Monterey College of Law

HYBRID

Civil Procedure II - Section 1

Final Examination

Spring 2023

Prof. M. Christensen

Instructions:
Answer three 3 Questions.
Total Time Allotted: Three (3) Hours

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Civil Procedure II, Spring 2023, Final Exam

Question 1

PAUL brought a negligence action against DAVID in federal district court for the District of State X for causing an accident between their two speedboats. The Court had diversity jurisdiction over the action. On the same day that he timely answered PAUL's complaint, DAVID also filed a complaint against TURTLE BOAT REPAIR, which is located a few blocks from his home, alleging that their mistakes in performing maintenance services on his boat caused the braking system on his boat to fail at the time of the accident.

In response, PAUL amended his complaint to add TURTLE BOAT REPAIR as a defendant. TURTLE BOAT REPAIR then filed a counterclaim against PAUL alleging that PAUL never paid a $1000 invoice for repairs to his jet skis.

1. Can DAVID bring his claim against TURTLE BOAT REPAIR?

2. Can TURTLE BOAT REPAIR bring their counterclaim against PAUL?

After discovery, dispositive motions, and trial, a jury found that DAVID and TURTLE BOAT REPAIR were jointly and severally liable to PAUL for $100,000 in damages. Specifically, the jury indicated on a special verdict form that the collision between the two boats was caused by Turtle's negligent repair work and DAVID's negligent boat driving. A couple months later, PAM brought her own action against DAVID and TURTLE BOAT REPAIR, alleging that she was on a raft near the accident and had been permanently blinded by flying debris. PAM seeks $1,000,000 in damages and has asked the court to apply the finding of liability in the first case and limit the trial to her damages.

3. Should the court in PAM's case apply the judgment from the previous *PAUL v. DAVID* case and set a trial only on the issue of PAM's damages?

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Question 2

PRIYA was using the air fryer that she got for her birthday when suddenly the appliance exploded, causing her injuries. After hiring an attorney and expert to investigate, she discovered that the appliance's air outlet valve gets stuck shut. PRIYA filed a products liability action against DOPE APPLIANCES INC., alleging defective design and defective manufacturing and seeking $100,000.

Before filing the complaint, PRIYA'S attorney interviewed PRIYA'S friend Winnie, who was present with PRIYA at the time of the accident. Winnie told the attorney that PRIYA had filled the food compartment with so many sliced potatoes to make french fries, that it had been hard to close the air fryer shut. Winnie also gave the attorney screenshots of her texts with PRIYA, in which the two friends discussed PRIYA'S injuries from the explosion.

1. What must PRIYA's attorney include about Winnie in the Plaintiff's initial disclosures?

PRIYA'S first set of requests for production of documents included the following:

> REQUEST 1: All documents related to each and every alternative air outlet valve design considered for DOPE's air fryer.
>
> REQUEST 2: All emails to or from DOPE employees discussing the air outlet valve on the DOPE air fryer, from 10 years before Plaintiff's injuries to present.

Defendant raised objections to both requests. After several lengthy meet and confer meetings, the parties were unable to agree on what D would produce, leading Plaintiff to file a motion to compel.

2. How would the Court likely rule on the motion to compel documents responsive to Requests 1 and 2?

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Question 3

PEDRO is suing DELICIOUS FOODS, INC., individually and on behalf of all others similarly situated, for selling a cereal product that allegedly contains mercury. PEDRO is seeking damages for himself and the class as well as an order enjoining DELICIOUS from continuing to sell the cereal until the presence of mercury has been eliminated. After a period of discovery on issues relevant to class certification, Plaintiff's Motion for Class Certification was granted.

After the close of discovery on the merits, DELICIOUS moved for Summary Judgment.

How should the Court rule on the issue below?

Moving Party's Undisputed Fact	*Non-Moving Party's Response*	*Moving Party's Reply*
The cereal does not contain mercury. <u>Evidence cited</u>: Deposition testimony from Mark, Defendant's factory manager, describing the company's systems for preventing contamination and checking the cereal for any dangerous or unwanted substances. Written report from expert witness Dr. Edwin Expert, who sampled a recent batch of the cereal, analyzed the sample, and concluded that no mercury was detected. Deposition testimony from Plaintiff, in which he was asked whether he could definitively prove that the mercury found in his body had come from Defendant's cereal, to which Plaintiff answered "no."	The cereal does contain mercury. <u>Evidence cited</u>: Deposition testimony from Walter, one of Defendant's former factory employees, that he often saw workers not following anti-contamination measures, and that he overheard a co-worker saying that items would sometimes accidentally fall into the machinery that made the cereal. Deposition testimony and exhibits from Plaintiff's doctor, who conducted tests after Plaintiff ate the cereal, finding mercury in the samples. Deposition testimony from Plaintiff that at the time he got sick, the only new thing he had eaten recently was Defendant's cereal.	<u>Evidence cited</u>: Deposition testimony from Mark, who used to supervise Walter, that Walter was not a good employee and was terminated for not following all protocols and being insubordinate to Mark. Deposition testimony from Will, Plaintiff's roommate, that Plaintiff has an unhealthy diet and eats a lot of processed foods. <u>Objections</u>: Walter's testimony about what he overheard from co-workers is inadmissible hearsay.

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Question 1-ANSWER

MODEL ANSWER

1. DAVID's claim against Turtle
    a. Impleader (R14): D can add a third party who may be liable for all or part of P's claim against D
    b. But there's likely a diversity problem because DAVID and Turtle are probably residents of the same state.
    c. → PAUL can amend complaint to add Turtle, but claim between Ds probably severed
2. Turtle's counterclaim against PAUL
    a. Compulsory (R13): same transaction or occurrence + diversity
        i. Here, jet skis are not part of same transaction or occurrence
        ii. There probably is diversity between PAUL and Turtle
        iii. → Not compulsory
    b. Permissive: court could exercise discretion to permit the counterclaim, because the claim does not destroy diversity of citizenship
3. Action 2: PAM v. DAVID & Turtle
    a. Issue: Non-Mutual Offensive Issue Preclusion
        i. Issues might not be identical.
            1. Same issue of who caused the boat collision, but PAM should have to prove that the debris that blinded her came from the same collision and not from elsewhere?
        ii. Issue of who caused the accident was actually litigated and decided in A1
            1. Same evidence about who caused the collision, and fact findings were made that D&T caused D's boat to collide with P's boat.
        iii. Necessary to the judgment
            1. No liability without causation.
        iv. Full and fair opportunity to litigate in A1? A1 was a 100k case, not a million-dollar case. Applying the A1 judgment here would be controversial. See Parklane v. Shore.
    b. → court might not apply the A1 judgment to PAM's case and set a trial only for damages because PAM needs to show she was blinded by the collision debris + D&T did not have a full and fair opportunity to defend themselves against a million dollar claim in A1

Q2-MODEL ANSWER

Part 1:

1. 26(a) initial disclosures
2. No obligation to disclose witnesses that you do not plan on using, or documents you do not plan on using. No obligation to disclose Winnie since they maybe do not plan on using her as a witness because her testimony about P's use of the air fryer would be harmful to P's claim.
3. But, P might want to use Winnie's text messages to prove P's damages. If they plan to use the text messages then those docs must be described and W must be listed as a witness.
4. If P changes their mind later in the case and decides to use W, they have a duty to supplement their initial disclosures.

Part 2:

REQUEST 1:

1. Scope of discovery under 26(b)(1)
    a. Nonprivileged: no issue here
    b. Relevant:
        i. P claims the air fryer has a defective air outlet valve that caused the explosion injuring her, so alternative valves that would have been safer are highly relevant to whether the explosion was caused by defective design.
    c. Proportionality Factors:
        i. Importance of issues: If a reasonable alternative design would have been more safe, highly relevant to show the valve used was defective. But, responsive documents should be limited to alternatives that would function the same and whether the alternatives could be safely tested using the same procedures and standards applied to the valve at issue, whether the alternatives would be interchangeable (Fine v. Facet).
        ii. Amount in controversy: P seeks 100k, so a somewhat burdensome request that requires D to search multiple custodian files, digital and otherwise, might not be disproportionate.
        iii. P does not have access to information about D's alternative designs
        iv. D is a large company and has resources to search its own records
        v. Unduly burdensome on D to produce all records without time limit, should be limited to 5 years leading up to purchase of P's air fryer (Fassett v. Sears).
2. Court would likely compel production of documents pertaining to interchangeable alternatives, but would narrow the request to a much shorter time period and limit it to alternatives that are actually interchangeable.

REQUEST 2:

2. Scope of discovery under 26(b)(1)
    a. Nonprivileged:
        i. A lot of responsive documents are privileged if they're communications by DOPE employees to their counsel, seeking legal advice, in confidence, and the contents of the communication was about the legal advice being given. D is entitled to withhold on the basis of privilege and must provide a privilege log. Cannot simply refuse to

produce any responsive documents on the basis that a portion of responsive docs are privileged.

b. Relevant:
    i. Communications between EEs about the air outlet valve is highly relevant to the issue of how the company made decisions about which air valve to use and whether the company knew their design was not a safe choice or whether they knew there were problems with manufacturing the valve. However, records from 10 years before the purchase are a lot less relevant unless the product at issue has been the same for 10 years.
c. Proportionality Factors:
    i. Importance of issues: D's decision making around design and manufacturing, and what D did and did not know about the valve's safety, is highly important.
    ii. Amount in controversy (same as Request 1)
    iii. P has no access to these communications, although P can depose D employees. But, P needs some discovery in order to know which employees to depose.
    iv. D is a large company and has resources to search its own records
    v. It would be unduly burdensome on P to produce records for more than 5 years or so before the purchase. Older documents are less probative.

3. Court would likely compel production of documents for a specific set of custodians who were more involved (more results when electronic search terms are run), for a shorter time period more focused on the period when D chose to use the valve at issue. Again, privileged documents are absolutely protected. D must withhold privileged documents and provide a privilege log.

MODEL ANSWER-Q3

I. Moving Party (D) has burden of Production
   a. Here, D tries the *Adickes* method of citing evidence that forecloses a fact P is asserting by citing Mark and expert testimony.
   b. D also tried the *Celotex* method by citing to Plaintiff's deposition testimony that he couldn't prove the mercury in his samples had come from Defendant's cereal.
   c. D likely met burden of production.

II. Burden shifts to P to show GDMF
   a. P tries to dispute Mark and expert's testimony with Walter's testimony and Pedro's doctor testimony (doctor as fact witness).
   b. Walter's testimony about his own personal knowledge that the protocols described by Mark are not always followed does raise a GDMF, but his testimony about what a co-worker said to him about items falling into the machines is inadmissible hearsay.
   c. Doctor's testimony doesn't seem very probative, because it doesn't prove that the mercury specifically came from the cereal, but the court does not weigh evidence at SJ.
   d. P's testimony that the only new thing he had eaten at the time was D's cereal may lack credibility, but the court does not weigh credibility at SJ.
   e. P likely met their burden to show GDMF.

III. The Court must draw all reasonable inferences in favor of P and cannot weigh evidence or assess credibility.
   a. Court would likely infer here that a reasonable jury could find that the factory was not following its safety protocols. Court cannot weigh Mark's testimony of Walter's or find Walter less credible.
   b. Court cannot weigh Will's testimony over P's testimony about what P had eaten. Must infer that a reasonable jury could find that the mercury in P's sample was due to the cereal.
   c. Court cannot weigh the expert's sample study on a recent batch more than P's evidence about a different time period, the time of P's injury.

IV. In sum, although P does not have direct evidence that the mercury found in his samples came from D's cereal, the contradicting testimony about whether anti-contamination protocols were followed and whether mercury found in P came from D's cereal creates a GDMF as to whether the cereal contains mercury. Summary judgment should likely be denied.

1) 90/100

1. David v. Turtle Boat Repair

Joinder of Parties

Third Party Impleader

A defendant in a case may implead and join and third party defendant (TPD) that may be liable in whole or in part for the judgment that the plaintiff will may get against the defendant. The defendant then becomes the third party plaintiff (TPP) in that new action. The cause of action must be based on the same transaction or occurrence. In order to implead, there must be jurisdiction over the third party claim.

Here, David (D) is the original defendant in action 1 (A1) that Paul (P) had brought against him for negligence. P alleges that D caused the accident between their speedboats. D answered the complaint and filed a complaint against Turtle Boat Repair (T) alleging that their mistake in maintenance of the boat caused the braking system to fail and cause the accident. Since D is impleading T based on a theory that T will be liable to D for any judgment that P obtains against D, this is a proper third party impleader action. The third party impleader is based on the same facts as the original complaint and largely the same evidence will be used to prove both liability claims since it is the same speedboats involved in the accident and both claims. Impleader will be subject to jurisdiction. Great

Subject Matter Jurisdiction (SMJ)

Federal courts have original jurisdiction over federal question cases and diversity cases

where the parties to the claim are diverse and the amount in controversy is over $75,000. Here, the facts state that the federal court had diversity jurisdiction over the original action. The third party action is between D and T, who reside in the same state. Therefore, they are not diverse parties. Even if the claim is for over $75,000 the court cannot exercise diversity jurisdiction over this claim. This claim does not involve federal question. The court can analyze for supplemental jurisdiction.

Supplemental Jurisdiction

Where a claim doesn't qualify for diversity or federal question, the court may exercise supplemental jurisdiction (SuppJ) if the cases arise from the same common nucleus of operative facts. Here, both claims stem from the same accident and involve the speedboats that both parties are being accused of being negligent with. Since the operative facts are the same and the only difference is the theory of liability, the court may exercise supplemental jurisdiction over this claim. Excellent!

Therefore, David can bring his claim against Turtle Boat Repair.

2. Turtle Boat Repair counterclaim against Paul

Joinder of Claims

Defendants may join claims to the current case against their opposing party. This is a counterclaim and they can either be compulsory or permissive.

Compulsory Counterclaim

A claim that a defendant has against a plaintiff in the current case and that arises from

the same transaction or occurrence and doesn't require adding a party over whom the court would not have jurisdiction must be brought in the current case. A court can find that a claim stems from the same transaction or occurrence if it shares large amount of evidence with the original claim, the claims share common questions of law or fact and if res judicata would later preclude the claim. Here, the original claim is P alleging negligence liability against T for the speedboat accident. The counterclaim that T has filed is for an unpaid $1000 invoice for repairs to P's jet skis. The claims do not stem from the same transaction or occurrence because the original claim was for a speedboat accident which was a tort action and the counterclaim is for an unpaid invoice resulting from a business transaction, likely a contract issue. The claims don't share common questions of law since one is a tort and one is a breach of contract or fact since they don't arise from the same incident. Additionally, res judicata would likely not preclude the counterclaim if it was brought in a separate action. The counterclaim does not require adding a party over whom the court does not have jurisdiction since the court already has jurisdiction over P. Given that the claim does not share common questions of law or fact with the original claim, the court will not find this is a compulsory counterclaim. It may be a permissive counterclaim. Excellent

Permissive Counterclaim

A permissive counterclaim does not have to be brought in the current case and can be about claims that do not arise from same transaction or occurence as the original claim. Any claim by a defendant against a plaintiff that is not compulsory is permissive. Here, as stated above, the claims do not arise from the same transaction or share questions of law or fact so the court would not require T to bring the action in this claim or risk losing his rights and interests to it. **Therefore, the court will likely find this is a permissive counterclaim.**

SMJ, see above.

Here, the parties are likely from diverse citizenship since T and D are from the same state and P is diverse from D. The claim is for $1,000 so it does not meet the amount in controversy requirement. The claim does not contain questions of federal law. Therefore, there is no original SMJ on the claim. The court will analyze for SUPPJ.

Supplemental Jurisdiction, see above.

Here, the claims do not share a common nucleus of operative facts since the claims do not stem from the same transaction or occurrence because the original claim was for a speedboat accident which was a tort action and the counterclaim is for an unpaid invoice resulting from a business transaction, likely a contract issue. Therefore, the court will decline to exercise SUPPJ.

Therefore, T will not be able to bring their counterclaim against P in this action.

3. Pam v. David and Turtle Boat Repair

Issue Preclusion

Issue preclusion prevents the relitigation of an issue that 1) is identical to the issue in action 1 (A1); 2) already litigated and decided in A1; 3) issue was necessary to valid, final judgment in A1; and 4) there was a full and fair opportunity to litigate the issue in A1. Issues are identical where they share a common question of law and fact. An issue will be deemed already litigated when there is a final judgment that decided the issue and there is nothing more for the court to do on that claim. An issue is deemed necessary to a valid, final judgment where it is clear how the issue was decided by the trier of fact and the judgment depended on the decision of that issue. For there to be a fair and full opportunity to litigate issue preclusion cannot be used against a new party (Due Process

Clause). A new party can, however, can use issue preclusion against a party to the previous case. This can happen one of two ways:

1. Non-mutual Defensive Issue Preclusion: where a new defendant uses the judgment in A1 against a plaintiff that lost in A1 or

2. Non-mutual Offensive Issue Preclusion: where a new plaintiff uses a judgment in A1 against a defendant that lost in A1.

The effect of issue preclusion is that the issue is found to be resolved in A2 and the parties don't have to introduce evidence to prove or disprove it. Very thorough rule statement!

Here, Pam was not a party to the first case and filed a case against D and T for damages, asking the court to use the judgment in A1 finding T did negligent repair work and D negligently drove the accident to not have to litigate the issue of negligence and for the court to find that T and D caused Pam's injuries and should be liable to her for damages. The issue of negligence is the same issue as it was in A1 because A1 was trying to decide who was negligent in causing the speedboat accident. The issue of negligence is the same issue of law and involves the same issues of fact in A1 as it does in this case. The issue was litigated and decided in A1 because after discovery, dispositive motions and trial the jury found D and T liable and that is clear in the judgment. The issue was necessary to a valid, final judgment on the merits of A1 because the claim was brought to find out who was negligent in causing the accident and the special verdict clearly states that T was negligent in repairing the boat and D was negligent in driving the boat. That decision on the issue of negligence meant that D and T were liable to the Paul and the judgment for Paul depending on a finding of liability. Here, D and T will argue that they did not have a fair opportunity to defend their case because in the first case they were facing liability of $100,000 jointly and in this case they are facing damages of $1,000,000. Pam is trying to use non-mutual offensive preclusion against D and T to not prove negligence and this type of preclusion is controversial. D and T will argue that their effort and expense in defending their case in A1 looked very different than it would look if they defended in

Yes, if we took this finding out of A1, the judgment would be different.

this $1million dollar case. Given this argument by D and T, the court is likely to find that there is no issue preclusion here since it would be unfair to the defendants and it is likely they didn't see a claim from another plaintiff for this amount coming.

Therefore, the court in Pam's case should not apply issue preclusion.

Excellent! You make a compelling argument.

2) 90/100

Priya v. DOPE Appliances Inc.

Discovery

Discovery in a case is governed by Rule 26 which outlines the timeline and scope of information that the parties must disclose and share with each other regarding their legal claims.

Initial Disclosures

Within 14 days from the Rule 26(f) conference where the parties discuss claims and defenses, preservation of information and their discovery plan, a party must make their initial disclosures. These initial disclosures are:

1) names and contacts for people who have discoverable information that the producing party may use to support their claims or defenses (unless their only use would be impeachment, in which case there is no requirement to disclose); 2) copies or descriptions of tangible items, documents or electronically stored information that the producing party may use to support their claim or defenses (unless their only use would be impeachment, in which case there is no requirement to disclose); 3) damages calculations and the sources they are calculated from; 4) insurance agreements for policies that may be held liable in part or in whole for any judgment against the defendant. A party does not have to disclose evidence that is adverse to their claim since it is not evidence they plan to use to support their claim. This information may be discoverable later, however, during the discovery process as the parties make discovery requests on each other. Excellent rule statement!

Here, Winnie (W) was present when the accident occurred and spoke to Priya's (P)

attorney (A). W shared that P had filled the food compartment with so many potato slices that it was hard to close the air fryer. She also shared screenshots of her texts with Priya where they discuss P's injuries from the explosion. Priya's attorney does not have to disclose W's name and contact IF she will not be using W to support P's claims at all. In their interview, the information that W shares is adverse to P's claim for defective design and defective manufacturing because it infers that P caused her own injuries by negligently using the air fryer and filling it up too much. Given that W's information is not in support of P's claims, the attorney can choose to not disclose W's name and contact in the initial disclosures. Additionally, W shared screenshots of the text messages between P and W discussing the injuries. If the communications reveal adverse information and the attorney will not be using them to support P's claims then she also does not have to disclose those since she will not be using them to support her claims. If the messages are supportive of P's claims, then for initial disclosure purposes, the attorney can either disclose copies of the messages or descriptions of their nature. The attorney will also have to disclose damages calculations to support the damages claim of $100,000. The attorney will need to include how those damages were calculated so that the opposing party can see the rationale behind the amount sought. If there are any insurance agreements that may be liable for the claim, then those also need to be disclosed.

Right!

Good.

Excellent. And I think P-counsel will be worried about not wanting D to find out about Winnie, so hopefully they have better/other evidence of P's injuries and don't need to use the texts, so they can leave those out of the disclosures as well.

2. Motion to Compel

Scope of Discovery

Discoverable information is limited to that which is 1) relevant, 2) non-privileged and 3) proportional. Factors used to determine proportionality include: amount in controversy, burden of production for producing party compared to requesting party, relative access to information requested, importance of the issues, the parties resources.

Request 1: All documents related to each and every alternative air outlet valve design

considered for DOPE's air fryer

1. Relevance

Evidence is relevant if it makes a fact more or less probable than it would be without the evidence and is material to the issue at hand. Here, P has filed an action for defective design and defective manufacturing. The defective design claim brings into issue the design process that DOPE (D) undertook, including any alternative designs they considered. As part of her claim, P can ask for D to disclose this information to assess liability. The fact that there were other designs considered is relevant to the issue of whether the design they went with was a less safe or effective alternative than other designs. The design issue is material to determining liability. D will object that the request is burdensome because P is asking for all documents related to each and every design. They might suggest that she narrow her request to ask for documents regarding designs that were more effective or safe than the current design, since less effective or safe designs are not relevant to her claim. The court will likely agree that she can narrow her request but will find the information sought relevant.

Excellent. Great job identifying how the request would likely be narrowly tailored to be within the proper scope of discoverable evidence under 26(b)(1), so that the request better targets the most relevant docs.

2. Non-privileged

Communications between an attorney and their client that were confidential and for the purpose of seeking legal advice are protected. Here, D will argue that their design documents are privileged because their attorneys were involved in the process of design and design implies liability. However, not every business communication that involves an attorney is privileged as it may not have been primarily for legal advice. Here, the court is likely to find that attorney-client privilege doesn't apply.

Great! But maybe there are some emails asking counsel whether it's ok to use a valve that they know is not as reliable as another one, and that would likely be privileged.

Work product prepared by a party or their representative in anticipation of litigation is protected and does not have to be disclosed. It may be disclosed if the requesting party shows substantial need and it would cause undue hardship if they did not have access to the information. Even if the party meets that burden, the mental impressions, legal

theories and conclusions contained within will be protected from disclosure. Here, P will argue that she has substantial need because without it she cannot prove that there was a superior design available for the air fryer which is part of her cause of action. She will also argue that she does not have access to it herself and it would cause her undue burden to have to try to recreate or come up with it some other way. D will argue that in the process of designing their products, they include mental impressions about the potential liability of each design. Since the court will likely find that P does have substantial need and not supplying her with the information would cause her undue burden, the court will find that it is discoverable but any mental impressions will be redacted.

3.Proportionality

Here, the court find that the burden to P of producing or recreating the designs outweighs the burden to D of producing it. Since only D has access to the information, this factor would also weigh in favor of P. The court would also find that the alternative designs are material to P's claim. Therefore, the request is proportional.

Good

The court is likely to find that the documents requested are discoverable but narrow the request to only relevant design alternatives.

Request 2: All emails to or from DOPE employees discussing the air outlet valve on the DOPE air fryer, from 10 years before P's injuries to present

Scope of Discovery, see above.

1. Relevant, see above.

Here, conversations by email of the air valve designs are relevant and material to P's claim because she is trying to show that the company knew of alternatives but chose a design

that was defective. She is trying to find the "smoking gun" that proves the company knew the design was defective and is therefore, liable. Here, D will argue that this request is overly broad. The court will find that emails of employee discussions regarding the air valve at issue are relevant but the request is too broad and will include non-relevant information as well given the overly broad time frame (10 years). The court will likely narrow the scope to closer to the time when the current valve and its alternatives were being discussed and especially surrounding the time that the design for the air fryer that allegedly caused P's injuries was being discussed. Good

2. Non-privileged, see above.

Here, D will again argue that the communications included attorneys and work product. P will argue that not every email requested is in fact covered by the attorney-client privilege since just including an attorney on a communication is not sufficient to deem the communication privileged. Additionally, P will argue that not every email was prepared in anticipation for litigation and so she should be able to access it given the burden she proved in her first request. The court will likely find that, since P can depose employees to ask about the design discussions, the need is not as great as it was for request #1 and that this request also doesn't pose undue burden. The court will find that P did not overcome D's work product protections. Therefore, the court will likely find that any emails that discussed legal issues with attorneys and the work product will be non-discoverable but non-privileged and non-work product will be discoverable.

Good. And D will have to produce a privilege log.

3. Proportional, see above

Here, the burden of producing emails is low, however, P has access to the depose the employees (so long as they are not deceased or moved away) and can find the same information through other sources. P can argue that she is a single plaintiff requesting information from a large corporation and that D's resources vastly outdo hers which means that her cost for deposition will be more of a burden than it would be for D to simply produce the emails which is rather inexpensive. She will argue that the amount in

controversy is $100,000 which is not a large amount of money and that the expenses she will incur to get the information that the D already has would be great. The court will likely find P's arguments compelling and find that the request is proportional once narrowed. Good. I don't see how P could access this info other ways, especially with the cap on # of depositions, everybody understands that you need to get the documents first in order to decide who to depose.

The court will likely find that some emails are relevant and discoverable if the request is narrowed, however, any emails that are covered by attorney-client privilege and that are work product will not be discoverable.

Request for Production: Documents and Electronically Stored Information

A requesting party may request tangible items, documents and electronically stored information from the producing party. If the responsive documents are business documents and the burden to produce is equal for both parties, the producing party may list in detail the location and description of the information and give the access to documents and electronically stored information to the requesting party so they can review and make copies. This request to produce can also be made of non-parties as long as the requesting party gives notice and serves a subpoena on all parties for the items and information. Here, P is requesting documents and electronically stored information so it is a proper request for production. D may give P a list of documents and their location and allow her access to inspect and copy them if they wish. Great.

Motion to Compel

When a party refuses to disclose information requested by the requesting party, the requesting party may move to compel the information they are seeking. The moving party must show that they made a good faith effort to meet and confer to resolve the discovery issues with the opposing party before filing a motion. Here, P did meet and confer in good faith and D still refused to produce. **Therefore, the court will likely compel D to produce the alternative designs with the narrowed parameters and the emails that are not privileged or work product are discoverable once the time frame is narrowed to emails discussing relevant designs during a narrower time**

frame (much closer to the P's injuries than the current 10 year request).

Very good!

3) 90/100

Summary Judgement

A motion for summary judgment must be granted if from the pleadings, affadavits, and discovery material on file, viewed in the light most favorable to the non-moving party, it appears as if:

1) *No genuine dispute of Material Fact exists; AND*
2) *moving party is entitled to a judgment as a matter of law.*

Step 1

The Moving party has the burden of production to show that there is NO genuine dispute of Material Fact.:

1) By Foreclosing a fact asserted by the Non-moving party

2) Or; by showing the Non-moving party does not have evidence to support a fact. Excellent!

Here, the defendant Moving Party is Delicious Foods, InC(D). D is asserting that the cereal does not contain any mercury. This assertion is factually based on testimonial evidence from Their factory manager, an expert witness and testimony from the plaintiff themselves. D is utilizing this evidence to assert that the non-moving Party Pedro(P) who is a named member of the class he represents has no evidence that there is mercury in the cereal that D produces. The deposition testimony from the manager Mark(M) describes the fact that there systems in place that prevent mercury from accidentally getting into the cereal, or at all. D then follows this up with a written report from an expert witness, which means that this person has an education or specialized knowledge on the inclusion of mercury in foods and testing for it. The Dr. analyzed a sample from a recent batch and determined no mercury was present. Here, there might be room for P to argue that they could have changed the formula or ensured that the cereal tested was free from mercury. However, if the Dr. is respected in the field and certified as an expert this is strong factual evidence that no mercury is present in the cereal.

All great points!

The testimony of P is one of the strongest pieces of evidence here and goes to D showing P does not have enough evidence to prove his assertions because P admits in his testimony that there is no way for him to definitively prove that the mercury he ingested came form D's cereal. So they are foreclosing his factual assertion that he was poisoned by cereal from their factory. Exactly right! The Adickes method.

Therefore, D has met their burden of production that there is no genuine dispute of material fact.

Step 2

If the Moving party meets their burden of production, the burden will then shift to the non-moving party to show that there is a genuine dispute of material fact with admissible evidence.

Here, P the non-moving party has responded to D's motion for summary judgement. P has provided testimony from a deposition of one of D's former factory employees. This is a person with direct knowledge of how the factory operates because he was employed there at one time. Walter is testifying that co-workers had stated that things would accidentally fall into the machinery, making the assertion that mercury could end up in the cereal entirely possible. Even though D had testimony from Mark stating the safety protocols at the factory, this fact asserted by P places a material issue in dispute.

There is deposition testimony from a Dr. that P had a test for mercury after eating the cereal and mercury was found in the samples, and the plaintiff's own testimony that when he became ill the only new thing he ingested was the D's cereal. These facts assert a genuine dispute of material fact because P has evidence to support his assertion that there is mercury in D's cereal and that he was potentially poisoned from it.

Therefore, P has met his burden as the non-moving party.

Very good job clearly connecting what D introduced to how P can dispute it

Step 3

Moving party will respond in an attempt to foreclose any facts asserted by the non-moving party.

Here, D has objected to the testimony from Walter that P has put forth on the basis of hearsay. P is required to assert facts with admissible evidence and if this is a sustained objection then this testimony could not be used. Walter is testifying about a statement that was made out of court that he overheard other parties saying.Therefore, D would object to this testimony as inadmissible hearsay and unless a valid exception applies it will most likely be thrown out. The other pieces of P's evidence are still valid and include asserted facts supported by admissible evidence that a reasonable jury could decide on.

good!

Step 4

The court will evaluate motion and opposition with fair inferences most favorable to the non-moving party.

The court will not weigh the evidence or assess issues of credibility.

Here, D has placed the credibility of Walter as a witness into question by describing him as a bad employee and for that he was terminated for not following protocols. The court however, does not assess issues of credibility because this is for the jury to decide. D is also attempting to impeach P as a witness through contradicting the testimony he gave about what he was eating. The court does not weigh evidence and will not analyze or cancel one piece of evidence out with another.

not

Very good

Here, when the court looks a the evidence, it will do so seperately because the court is not weighing which evidence is better. Instead the court is evaluating with inferences favorable to P whether there are facts asserted that there is a genuine dispute of material fact present here, that a reasonable jury could adjudicate. P has presented enough evidence even with Walters testimony potentially to not be admitted to dispute the fact

asserted that there is no mercury in D's cereal. A Dr. has done tests after he has consumed the cereal and found mercury present. Even though this could be argued with the testimony P gave that D has enetered, it also illustrates that there is a genuine dispute of a material fact.

Therefore, the court would deny the motion for Summary Judgement

Excellent job applying the SJ rule! The court cannot weigh whether Walter is a credible witness.

END OF EXAM