

Monterey College of Law
Civil Procedure
Final Examination
Spring 2025
Professor Isaac Adams

Instructions:

Answer: Three Essay Questions

Total Time Allotted: Three (3) Hours

MCL
Civil Procedure II
Spring 2025
Prof. I. Adams

Question One.

Jim was driving his car on a State X highway with his friend, Mark. Jim and Mark are citizens of State X. During the drive, Jim collided with Trucker, a citizen of State Y. As a result, Jim, Mark, and Trucker all sustained injuries.

Jim initially sued Trucker in federal district court in State X, seeking \$76,000 in property damages to his car. After a trial, the jury found Jim negligent.

Later, Mark sued Jim in State X court. In response, Jim moved to dismiss the lawsuit, arguing that Trucker was an indispensable party who had not been joined. The court denied Jim's motion. The case proceeded to trial, and the jury found in Mark's favor.

Frustrated by his second loss, Jim then sued Trucker in State X court, seeking \$100,000 for personal injury damages. Trucker objected, arguing that Jim's claim was barred by res judicata. Trucker also filed a counterclaim against Jim for \$90,000 in personal injury and property damages. The court allowed both Jim's lawsuit and Trucker's counterclaim.

1. Did the court correctly deny Jim's motion to dismiss Mark's lawsuit for failure to join an indispensable party?
2. Did the court properly allow Jim's second lawsuit against Trucker?
3. Did the court correctly permit Trucker's counterclaim against Jim?

Question Two

In January, while testing her new hoverboard in the park, Dalila collided with Phil, causing the hoverboard's battery to ignite. As a result, Phil sustained severe burns. Concerned about potential litigation, the in-house counsel for the hoverboard manufacturer, FlyingCarpet, hired an investigator to identify and interview all witnesses present at the scene.

In April, Phil filed a lawsuit against Dalila and FlyingCarpet, seeking damages for his physical injuries.

During discovery, Dalila filed a motion requesting that the court order Phil to undergo both a physical and a mental examination. Phil objected, but the court granted Dalila's motion and ordered him to submit to both examinations. Phil attempted to appeal the decision, but the court of appeals refused to hear his case.

Later, Phil served an interrogatory on FlyingCarpet, asking whether the company had taken statements from any witnesses to the accident and requesting copies of any such statements. FlyingCarpet objected, arguing that the interrogatory sought protected work product and refused to provide an answer or produce any documents. In response, Phil filed a motion to compel the production of the requested documents. The court granted Phil's motion.

1. Did the court err in granting Dalila's motion to compel Phil's physical and mental examinations?
2. Did the court of appeals err in refusing to hear Phil's appeal?
3. Did the court err in granting Phil's motion to compel FlyingCarpet to produce the requested documents?

MCL
Civil Procedure II
Spring 2025
Prof. I. Adams

Question Three

In 2022, Max and Tony each obtained a \$200,000 car loan from BigDollar to buy their dream supercars. When they began repaying the loan, they were shocked to learn that their monthly payments were greater than expected.

In 2023, Max sued and won a judgment against BigDollar for violating the Federal Truth in Lending Act. BigDollar appealed.

In 2024, relying solely on the judgment in Max v. BigDollar, Tony sued BigDollar, which it answered by filing a motion for summary judgment on the ground of res judicata, BigDollar also asserted that the judgment in Max v. BigDollar is not final because the case it is being appealed. The court granted BigDollar's motion for summary judgment.

What effect, if any, does Max v. BigDollar have on Tony v. BigDollar? Discuss

Model answer to question one:

Did the court correctly deny Jim's motion to dismiss Mark's lawsuit for failure to join an indispensable party?

Is Trucker necessary?

F.R.C.P. 19 (a) provides that a person who is subject to service of process (i.e., personal jurisdiction) and whose joinder will not deprive the court of jurisdiction over the subject matter (i.e., destroy complete diversity) should be joined as a party in the action if:

- 1) In his absence complete relief cannot be accorded among those already parties (worried about multiple suits), OR
- 2) The disposition of the action in the absent of the intervenor will be likely to impair his ability to protect that interest. (Absentee's interest may be harmed if not joined i.e. practical harm) OR
- 3) Absentee claims an interest that subjects a party (usually D) to a risk of multiple obligations.

Is Trucker indispensable?

If the court determines that Trucker is a necessary party, then it must rule if Trucker is indispensable.

Indispensable party (a necessary party whom it is not feasible to join and in whose absence the lawsuit - "in equity and good conscience" – should be dismissed)

Can the court feasibly join the Absentee? It is feasible to join absentee (A) if:

(1) there is PJ over A and

(2) joining A will not destroy diversity jurisdiction (the court determines whether A would come in as a P or a D to see if bringing A in will destroy up diversity).

If A's joinder is feasible, the court will order A's joinder.

If joining A is not feasible, the court must decide to either, in equity and good conscience, proceed without A or dismissed

The court will look at these factors in making its decision:

- 1) Is there an alternative forum available? (maybe some state court);
- 2) What is the actual likelihood of harm to A?
- 3) Can the court shape relief to avoid that harm to A?

If the court decides to dismiss the case rather than proceed, A is called an indispensable party.

Jim's motion to dismiss Mark's lawsuit for failure to join Trucker was properly denied because Trucker is neither a necessary nor an indispensable party under F.R.C.P. 19. Trucker's absence does not prevent complete relief between Mark and Jim, since Mark's claim arises solely from Jim's alleged negligence, independent of any potential fault by Trucker. There is no indication that Trucker's legal interests would be impaired or that Jim would face inconsistent obligations without Trucker's joinder. Even if Trucker were deemed necessary, joinder would be feasible because he is subject to personal jurisdiction in State X and his addition would not destroy diversity, as the case is in state court. Therefore, the court correctly chose to proceed without Trucker, who is neither necessary under Rule 19(a) nor indispensable under Rule 19(b).

Did the court properly allow Jim's second lawsuit against Trucker?

A valid and final judgment on the merits of a claim or cause of action precludes reassertion of that claim or cause of action in a subsequent action between the same parties or their privies, even as to claims that should have been, but were not, raised in the former case.

To apply Claim Preclusion, the following must be met:

- Case 1 and case 2 were brought by the same claimant against the same defendant.
- Case 1 ended in a valid final judgment on the merits.
 - a. Valid: All judgments are valid except when the court lacks SMJ, PJ, based on fraud, or the notice to D failed to conform to the due process requirement.
 - b. Final: the trial court has nothing left to do.
 - c. On the merits: All judgments are on the merit unless it was based on lack of jurisdiction (SMJ and PJ), improper venue, indispensable parties, or statutes of limitation. (notes 1 and 2, page 796)
- Cases 1 and 2 asserted the "same claim" (same transaction or occurrence test). There is a single cause of action when the claims asserted arise from the same transaction (majority view).

- Minority view: Primary rights theory. Each right violated constitutes a separate cause of action. There are separate claims for property damages and personal injuries because these are different primary rights

While both cases were brought by the same claimant, Jim, against the same defendant, Trucker, and the first case ended in a valid, final judgment on the merits when the jury found Jim negligent, the key issue is whether the second case asserts the “same claim.” Under the majority view’s transactional approach, all claims arising from the same accident—including property and personal injury damages—must be brought together, which would suggest claim preclusion applies. However, under the minority’s primary rights theory, Jim’s property damage and personal injury claims are considered distinct because they seek redress for separate harms to separate rights. If State X follows the minority view, then Jim’s current suit for personal injury is not precluded by his earlier action for property damage.

Did the court correctly permit Trucker’s counterclaim against Jim?

The court erred in permitting Trucker’s counterclaim against Jim because it is barred under F.R.C.P. 13(a)’s compulsory counterclaim rule. Trucker’s claim for personal injury and property damage arises out of the same transaction or occurrence as Jim’s earlier federal lawsuit over the same car accident. Under Rule 13(a), a defendant must assert any counterclaim that arises from the same transaction or occurrence as the plaintiff’s claim, or the opportunity is waived. Trucker had the opportunity to raise his claims during Jim’s initial federal lawsuit, which proceeded to final judgment, but failed to do so. Because the compulsory counterclaim rule serves to promote judicial efficiency and avoid piecemeal litigation, Trucker’s failure to assert the counterclaim earlier bars him from pursuing it now. Therefore, the court improperly allowed the counterclaim to go forward.

Model answer to question two:

Did the court err in granting Dalila’s motion to compel Phil’s physical and mental examinations?

Scope of Discovery

Federal Rule 26(b)(1), parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense. For good cause, the court may order discovery of any matter relevant to the subject matter" involved in the action. Rule 26 (b)(1) further provides that "relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.

***(Rule prior to December 2015 FRCP Amendment)**

Dalila (D) struck and injured Phil (P) in an auto accident. P's complaint against D sought damages for negligence for physical injury. As such, D’s motion asking the court to order a physical and mental examination is intended to obtain nonprivileged matter relevant to P's claim regarding the extent of his alleged damages arising out of the accident.

Therefore, D's discovery motion requesting the court to order a physical and mental

examination is within the proper scope of discovery.

The Physical Examination

Under Rule 35, the district court may order (1) "a party, or a person its custody or under its legal control," (2) whose mental or physical condition is "in controversy," (3) to submit to a physical or mental examination, (4) on a motion for "good cause."

Here, Phil, as the plaintiff, is a party. In *Schlagenhaufv. Holder*, the U.S. Supreme Court stated that "[a] plaintiff in a negligence action who asserts mental or physical injury, places that mental or physical injury clearly in controversy and provides the defendant with good cause for an examination to determine the existence and extent of such asserted injury.

P's complaint sought damages for physical injury caused by D. His physical injury is therefore *in controversy* and *good cause* has been shown for the physical examination.

The court did not err in granting D's motion to order the physical examination.

The Mental Examination of P

Here, P did not assert mental injury. Therefore, D must support her motion to order a mental examination of P by making *an affirmative showing* that P's mental condition is in controversy and that there is good cause for ordering a mental examination of P. D has not made such a showing. Therefore, the court erred in ordering P to submit to a mental examination.

Did the court of appeals err in refusing to hear Phil's appeal?

Final judgment rule: A final judgment is one that finally disposes of the case, where nothing remains to be done in the suit but to execute the judgment. The general rule is that interlocutory (non-final) orders are not immediately appealable. The reason is not to burden the court of appeals with piecemeal litigations. A notice of appeal must be filed in the district court within 30 days after the entry of the final judgment. 60 days if the U.S. is a party.

- 1- Exception of the final judgment rule (6 exceptions)
 - a- Injunction. Not applicable.
 - b- Interlocutory Appeals Act. Not applicable.
 - c- Class certification (discretion). Not applicable.
 - d- Multiple claims/ parties. Not applicable.
 - e- Writ. (two types)—writ of prohibition and writ of mandamus. (Three elements. All three have to be met) 1) Available only when there is "no other means to attain" a correction of circumstances from the trial court that amounts to a "judicial usurpation of the power." 2) the movant bears the burden of showing that the right to relief is

“clear and indisputable.” 3) the issuing court, in its discretion, must be satisfied that the writ is appropriate under the circumstances.

f- Collateral order doctrine. Not applicable.

Reviewability

Harmless error v. prejudicial error. An appellate court may not reverse a judgment unless the error was prejudicial, i.e., determined the case’s outcome.

Scope of appellate review (where did the error occur in the lower court?)

- a- If errors of law occur in the lower court (district court), the court of appeals will review the record de novo.
- b- Errors in facts by a judge. A judge’s finding of facts may not be set aside unless the appellate court finds that the facts found are clearly erroneous.
- c- Errors in mixed questions of law and facts by a judge. The court of appeals will review the record de novo.
- d- If there were a discretionary ruling by the trial court, the court of appeals would look for abuse of discretion. The appeals court will not substitute its discretion for that of the trial judge.
- e- A finding of fact by the jury. It is not the function of the appellate court to determine the facts. However, an appellate court can review factual determinations to ensure that the evidence sufficiently justifies them. The appellate court will not weigh the evidence to second-guess the jury. It merely tests the legal sufficiency of the evidence to determine if the verdict is rationally supported by substantial evidence. The appeals court will affirm unless reasonable people could not have made that finding.

The court of appeals did not err in refusing to hear Phil’s appeal because the order granting Dalila’s motion for physical and mental examinations is an interlocutory order, not a final judgment. Under the final judgment rule, only final judgments—those that dispose of the case completely—are appealable. Since the discovery order did not resolve the case and was not a final judgment, Phil’s appeal is premature. However, there is an exception. To challenge this order, Phil would need to seek a writ of prohibition or mandamus.

Did the court err in granting Phil’s motion to compel FlyingCarpet to produce the requested documents?

Work Product- Pursuant to the court’s decision in Hickman v. Taylor, there is a qualified immunity from discovery for documents or other tangible things prepared in anticipation of litigation by or for a party or that party’s representative unless the discovering party can show a substantial need and inability to

obtain equivalent material by other means (factual work product). The mental impressions, opinions, theories and strategies of an attorney of a party receive the highest degree of protection and cannot be discovered absent extreme necessity (compelling need).

a) "Documents" would include copies of signed statements from two witnesses.

b) Anticipation of litigation? Concerned about potential litigation, FlyingCarpet took witness statements." If the witness's statements were taken in contemplation of litigation, they would be protected work product.

Exception

Qualified work product 1) there is a substantial need and 2) to avoid undue hardship because the information cannot be obtained through other means.

If P can demonstrate that he has a substantial need for the documents and that the unavailability of the content of those documents elsewhere, he may be able to get them.

Model answer to question three:

Collateral Estoppel - Issue Preclusion -: Where the second lawsuit involves a different claim, the first judgment may be invoked as to all issues which were actually litigated and determined in the first action and necessarily determined (i.e., essential to the determination of the first action).

Prerequisites to the application of collateral estoppel:

1. Identical issue: Collateral Estoppel applies only when an identical factual issue is involved in both actions. Similarity of issues is not enough
2. Actually litigated and determined: The issue preclusion effect of a prior judgment in a later action applies to those issues actually litigated and determined in the former action, but not to those issues which merely could have been (but were not) litigated therein. The trier of fact in the former action must have actually made a determination (i.e., a finding) with respect to the fact in order for collateral estoppel to preclude relitigation of that fact in the subsequent action.
3. Necessarily determined" - Essential facts: Collateral estoppel applies only as to those fact issues decided in the former action that were essential to the judgment
4. Full and fair opportunity to litigate. If the party against whom collateral estoppel is invoked can show that he did not have a full and fair opportunity to litigate the issue in the former action, he will not be precluded from relitigating that issue in the subsequent suit

Persons Who Can Invoke Collateral Estoppel:

Mutuality rule: Since a judgment cannot be used against a person who was not a party or in privity with a party, that person has traditionally been barred from taking advantage of the judgment

Offensive Use: Prior judgment used as a sword

Usually not allowed. However, there is a trend to allow this. Here are the factors to analyze.

- a. Full and fair opportunity to litigate in case 1
- b. Incentive to litigate strongly
- c. No inconsistent finding on this issue.

- d. Was it easy for Tony to join Max v. BigDollar, or did he adopt a “wait and see” strategy to protect himself from an adverse judgment?
- e. Was it foreseeable for the party in Max v. BigDollar that someone in a subsequent suit would use issue preclusion offensively against the party?

**MCL
Civil Procedure II
Spring 2025
Prof. I Adams**

ANSWER OUTLINE

Model answer to question one:

Did the court correctly deny Jim's motion to dismiss Mark's lawsuit for failure to join an indispensable party?

Is Trucker necessary?

F.R.C.P. 19 (a) provides that a person who is subject to service of process (i.e., personal jurisdiction) and whose joinder will not deprive the court of jurisdiction over the subject matter (i.e., destroy complete diversity) should be joined as a party in the action if:

- 1) In his absence complete relief cannot be accorded among those already parties (worried about multiple suits), OR
- 2) The disposition of the action in the absent of the intervenor will be likely to impair his ability to protect that interest. (Absentee's interest may be harmed if not joined i.e. practical harm) OR
- 3) Absentee claims an interest that subjects a party (usually D) to a risk of multiple obligations.

Is Trucker indispensable?

If the court determines that Trucker is a necessary party, then it must rule if Trucker is indispensable.

Indispensable party (a necessary party whom it is not feasible to join and in whose absence the lawsuit - "in equity and good conscience" – should be dismissed)

Can the court feasibly join the Absentee? It is feasible to join absentee (A) if:

(1) there is PJ over A and

(2) joining A will not destroy diversity jurisdiction (the court determines whether A would come in as a P or a D to see if bringing A in will destroy up diversity).

If A's joinder is feasible, the court will order A's joinder.

If joining A is not feasible, the court must decide to either, in equity and good conscience, proceed without A or dismissed

The court will look at these factors in making its decision:

- 1) Is there an alternative forum available? (maybe some state court);

- 2) What is the actual likelihood of harm to A?
- 3) Can the court shape relief to avoid that harm to A?

If the court decides to dismiss the case rather than proceed, A is called an indispensable party.

Jim's motion to dismiss Mark's lawsuit for failure to join Trucker was properly denied because Trucker is neither a necessary nor an indispensable party under F.R.C.P. 19. Trucker's absence does not prevent complete relief between Mark and Jim, since Mark's claim arises solely from Jim's alleged negligence, independent of any potential fault by Trucker. There is no indication that Trucker's legal interests would be impaired or that Jim would face inconsistent obligations without Trucker's joinder. Even if Trucker were deemed necessary, joinder would be feasible because he is subject to personal jurisdiction in State X and his addition would not destroy diversity, as the case is in state court. Therefore, the court correctly chose to proceed without Trucker, who is neither necessary under Rule 19(a) nor indispensable under Rule 19(b).

Did the court properly allow Jim's second lawsuit against Trucker?

A valid and final judgment on the merits of a claim or cause of action precludes reassertion of that claim or cause of action in a subsequent action between the same parties or their privies, even as to claims that should have been, but were not, raised in the former case.

To apply Claim Preclusion, the following must be met:

- Case 1 and case 2 were brought by the same claimant against the same defendant.
- Case 1 ended in a valid final judgment on the merits.
 - a. Valid: All judgments are valid except when the court lacks SMJ, PJ, based on fraud, or the notice to D failed to conform to the due process requirement.
 - b. Final: the trial court has nothing left to do.
 - c. On the merits: All judgments are on the merit unless it was based on lack of jurisdiction (SMJ and PJ), improper venue, indispensable parties, or statutes of limitation. (notes 1 and 2, page 796)
 - Cases 1 and 2 asserted the "same claim" (same transaction or occurrence test). There is a single cause of action when the claims asserted arise from the same transaction (majority view).
 - Minority view: Primary rights theory. Each right violated constitutes a separate cause of action. There are separate claims for property damages and personal injuries because these are different primary rights

While both cases were brought by the same claimant, Jim, against the same defendant, Trucker, and the first case ended in a valid, final judgment on the merits when the jury found Jim negligent, the key issue is whether the second case asserts the "same claim." Under the majority view's transactional approach, all claims arising from the same accident—including property and personal injury damages—must be

brought together, which would suggest claim preclusion applies. However, under the minority's primary rights theory, Jim's property damage and personal injury claims are considered distinct because they seek redress for separate harms to separate rights. If State X follows the minority view, then Jim's current suit for personal injury is not precluded by his earlier action for property damage.

Did the court correctly permit Trucker's counterclaim against Jim?

The court erred in permitting Trucker's counterclaim against Jim because it is barred under F.R.C.P. 13(a)'s compulsory counterclaim rule. Trucker's claim for personal injury and property damage arises out of the same transaction or occurrence as Jim's earlier federal lawsuit over the same car accident. Under Rule 13(a), a defendant must assert any counterclaim that arises from the same transaction or occurrence as the plaintiff's claim, or the opportunity is waived. Trucker had the opportunity to raise his claims during Jim's initial federal lawsuit, which proceeded to final judgment, but failed to do so. Because the compulsory counterclaim rule serves to promote judicial efficiency and avoid piecemeal litigation, Trucker's failure to assert the counterclaim earlier bars him from pursuing it now. Therefore, the court improperly allowed the counterclaim to go forward.

Model answer to question two:

Did the court err in granting Dalila's motion to compel Phil's physical and mental examinations?

Scope of Discovery

Federal Rule 26(b)(1), parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense. For good cause, the court may order discovery of any matter relevant to the subject matter" involved in the action. Rule 26 (b)(1) further provides that "relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.

***(Rule prior to December 2015 FRCP Amendment)**

Dalila (D) struck and injured Phil (P) in an auto accident. P's complaint against D sought damages for negligence for physical injury. As such, D's motion asking the court to order a physical and mental examination is intended to obtain nonprivileged matter relevant to P's claim regarding the extent of his alleged damages arising out of the accident.

Therefore, D's discovery motion requesting the court to order a physical and mental examination is within the proper scope of discovery.

The Physical Examination

Under Rule 35, the district court may order (1) "a party, or a person its custody or under its legal control," (2) whose mental or physical condition is "in controversy," (3) to submit to a physical or mental examination, (4) on a motion for "good cause."

Here, Phil, as the plaintiff, is a party. In *Schlagenhaufv. Holder*, the U.S. Supreme Court stated that "[a] plaintiff in a negligence action who asserts mental or physical injury, places that mental or physical injury clearly in controversy and provides the defendant

with good cause for an examination to determine the existence and extent of such asserted injury.

P's complaint sought damages for physical injury caused by D. His physical injury is therefore *in controversy* and *good cause* has been shown for the physical examination.

The court did not err in granting D's motion to order the physical examination.

The Mental Examination of P

Here, P did not assert mental injury. Therefore, D must support her motion to order a mental examination of P by making *an affirmative showing* that P's mental condition is in controversy and that there is good cause for ordering a mental examination of P. D has not made such a showing. Therefore, the court erred in ordering P to submit to a mental examination.

Did the court of appeals err in refusing to hear Phil's appeal?

Final judgment rule: A final judgment is one that finally disposes of the case, where nothing remains to be done in the suit but to execute the judgment. The general rule is that interlocutory (non-final) orders are not immediately appealable. The reason is not to burden the court of appeals with piecemeal litigations. A notice of appeal must be filed in the district court within 30 days after the entry of the final judgment. 60 days if the U.S. is a party.

- 1- Exception of the final judgment rule (6 exceptions)
 - a- Injunction. Not applicable.
 - b- Interlocutory Appeals Act. Not applicable.
 - c- Class certification (discretion). Not applicable.
 - d- Multiple claims/ parties. Not applicable.
 - e- Writ. (two types)—writ of prohibition and writ of mandamus. (Three elements. All three have to be met) 1) Available only when there is “no other means to attain” a correction of circumstances from the trial court that amounts to a “judicial usurpation of the power.” 2) the movant bears the burden of showing that the right to relief is “clear and indisputable.” 3) the issuing court, in its discretion, must be satisfied that the writ is appropriate under the circumstances.
 - f- Collateral order doctrine. Not applicable.

Reviewability

Harmless error v. prejudicial error. An appellate court may not reverse a judgment unless the error was prejudicial, i.e., determined the case's outcome.

Scope of appellate review (where did the error occur in the lower court?)

- a- If errors of law occur in the lower court (district court), the court of appeals will review the record de novo.
- b- Errors in facts by a judge. A judge's finding of facts may not be set aside unless the appellate court finds that the facts found are clearly erroneous.
- c- Errors in mixed questions of law and facts by a judge. The court of appeals will review the record de novo.
- d- If there were a discretionary ruling by the trial court, the court of appeals would look for abuse of discretion. The appeals court will not substitute its discretion for that of the trial judge.
- e- A finding of fact by the jury. It is not the function of the appellate court to determine the facts. However, an appellate court can review factual determinations to ensure that the evidence sufficiently justifies them. The appellate court will not weigh the evidence to second-guess the jury. It merely tests the legal sufficiency of the evidence to determine if the verdict is rationally supported by substantial evidence. The appeals court will affirm unless reasonable people could not have made that finding.

The court of appeals did not err in refusing to hear Phil's appeal because the order granting Dalila's motion for physical and mental examinations is an interlocutory order, not a final judgment. Under the final judgment rule, only final judgments—those that dispose of the case completely—are appealable. Since the discovery order did not resolve the case and was not a final judgment, Phil's appeal is premature. However, there is an exception. To challenge this order, Phil would need to seek a writ of prohibition or mandamus.

Did the court err in granting Phil's motion to compel FlyingCarpet to produce the requested documents?

Work Product- Pursuant to the court's decision in Hickman v. Taylor, there is a qualified immunity from discovery for documents or other tangible things prepared in anticipation of litigation by or for a party or that party's representative unless the discovering party can show a substantial need and inability to obtain equivalent material by other means (factual work product). The mental impressions, opinions, theories and strategies of an attorney of a party receive the highest degree of protection and cannot be discovered absent extreme necessity (compelling need).

a) "Documents" would include copies of signed statements from two witnesses.

b) Anticipation of litigation? Concerned about potential litigation, FlyingCarpet took witnesses statements." If the witness's statements were taken in contemplation of litigation, they would be protected work product.

Exception

Qualified work product 1) there is a substantial need and 2) to avoid undue hardship because the information cannot be obtained through other means.

If P can demonstrate that he has a substantial need for the documents and that the unavailability of the content of those documents elsewhere, he may be able to get them.

Model answer to question three:

Collateral Estoppel - Issue Preclusion -: Where the second lawsuit involves a different claim, the first judgment may be invoked as to all issues which were actually litigated and determined in the first action and necessarily determined (i.e., essential to the determination of the first action).

Prerequisites to the application of collateral estoppel:

1. Identical issue: Collateral Estoppel applies only when an identical factual issue is involved in both actions. Similarity of issues is not enough
2. Actually litigated and determined: The issue preclusion effect of a prior judgment in a later action applies to those issues actually litigated and determined in the former action, but not to those issues which merely could have been (but were not) litigated therein. The trier of fact in the former action must have actually made a determination (i.e., a finding) with respect to the fact in order for collateral estoppel to preclude relitigation of that fact in the subsequent action.
3. Necessarily determined" - Essential facts: Collateral estoppel applies only as to those fact issues decided in the former action that were essential to the judgment
4. Full and fair opportunity to litigate. If the party against whom collateral estoppel is invoked can show that he did not have a full and fair opportunity to litigate the issue in the former action, he will not be precluded from relitigating that issue in the subsequent suit

Persons Who Can Invoke Collateral Estoppel:

Mutuality rule: Since a judgment cannot be used against a person who was not a party or in privity with a party, that person has traditionally been barred from taking advantage of the judgment

Offensive Use: Prior judgment used as a sword

Usually not allowed. However, there is a trend to allow this. Here are the factors to analyze.

- a. Full and fair opportunity to litigate in case 1
- b. Incentive to litigate strongly
- c. No inconsistent finding on this issue.
- d. Was it easy for Tony to join Max v. BigDollar, or did he adopt a “wait and see” strategy to protect himself from an adverse judgment?
- e. Was it foreseeable for the party in Max v. BigDollar that someone in a subsequent suit would use issue preclusion offensively against the party?

1)

1) **Necessary and Indispensable Party**

A Party is considered necessary and indispensable when their absence from the case would not afford the parties relief, cause the absentee to have their interest harmed, or have inconsistent judgments awarded in their absence

Here, the Court would be able to afford parties relief as they are different parties with different claims. Second, if Trucker is not joined to the action his interest in this case would not be harmed likely, Jim wanted Trucker to be added for purposes of shifting liability and second it is unlikely that the Court would order an inconsistent judgment as Mark's case arises from the same transaction an occurrence of the accident.

If the Trucker would have been found to be a necessary and indispensable party the Court would have dismissed the case because the Court would not have proceeded with case if Trucker's participation was detrimental to the case.

In conclusion, in Mark versus Jim, Trucker is not a necessary and indispensable party.

2) **Jim's Second Lawsuit against Trucker**

The Court did not err in allowing the second lawsuit against Trucker by Jim.

Claim preclusion prevents the same parties from relitigating claims that have already ended on a final and valid judgment on the merits.

Claim preclusion does not allow for the same parties to relitigate the same claim twice that arose from the same transaction or occurrence.

Here, we have the same parties, Jim and Trucker, in the same lawsuit in their respective positions in comparison to the first lawsuit. In the first case Jim was the plaintiff and Trucker was the defendant and the second lawsuit mirrors the same situation. Second, the first lawsuit ended with a valid judgement on the merits.

A valid judgment on the merits means that the court rendered a judgment as to the reason why the procedural matter.

Here, Case 1 ended with a valid judgment on the merits and found the Trucker was negligent.

Third, the second lawsuit between Jim and Trucker is arising from the same transaction and occurrence. In both case 1 and case 2, the same transaction and occurrence at issue is the collision that occurred in State X. Jim is deriving both claims from the same incident.

However, In claim 1, Jim sued for property damages and claim 2 Jim sued for personal damages. There is a split in authority as to these two matters.

Under Federal Jurisdiction, A plaintiff must assert all of their claims in one go or else they will not have the opportunity to bring forth another lawsuit against the same defendant that arises from the same transaction or occurrence.

However, in a Personal Theory Jurisdiction, a person may bring two different claims against the same defendant because they distinguish bodily injury claims from claims of property.

Here, because he is in state court, it is possible that the state reasoning for allowing the second lawsuit is because it not the same claim as in the first case. In the second case, he asserting claim for personal injury and not property damages.

3) Trucker's Counterclaim

The Court did err in allowing Trucker's counterclaim because Trucker should have asserted these claims in the first lawsuit with Jim.

Trucker should used a compulsory counterclaim in order to sue Jim in the first lawsuit.

A compulsory counterclaim is used to sue the plaintiff in the same lawsuit for claims you may have against the plaintiff arising from the same transaction and occurrence. If you do not assert the claim in the first lawsuit you are barred from bring up the claims in a separate lawsuit .

Here, Trucker should have filed a counterclaim in the first lawsuit against Jim. At this point, Trucker waived any claims that he may have had against Jim and he cannot assert them in the second lawsuit.

In conclusion, the Court did err by allowing Trucker to bring the counterclaim because it should have

been asserted in the their first

2)

1.) Did the Court Err in Granting Dalila's Motion?

Physical and Mental Examinations

When a party's physical or mental condition is placed at issue either by an opposing party or the nature of the litigation, the opposing party may request a court order to have a physical or mental examination conducted on a party or a person in that party's custody or legal control on matters placed in controversy and under a good faith basis.

In Custody

A person in custody of a party is often someone like a child or mentally handicapped person whom the party has legal control over. Employers do not have legal control over their employees.

Here, Dalila filed a motion requesting that Phil undergo both a physical and mental examination. Phil is the party who filed the lawsuit, so this element is satisfied.

In Controversy

A person may move for the court to order a physical or mental exam on another party only for a condition that is placed in controversy. The movant may not use physical or mental exams to go on a fishing expedition and order a battery of tests to be done on an opposing party.

Here, Dalila has filed a motion requesting Phil undergo both a physical and mental examination, even though Phil's physical condition is the only thing in controversy. Phil suffered severe burns as a result of the hoverboard's battery igniting, and Phil is suing Dalila and FlyingCarpet seeking damages for his physical injuries. Consequently, he has placed his physical condition in controversy. No facts suggest that Phil has suffered any mental damage from the accident and he has not placed his mental state in controversy in this matter. As such, Dalila's motion to order a mental examination of Phil is improper.

Dalila's motion to order a physical examination of Phil is proper because Phil placed his physical condition at issue by suing for personal injury. It is relevant to the lawsuit for Delila to discover the extent or veracity of Phil's injuries, so it is proper for her to move for an order of a physical examination.

Good Faith

A person may move for the court to order a physical or mental exam on another party only in good faith.

Here, no facts suggest that Phil's mental state is at issue and should be tested in the interests of the lawsuit. As such, Dalila's motion to order a mental examination of Phil is improper.

Dalila's motion to order a physical examination is in good faith however because facts suggest that Phil sustained an injury. Dalila has a good faith reason to order a physical examination because it would be likely necessary to determine damages or liability.

Overall, the court erred in granting Delila's motion to order a mental examination of Phil, but did not err in grating her motion to order a physical examination.

2.) Did the Court of Appeals Err in refusing to Hear Phil's Appeal?

Appellate Review

Appellate review occurs when parties to a suit at the trial level appeal interlocutory and final rulings. The appellate court reviews these appeals and makes a determination if they have adequate jurisdiction to hear the party's claims.

Here, Phil is appealing the trial court's improper order to submit to a mental examination. If he is successful, the appellate court will consider the trial court's action inappropriate and likely issue a writ of prohibition.

Final Judgement Rule

The final judgement rule states that parties may not appeal interlocutory orders or rulings by the trial court until a valid final judgement on the merits has been reached by the trial court so as not to burden the appellate court.

Here, a valid final judgement on the merits in the suit between Phil, Dalila, and Flying Carpet has not been reached because the parties are still in discovery and there is still material claims which have not

yet been ruled upon. Phil will have to find an exception to the final judgement rule in order for him to make a permitted interlocutory appeal.

Writs Exception to the Final Judgement Rule

Parties may immediately appeal conduct of a trial court that would amount to a total usurpation of judicial power, that if left unremedied, would result in undue, inequitable damage to the party. The granting of this appeal however is discretionary on the appellate court. Upon appellate review, the appellate court will issue a writ of mandamus or writ of prohibition to ensure that the trial court's conduct is appropriate.

Writ of Mandamus

A party may request the appellate court to file a writ of mandamus in order to compel the trial court to pursue some conduct or action.

Here, Phil may request the appellate court to file a writ of mandamus to compel the trial court to pursue some other action instead of ordering the mental examination.

Writ of Prohibition

A party may request the appellate court to file a writ of Prohibition in order to compel the trial court to stop some conduct or action.

Here, Phil will likely request the appellate court to issue a writ of prohibition and compel the trial court to cease the ordering of the mental examination since Dalila's motion to compel Phil's mental examination was improper in the first place. The appellate court will likely find that the motion to compel the mental examination was not based upon good faith and the mental condition of Phil was not in controversy, so it was improper for the court to order Phil to comply with the mental examination.

In conclusion, the court did err in refusing to hear Phil's appeal.

3.) Did the Court Err in granting Phil's Motion?

Scope of Discovery

Any non privileged, relevant information is able to be requested for review by an opposing party as long as that material/information is relevant to the claims or defenses involved in the matter. The opposing party, when requesting the material, must define what they are requesting with particularity and must request the material on a good faith basis.

Here, Phil was within his rights in asking whether FlyingCarpet had taken statements from any witnesses to the accident and requesting copies of such statements. Phil's request was not vague and he specifically asked for witness statements, so his request for review was valid. However, when complying with Phil's request for evidence, FlyingCarpet need not turn over privileged information.

Work Product

Work product is privileged material that is prepared in anticipation of litigation. Work product need not be produced by an attorney to be privileged, but rather any one involved with or hired for the purpose of preparing for litigation. Work Product is made up of two components, absolute work product and qualified work product. When an opposing party requests discovery of work product, they must show a substantial need for the material, since it is normally privileged. Additionally, the opposing party bears the burden of proving that they could not acquire the information contained in the work product through any other reasonable means and that they would be suffering an undue hardship due to the unavailability of that material.

Absolute Work Product

Absolute work product is the mental impressions, opinions, and legal theories contained within work product. This component is absolutely privileged and never discoverable, even if an opposing party shows a substantial need.

Here, FlyingCarpet does not need to relinquish any absolute work product contained within their investigator's interview notes because those are privileged.

Qualified Work Product

Portions of work product is discoverable under the qualified work product exception. Qualified work product is the component of work product containing the material collected in anticipation of litigation. This material is usually evidence gathered by an investigator and includes physical evidence and witness testimony.

Here, Phil may have a substantial need for the witness interviews because they may contain relevant information regarding his lawsuit, especially concerning the ignition of the hoverboard. Phil may not be able to reasonably acquire this evidence on his own due to the cost and effort of locating those witnesses months after the accident took place. As such, Phil may suffer an undue hardship if his request for this evidence is denied because his case will suffer on no fault of his own. Since the evidence is already in the hands of his opponent, it would be in the interests of equity if he was allowed to receive the qualified portions of this work product.

The court likely did not err in granting Phil's motion to compel the production of the requested documents if he asserted a substantial need and that he would suffer an undue hardship if he did not have the documents in a qualified format.

3)

1.) What affect does Max v. BigDollar have on Tony v. BigDollar?

Issue Preclusion (Collateral Estoppel)

When there is a valid final judgement on the merits on an actually litigated and necessarily decided issue, that issue may not be re-litigated in a future suit between the same parties or their privies in cases with common issues and facts. Issues are actually litigated if they are material to the suit and were given the full consideration of litigation. Issues are necessarily decided when the suit was not dismissed due to procedural processes like motions for summary judgement.

Here, Max sued BigDollar, hereafter BD, for the violation of the federal truth in lending act and won. Max and BD will be precluded from re-litigating the issue of if BD did violate the federal truth in lending act in any future suit between them or their privies. This issue was the most substantial and material issue in the matter between Max and BD so it can be inferred that the issue was actually litigated. The facts suggest that Max won the a judgement against BD, so it can be reasonably inferred that the issue was necessarily decided and the case was litigated to completion without being subject to some sort of dismissive procedural process.

Max and BD will be precluded from re-litigating the issue if the judgement of the trial court was valid, final, and on the merits.

Valid

All judgments are valid if they were not procured by fraud, if the court did not lack PJ and SMJ, and if there was no improper service of process of the defendant according to the requirements of due process.

The judgement in Max v. BD was likely valid because no facts suggest fraud or an improper service of process. The amount of controversy and citizenship of the parties is unknown so it will be assumed that there is no lack of PJ or SMJ.

Final

All judgments are final when there is no issues or matters left for the trial court to rule on.

The judgement in Max v. BD was final because the facts suggest that a judgement was won by Max after the sole material issue was ruled upon.

On the Merits

All judgments are on the merits when the trial court is in the appropriate venue and does not lack PJ and SMJ.

The judgement in Max v. BD was likely on the merits because no information would suggest otherwise.

Full Faith and Credit Clause

When considering if the re-litigation of a issue is barred by Collateral Estoppel, the second court relies on the same jurisdictional law featured in the previous court that heard the first litigation of the issue, even if these two courts operate on different jurisdictional law.

Here, any court that will hear the second case between Max v. BD will follow the jurisdictional laws of collateral estoppel that the court in the first suit followed.

Since the judgement in Max v. BD was valid, final and on the merits, any court that may hear Tony v. BD will follow the jurisdictional law of the first court and preclude the re-litigation in any future suits involving BD the issue of whether or not BD violated the Federal Truth in Lending Act.

Mutuality Rule

The mutuality rule states that for an issue litigated in a previous case to be precluded in a future case, the parties in the second case must be the same as the parties in case one. In this arrangement, the parties are mutual because they both had the opportunity to litigate the precluded issue in the previous case.

Here, the judgment in Max v. BD would make any re-litigation of the material issue in that case improper if Max and BD were not opposing parties in a future suit between them due to the mutuality rule.

Exceptions to the Mutuality Rule

Courts have allowed the use of issue preclusion by nonparties to the first lawsuit under certain

circumstances. This is called nonmutual issue preclusion and courts have carved out an exception for the use of issue preclusion by a party when they are sued by a nonparty to the first suit where the issue was originally litigated. This is called defensive nonmutual issue preclusion. Additionally, Courts have shown a trend of allowing offensive nonmutual issue preclusion, or the use of issue preclusion by a nonparty who is suing a party to a suit where the issue was originally litigated.

Here, Tony and BD may be able to preclude the re-litigation of the issue of whether or not BD violated the federal truth in lending act in a suit between them depending on the circumstances.

Offensive Nonmutual Issue Preclusion

While use of offensive nonmutual issue preclusion is generally not permitted, the court allows its use if fair and upon a few considerations.

First, courts consider if the nonparty seeking to preclude the party relied on a wait and see strategy. If Tony waited for BD to lose Max v. BD so Tony could have an easier time recovering against BD through a use of offensive nonmutual issue preclusion, then the court would consider that to be inequitable to BD and likely consider this issue preclusion not allowed.

Second, courts consider if the party had the opportunity during the first suit to fully and fairly litigate the issue. If BD was hampered in any way or was not able to acquire adequate legal representation in Max v. BD, it would be inequitable for the court to allow offensive nonmutual issue preclusion against them because they did not have the opportunity to fully and fairly litigate the issue. The court would likely allow barely litigated issues to be precluded against a party by a nonparty.

Third, courts consider if the party had an incentive to litigate the issue in the first suit. If BD did not have a strong incentive to litigate the issue in Max v. BD, then the issue may have been not fully litigated and its use against BD wo

Courts consider if the party could foresee if they would be precluded from re-litigating the issue by nonparties in future suits

Courts consider if the party could

Summary Judgment - Res Judicata and Appeal Affect on Final Judgement

A party may file a motion for summary judgement when there is no genuine dispute of material fact in a case. A court's decision to grant a motion for summary judgement is discretionary.

Here, the court granted BD's motion for summary judgement. BD claimed that Tony was precluded from suing BD on the grounds of res judicata and that, because the first suit is being appealed, there was no final judgment.

BD's claim that Tony was precluded from asserting a claim against BD is unsubstantiated because Tony was not a party to the lawsuit of Max v. BD. As such, he is asserting a unique claim that was not previously asserted by him and is not precluded from doing so according to the principles of Res Judicata.

BD's claim that the judgement in Max v. BD is not final due to that judgement being appealed is also unsubstantiated. Trial courts reach a final judgement when they have no more matters left to rule on. Trial courts do not have the jurisdiction to handle appellate matters, and so they would have no jurisdiction to rule on a pending appeal to their own judgement. The appellate court would have the jurisdiction to handle BD's appeal on the judgement in Max v. BD instead. The facts and analysis above suggest that a final judgement was reached in Max v. BD, so the presence of an appeal to that judgement would not be grounds to grant a motion of summary judgement.

The judgement of Max v. BD is final and thus a suit between Tony and BD could not be precluded based on Res Judicata or the fact that an appeal is pending.

Defensive Nonmutual Issue Preclusion

Defensive Nonmutual issue preclusion is allowed by the courts as an exception to the mutuality rule. Generally, if the party had the opportunity to fairly and fully litigate the issue sought to be precluded, they may use it as a shield to protect themselves from a nonparty attempting to re-litigate that issue.

Here, BD may preclude Tony from re-litigating the issue of whether or not BD violated the Federal Truth in Lending act through defensive nonmutual issue preclusion because that issue was already actually litigated on in Max v. BD. Additionally, BD may preclude Tony from re-litigating the issue because BD had the opportunity to fully litigate the issue in Max v. BD because no facts state otherwise.

END OF EXAM