anti-lapse statute can be negated in the will (either through express survivorship req's or through a provision saying anti-lapse doesn't apply), but there is no evidence D's will contained such a provision.

The devise of Disney stock to Sally and Walmart stock to Frances and Gina are also specific devises.

The Disney stock (500 shares) goes to Sally's daughter Rhonda. Generally where devisee fails to survive testator the devise fails (lapses). But there is a statutory rule called anti-lapse statute that prevents the devise from failing where the devisee predeceases the testator, is related to the testator (by blood--child, sibling, parent, etc), and the devisee leaves issue. Where this is met the devise goes to the devisee's heirs. Here the devise of Disney stock is to Sally, Darcy's sister. Sally predeceases D, but S is a sister, and leaves issue. Thus the devise goes to S's heirs. S has one heir, Rhonda. Thus the devise passes to Rhonda under the anti-lapse statute.

The 1/2 of Wal-Mart stock (300 shares) to Frances will go to Frances. Frances is alive when Darcy dies and thus Darcy's intentions will be followed. Thus the stock goes to Frances.

The 1/2 of Wal-Mart stock (300 shares) to Gena will pass under D's residuary provision. The devise to Gena fails because Gena did not survive D by 120 hours. In addition the anti-lapse statute cannot apply. See above for rule. The anti-lapse statute does not apply because Gena is not related to Darcy. Thus the devise fails and it passes under the residue of the estate (to whomever the residuary beneficiary is).

The \$400,000 will be split b/w W, B, and Z. A general devise is a devise for cash that need not come from any source of the funds. A general devise is satisfied by taking the money from the residue of the estate (and sellign residue if needed). D had three kids A, B, and C. A had one child W, B has two kids X, Y and C has one kid Z. The devise is for \$400k to be split per capita by right of rep to D's descendants. In Per capita by right of representation, one share is allocated to each line of descendants at the first level where there are living descendants. Then if the share allocated to a particular line does not have a living descendant on that level, you continue down that line of descents and give it the descendant of that line. Here the first level with living descendants is the children of D. D is survived by her son C. A predeceased and B died within 120 hours of D, thus C is deemed to not survive D

But D's son disclaims his interest in D's estate. A disclaimer is proper where done w/i 6 months of probate beginning and before accepting any devise. Here C's disclaimer is proper. Where

disclaimer is proper the estate treats devisees as if the disclaiming party predeceased testator. thus C will be treated as if predeceased D.

There is an issue as to whether anti-lapse will apply b/c per capita is specified. Thus survivorship is required by this devise and anti-lapse does not apply. Thus D will be deemed to have first survivors on second level (grandchildren), and thus the shares are allocated at that level. Thus W, X, Y and Z will each get 1/4.

If Anti-lapse applies then one share at first level (children). Thus W and Z would get 1/3 of 400k, and X and Y would share the other 1/3 or 1/6 each.

W's share may be deemed a satisfaction b/c D gave W money saying I give it to you as part of your inheritance. But an advancement is only valid when the advancement is stated in a contemporaneous writing by Testator, stated in the will or the devisee admits in writing that it was an advancement. Here there may be an advancement if there were a contemporaneous writing by D or if W admitted it in writing. O/w W will get her full share. If there is an advancement then the 30k will be deemed to be part of the money W is entitled to and will reduce any payout.

The residue of the estate passes to Frances. The residue of the estate is anything that is not distributed by contract (life ins, POD, TOD, etc), and that is not distributed under any specific, demonstrative or general devise. Here Whiteacre passes under spec devise, all Disney stock passes under spec devise, 1/2 of the Wal-Mart stock passes under spec devise, and \$400,000 passes under general devise. That leaves 1/2 of Wal-Mart stock and \$600,000 (or remaining cash if there has already been an advancement) to pass under the residuary provision.

The residuary provision here goes to Frances and Gena. Here Gena predeceases D and is not related. Thus anti-lapse statute does not apply and Gena takes nothing under this provision. Frances is alive at D's death and thus takes the entire residue: 300 shares of Wal-Mart stock and 600k (or more if advancement).

AM Essay 3 Example 1

3)

(1)

No, Sally will not be able to prove a cause of action against John and Mary for intentional misrepresentation. In order to establish a prima facie case of intentional misrepresentation, Sally must show: (1) an affirmative misrepresentation of material fact; (2) scienter; (3) an intent to induce reliance; (4) justifiable reliance in fact resulted; (5) causation; and (6) damages. Scienter requires a showing of *Sullivan* malice, i.e. an intentional or reckless misrepresentation. The issue is whether Sally can successfully plead and prove these elements.

In this case, Sally cannot point to any *affirmative* misrepresentation on the part of John and Mary. Sally will argue that their not telling her about Big Hits' plan to move to Littletown is the misrepresentation, but this argument will fail because John and Mary were under no duty to voluntarily disclose competitive information about the local video rental market to a potential buyer. Their advertisement was completely accurate, they supplied Sally with accurate and complete financial records for the previous five years of business, and Sally did not ask John or Mary if they had any knowledge of a franchise movie rental business opening in Littletown. If Sally had asked and John or Mary had denied any such knowledge, then Sally would have a claim for intentional misrepresentation because of their affirmative misrepresentation of this material fact. However, that did not occur on these facts and Sally will therefore not be successful in her claim. Nor can Sally claim that the advertisement's statement that "Movie Time has been the only movie rental business in Littletown for ten years" constitutes a misrepresentation of fact. It is merely a true statement. Any inference she draws about the future market conditions is her own. This was an arms-length transaction.

Note that the other elements are met here. Sally can prove that John and Mary intentionally withheld from them their knowledge of Big Hits' plans. She can prove that they intended to induce her reliance because they hoped she would purchase the company before it lost money. She did justifiably rely on John and Mary's representations, especially because she first checked into market conditions with the local planning and zoning department. She can prove that if she had known about Big Hits, she would not have made the purchase (i.e. causation). Finally, she could prove damages because the business suffered financially and later

closed. Nevertheless, Sally will not be successful on her claim because there was no affirmative misrepresentation of material fact.

(2)

Such a contract provision would further bar Sally's claim because in it she has agreed that she is not relying on any representations outside the agreement at the time the contract was signed. Since the contract does not include any representations about the future of the Littletown video rental market, she could not have reasonably relied on such a representation in light of her agreement not to do so. This negates a prima facie element of her claim. Further, the parol evidence rule would bar Sally from introducing any evidence of prior understandings or agreements between the parties prior to the contract. Where a contract is fully integrated, is not ambiguous on its face, and the parties intended it to be the full and final expression of the agreement, the court will not allow extrinsic evidence to show otherwise. Thus, Sally would be barred from showing any evidence that John and Mary made any representation about Big Hits or the video rental market in Littletown. This would also negate an element of the prima facie case. Thus, the contract provision will further bar Sally's claim.

AM Essay 3 Example 2

3)

1. No, she will not be able to establish intentional misrepresentation. To establish intentional misrepresentation, she will need to establish the following:

- 1) John and/or Mary made an affirmative false statement of fact
- 2) They knew it was false
- 3) They intended for Sally to rely on the false statement
- 4) Sally reasonably relied on the false statement
- 5) She suffered damages and
- 6) The damages were caused by the misrepresentation

In this case, there is no evidence that John or Mary affirmatively misstated a fact about the business. They did state that they have been the only movie rental business in Little Town for 10 years but there is no indication that they told Sally "no other movie business are moving to town." Furthermore, they did not keep quiet when they had a duty to speak. A duty to speak may arise if there was a confidential relationship, a fiduciary relationship, when there is a sale of real property and the seller knows of a defect that the buyer could not reasonably find, or if they are specifically asked about something and their silence would be, in effect, a misstatement. In this case, none of the special relationships are present and Sally did not specifically ask about competition in the area or if they knew of competition moving to the area. Sally would argue that their statement on the internet was enough of a statement that it was a misrepresentation of fact but she will not be successful. Therefore, there was no affirmative misrepresentation.

If, however, Sally could get passed element (1), she could show John and Mary knew that another movie business was moving to town so they knew it was false and possibly that they wanted Sally to rely on their being no competition but Sally would likely have difficulty proving element (4). She claims that she had a business plan that would prevent stores like Big Hits from taking away her business. Thus, she probably would have bought the store even if she had known that Big Hits planned to move to town.

She did suffer damages but again, there was no affirmative misrepresentation and, if there was, her damages may not have been caused by it because there is evidence she would have bought the store anyway. Sally will not be successful in a suit for Intentional Misrepresentation.

2. If Sally is trying to get out of the contract, Sally will not be allowed to use any extrinsic evidence to show that the contract was based on a misrepresentation. If, however, Sally is not suing to get out of the contract, to change, contradict, or add to the contract but rather just suing for tort of intentional misrepresentation then the contract will have no effect on her being able to produce evidence that Mary and John made a misrepresentation. The Parol Evidence Rule states that where a contract is complete on its face, no extrinsic evidence of a prior or contemporaneous agreement will be allowed to the extent that it contradicts or adds to the contract. There are a few exceptions to the parol Evidence Rule-- extrinsic evidence will be admissible to show that the contract was the product of duress, extrinsic fraud, or undue influence or if there was a mutual mistake of fact then evidence can be admitted to reform the writing to the true agreement of the parties. An agreement is presumed to be complete on its face if it includes a clause such as the one here stating that it is the entire agreement of the parties. Intentional misrepresentation does not rise to the level of extrinsic fraud which is when someone signs a contract not knowing it is a contract. Thus, any extrinsic evidence showing that the contract was formed based on an intentional misrepresentation will not be admissible. This would make it virtually impossible for Sally to show she "relied" on the misrepresentation even in a tort case.

AM Essay 3 Example 3

3)

1) Sally will not be able to establish a claim for intentional misrepresentation. To sue for intentional misrepresentation, Sally must establish that 1) John and Mary misrepresented a material fact; 2) that they intended to misrepresent to Sally and that they intended for her to rely on their misrepresentation; and 3) that Sally relied on their misrepresentation to her detriment. Here, Sally will have a difficult time establishing these elements. First, is the issue of whether or not John and Mary misrepresented a material fact. First, they did not expressly misrepresent - they did not lie to Sally. Instead, they failed to tell her information that they knew that affected the value of their business. While an express misrepresentation is easier to establish, a misrepresentation does not have to be express (it can be unstated or implied by another statement). Here, the fact finder will evaluate whether or not a reasonable person would consider the statement "Movie Time has been the only movie rental business in Littleton for ten years" to imply that Movie Time will continue to be the only movie rental business for a significant amount of time (here, probably 1 year for Sally to put her marketing plan in place). Second, Sally must show that the fact that they failed to disclose was material. Since the fact that Big Hits was going to move to Littleton in effect meant that Movie Time was going to go out of business very quickly, Sally can establish that it is a material fact because the existence of that fact makes a substantial difference in the value (i.e. the purchase price) of Movie Time. Although it is more difficult to prove misrepresentation on an unstated claim, Sally can probably meet the first element.

Second, Sally must show that John and Mary intended to misrepresent the material fact to her. A fact finder will look at their express language to determine if it implies a misrepresentation. Sally can show that John and Mary had knowledge of Big Hits' plans. If she can also show that the statements and facts that they did reveal implied Movie Time's continuing exclusivity, then she can meet the second element.

Third, Sally must show that she relied on their misrepresentation to her detriment. First, Sally may have difficulty establishing this because there are facts that show that she did not rely solely on their representations, but instead relied on her own outside research. This research included checking the planning and zoning department records. However, she will argue that because the records did not show Big Hits' plans, she had no other information to rely on apart

from John and Mary's statements, and thus did rely on their statements. Second, if Sally can show reliance, she will be able to show that she relied to her detriment. She clearly suffered a loss due to her purchase because she bought Movie Time at a price that was based on its historical financial performance when it was the exclusive movie business, and did not take into account the new fact that Big Hits was moving to town.

Although parties in contract negotiations are not required to disclose all facts to the other side, the failure to disclose certain material facts can be unethical and in some cases can rise to the level of material misrepresentation. Looking back, Sally should have directly asked John and Mary - if they had made an express statement, her case would be much easier to prove. As the facts stand, Sally can only win if a fact-finder determines that the statements that John and Mary did make imply misrepresentation.

2) A contract with that wording would bar Sally's ability to claim intentional misrepresentation. At issue are the exceptions to the Parol Evidence Rule. When parties form a written contract that is intended to be the final agreement between them, the court will not allow extrinsic evidence to contradict the terms of the agreement. This is called the Parol Evidence Rule. Parol Evidence is outside evidence and will be barred to contradict the terms of a final written agreement. Here, the written agreement is fully integrated. Because the writing expressly says "there are no representations or understandings being relied on ... that are not set forth herein," any evidence that Sally introduces to show that she relied on will contradict the express terms of the agreement and will be barred.

However, even when an agreement is fully integrated, Parol Evidence is admissible to challenge the validity of the contract. Evidence that shows fraud, duress, misrepresentation, lack of capacity, etc. will be admissible to show that the contract was voidable when entered into. Although evidence of misrepresentation can show that a contract was voidable, it would contradict the express clause in the contract here (that speaks specifically to all representations) and thus be barred. Before signing a contract with such a clause, it is expected that Sally did her proper homework, or at least included the representation that she is claiming to be false in the contract.

AM Essay 4 Example 1

4)

1. Yes, all of the lawsuits could be consolidated into one lawsuit even if the 12 people have different lawyers. Under Missouri rules of civil procedure, there is no requirement that all of the plaintiffs in a case share the same attorney. The plaintiffs are joined together in one suit because their injuries derive from the same conduct, transaction, or occurrence and there is an issue of fact or law common to them all. The 12 people do not need to bring their claim as a class action, where they would share an attorney. Therefore, Good Times could be sued in one suit by all parties.

2. Good Times will not be able to use a favorable judgment to dismiss suits filed later. At issue is the application of collateral estoppel and non-mutual collateral estoppel. Under Missouri rules of civil procedure, an issue can be barred from re-litigation because it had been decided previously in a different case. In order for collateral estoppel to apply, there must have been (1) identical issues litigated in the previous suit, (2) a final judgment on the merits, (3) a full and fair opportunity to litigate the issue, (4) the party against whom collateral estoppel is being asserted was a party or in privity with a party in the previous suit, (5) and use of the doctrine would be equitable (fair). A court will apply non-mutual collateral estoppel if both parties were not in the previous suit but the party to be estopped was in the previous suit. In this case, Good Times would be able to show that there is an identical issue and a final judgment on the merits, but the party against whom he would be asserting collateral estoppel was not a party in the case, nor did they have an opportunity to fully and fairly litigate their claim. A court will not consider them to be in privity in the previous suit just because they share a common injury. Therefore, Good Times will be able to employ collateral estoppel to have later cases dismissed.

Good Times also would not be able to argue the res judicata should require the dismissal of later claims. Under Missouri rules of civil procedure, the doctrine of res judicata bars the litigations of claims brought in a previous case if (1) there is complete identity of parties, (2) there was a final judgment on the merits in the previous case, (3) the issue is one that was litigated in the previous case or could have been litigated. Here, the parties to later suits would not have been parties in the first suit, and res judicata requires complete identity of parties. Also, there is no requirement that all 12 parties be joined in one suit or their claims would be barred. They can file against Good Times individually. Therefore, a judgment in Good Times's favor

will not aid it in later suits.

3. Good Times could implead Fast Wheels as a third-party defendant. Under Missouri rules of civil procedure, a defendant may implead a third party if the third party could be liable for all or part of any liability that the defendant is found to owe to the plaintiff. One common example of impleader is the derivative liability owed by a manufacturer to a retailer or service provider.

Here, the accident was caused by both a problem with assembly and routine maintenance. Good Times could implead Fast Wheels (the manufacturer) and attempt to show that the problem was with assembly and creation and get at least some contribution from Fast Wheels for any liability that Good Times owes the plaintiffs.

4. Good Times is entitled to one automatic change of judge if it dislikes the judge it is initially assigned. If it wants to change judges after its automatic change, it will have to show that there is a reason why the judge should recuse himself (financial stake in case, strong bias against Good Times). For this relief, Good Times must file within the later of 60 days after it receives service or thirty days after a judge is named.

5. The plaintiff must file a motion for summary judgment. The plaintiff would have to show that there was no genuine issue of material fact such that a decision against Good Times for its liability was proper as a matter of law. Under the ITT Finance approach, the plaintiff would have to show that there was no genuine dispute that she could prove each element of her prima facie case for liability and that Good Times could not show at least one element of each affirmative defense. The Plaintiff has to include affidavits and a memorandum of law with her motion for summary judgment, and in her motion she should list each undisputed fact in a separate paragraph. Plaintiff can support her motion on the affidavits, information produced by Good Time in discovery, and statements in Good Times's pleadings.

6. If Good Times wants to argue that there was trial error, it must file a motion for a new trial within 30 days after judgment is entered. A motion for a new trial is necessary to preverse the issue of trial error for appeal in a case tried by a jury. If Good Times does not file a motion for a new trial or does so after the 30 days have passed, it can not appeal trial errors.

AM Essay 4 Example 2

4)

1. All the lawsuits could be filed as one suit even if the 12 plaintiffs have separate lawyers. At issue is whether permissive joinder of parties is viable in this case. Under Missouri civil practice rules, plaintiff may join other plaintiffs if the action derives from the same conduct transaction or occurrence and share at least one common question of law or fact. In this case, since all 12 plaintiffs were injured in the same incident and the resolution of each of their cases will share common questions as to whether Good Times was negligent in any respect, the case could proceed as one suit by the 12 plaintiffs even if they have separate lawyers.

2. Good Times will likely be unable to get a dismissal of the other cases. At issue is whether collateral estoppel applies in this case. Collateral estoppel or issue preclusion, prevents a party from relitigating an issue that has been decided in a prior case. For collateral estoppel to be viable, the following requirements must be satisfied: (i) the issue decided must be identical to the issue in the subsequent case, (ii) the party to be estopped must have been a party or in privity with a party in the first case, (iii) the party to be estopped must have had a full and fair opportunity to be heard in the first case, (iv) there must have been a final judgment on the merits in the first case, and (v) the court should find it is not inequitable to apply collateral estoppel. In Missouri, the courts allow nonmutual collateral estoppel, that is, a party who was not a party or in privity with a party to the prior action may be prevented from relitigating an issue. However, Missouri courts are more cautious about allowing offensive nonmutual collateral estoppel than defensive nonmutual collateral estoppel. Here, Good Times is trying to use offensive nonmutual collateral estoppel since it is trying to preclude persons who were not parties or in privity with parties in the first case from relitigating the issue. The court will likely find it inequitable and not allow Good Times to get a dismissal.

3. Good Times can implead Fast Wheels, Inc. Impleader allows a defendant to bring into the suit a third party defendant when the defendant claims that in case he is found liable in the case, the third party defendant will be liable to the defendant under derivative liability. The defendant is in fact asserting that the third party defendant will be liable for all or part of the award given to the plaintiff because the defendant has a right to indemnity. Indemnity is viable when a party is

found liable under a defective product manufactured by another company. As such, Good Times will be able to implead Fast Wheels, Inc., as a third party defendant.

4. Good Times will be able to change the judge. Each class of parties has an automatic right to change the judge assigned to the case without cause. Good Times may use this automatic right. Moreover, Good Times, may also ask for change of judge for any cause justifying recusal of the judge. The request for change of judge should be filed within 60 days of service or 30 days from the designation of the trial judge whichever is longer.

5. Good Times should file a motion for summary judgment. A motion for summary judgment should be granted when there is no genuine issue of material fact such that judgment is proper as a matter of law. If the defendant is the movant, the defendant must show that either (i) there is no genuine issue that plaintiff cannot prove at least one element of its prima facie case, or (ii) there is no genuine issue that the defendant can prove every element of one affirmative defense. The motion must include a statement of uncontroverted facts with citations to the record, affidavits, discovery, and other evidence must be attached to it. Moreover, the motion must include a memorandum of law in support.

The respondent has an opportunity to file a response in which it denies or admits the movant's uncontroverted facts and provides its owns uncontroverted facts. The response must also be supported by affidavits, discovery and other evidence.

6. Good Times must file a Motion for New Trial. A motion for new trial is an authorized motion that must be filed within 30 days of the judgment. This motion is necessary in jury trial cases where the party wants to preserve a trial error allegation for appellate review. A motion for new trial is not necessary in a judge tried case. The motion for new trial may be granted based on several grounds: (i) the verdict is against the weight of the evidence, (ii) trial error, (iii) misconduct of the jury, (iv) newly discovered evidence, (v) addittur or remittitur.

AM Essay 4 Example 3

4)

1. Yes. All the lawsuits can be filed as one lawsuit even if the 12 injured people have separate lawyers. The issue is the joinder of parties to a lawsuit. Parties may be joined in one lawsuit if the claims each asserts arise out of the same transaction or occurrence or series of transactions or occurrences, and that the claims share one common issue of law or fact. The court's concern is that each party's claim, if not similar enough, could be confusing to the jury and could lead to an undeserved finding of liability for the defendant.

In this case, each of the twelve plaintiffs was injured in the same occurrence--the roller coaster track coming apart. Additionally, each shares a common question of fact--was the bolt undersized. Additionally, each shares at least one common question of law, including whether Good Times failure to catch the bolt problem during assembly and routine maintenance was negligent.

2. No. If Good Times is found not liable in one lawsuit, Good Times will probably not be able to preclude litigation in the subsequent suits. The issue is whether Good Times can use defensive non mutual collateral estoppel to preclude subsequent plaintiffs from claiming Good Times was negligent. Missouri does recognize nonmutual collateral estoppel. The four requirements for collateral estoppel are identical issues in the present case and the prior case, the prior case was resolved with a final judgment on the merits, the party to be estopped was a party to the first case or in privity with a party in the first case, the party to be estopped (or privity) had a full and fair opportunity to be heard in the first case. Here, the issues in this case--whether Good Times was negligent, is identical to the issue in the prior case. Additionally, the first case, resulting in a verdict for Good Times, was a final judgment on the merits. However, unless the court finds that the current plaintiff's interests were fully protected in the first case, the court will probably not allow the use of issue preclusion against the subsequent plaintiffs. More specifically, the subsequent plaintiffs were not parties in the first case (nor in privity). Additionally, if they did not join or intervene in the first case, they also would not have had a full and fair opportunity to present their case.

3. Good Times should use impleader to bring Fast Wheel's in as a third party defendant.

Impleader should be used when a second defendant could be derivatively liable for the liability of the first defendant. In other words, if the second defendant will be liable IF the first defendant is held liable to the plaintiff, FOR all or part of the first defendant's liability, impleader is the appropriate mechanism to bring the third party defendant into the case.

Here, if Good Times is found liable to the plaintiffs for negligently failing to catch the small bolt, Fast Times could be derivatively liable for faulty manufacture of the roller coaster. In such a case, Fast Times could be liable for all or part of Good Time's liability.

4. Yes. The issue is whether a party can change a judge. In MO, each class of parties (all Ps or all Ds) can get one change of judge without cause. Additionally, a change of judge can be based on cause for any reason which would require the judge to recuse him or herself (like a personal stake in the outcome of the litigation). In this case, Good Times could get one change of judge for no cause shown--merely not liking the judge is sufficient. Good Times must file a motion for change of judge within 60 days of the filing of the suit, or within 30 days of learning who the judge is. If the change is not for cause, no additional changes without cause will be allowed by any other defendant.

5. The Plaintiff should file a motion for summary judgment. A motion for SJ should be granted if there is no dispute as to any material fact and those facts entitle the movant to a verdict as a matter of law. Under ITT Commercial Finance, the Plaintiff must establish that there is no genuine dispute that it can prove every element of its prima facie case, using affidavits or other evidence in support (and not just relying on its own pleadings). Additionally, the plaintiff must establish that there is no genuine dispute that the defendant cannot prove at least one element of every properly pled affirmative defense by attaching affidavits or other evidence refuting it. (Here the plaintiff could rely on the defendant's pleadings). The form of a SJ motion involves specifying, paragraph by paragraph, each undisputed fact (supported by citations to the record). The motion should be accompanied by affidavits or other evidence and a memorandum of law showing that the movant is entitled to a verdict as a matter of law.

6. The appealing party in a jury tried case must file a motion for new trial to preserve error

concerning the introduction of evidence. (Such a motion is not required to preserve error in a judge tried case). The wrongful introduction of evidence would be trial error. A new trial motion can be made based on inadequacy of the evidence, trial error (applicable here), juror misconduct, and additur or remittitur. The motion must be filed within 30 days of the entering of the judgment. The judgment is entered when there is a written document, designated "judgment" or "decree", signed by the judge, and filed. The thirty day time period for all authorized post-trial motions (including new trial) begins as of this date. The post trial motion suspends the time limit for the notice of appeal.
