



California Bar Examination

Essay Questions and Selected Answers

February 2019



The State Bar Of California
Committee of Bar Examiners/Office of Admissions

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ESSAY QUESTIONS AND SELECTED ANSWERS

FEBRUARY 2019

CALIFORNIA BAR EXAMINATION

This publication contains the five essay questions from the February 2019 California Bar Examination and two selected answers for each question.

The answers were assigned high grades and were written by applicants who passed the examination after one read. The answers were produced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. They are reproduced here with the consent of the authors.

<u>Question Number</u>	<u>Subject</u>
1.	Wills and Trusts / Community Property
2.	Torts
3.	Real Property
4.	Evidence / Civil Procedure
5.	Professional Responsibility

ESSAY EXAMINATION INSTRUCTIONS

Your answer should demonstrate your ability to analyze the facts in the question, to tell the difference between material facts and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply the law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little or no credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines that are not pertinent to the solution of the problem.

Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.

QUESTION 1

In 2006, while Hank and Wendy were married and living in State X, a non-community property state, they purchased a house in State X and a condominium in California with money from Hank's salary. Hank took title to both the house and the condominium in his name alone.

In 2008, Hank executed a will leaving whatever he might own at death to Wendy. As allowed by State X law, only one witness signed the will.

In 2016, Hank and Wendy retired and moved to California. Hank conveyed the condominium to himself and to Sid, his son from a prior marriage, as joint tenants with right of survivorship, doing so as a gift to Sid. Hank then put \$100,000 he obtained from an inheritance into a valid revocable trust, the income to be paid to him for life, then to Wendy for life, remainder to Sid.

In 2017, as a result of a skiing injury, Hank lost all mental capacity and was on the verge of death. In accordance with Hank's prior wishes, Sid was appointed as Hank's conservator. Sid prepared a codicil to Hank's will, giving a one-half interest in the State X house to Hank's best friend, Bill. Sid signed the codicil as conservator, and had it properly witnessed.

In 2018, Hank died. Sid found that Hank owed various creditors more than the value of the State X house and California condominium combined.

1. What rights, if any, do Wendy and Sid have in the California condominium? Discuss. Answer according to California law.
2. What rights, if any, do Wendy and Bill have in the State X house? Discuss. Answer according to California law.
3. Will Hank's creditors be able to reach the assets in the trust? Discuss.

QUESTION 1: SELECTED ANSWER A

Community Property Basics / Overview

General Community Property Rules; Quasi-Community Property Concept

California is a community property state - a married couple is seen as forming a marital economic community (MEC) and property acquired by the couple or either spouse during the MEC (which exists from time of valid marriage until the earlier of permanent separation (which may be affected unilaterally by a spouse by the communication of the intent to permanently separate together with conduct in conformity with such intent) or death) while domiciled in CA is presumptively community property, unless it fits into specific categories of so-called "separate property". Separate property includes property acquired by either spouse prior to (or for that matter after) the MEC, or during the MEC if: (1) by gift, inheritance, or bequest; (2) as income, issue, or rents on SP; or (3) by the expenditure of SP funds (i.e., property traceable to SP).

California's system also captures so called "quasi-community property" - property that would have been CP if the couple had been domiciled in CA at the time of acquisition. QCP is treated like SP until the death (or dissolution) of the MEC, when it is subject to treatment like CP.

Default Division upon Death of Spouse; Right of Decedent Spouse to Make Will; Surviving Spouse Rights to Take Against Will

At death, in the absence of a valid will (i.e., decedent spouse dies intestate), CP and QCP owned by the decedent spouse will generally all be inherited by the surviving spouse (anywhere from 1/3 to all of decedent spouse's SP will also be inherited by surviving spouse - it would be 100% if decedent spouse left no issue or surviving parents or issue of parents; but if as here decedent spouse was survived by 1 child, then surviving spouse would take 1/2 SP)

However, a spouse may make a valid will - and CA will probate a will that was validly made pursuant to the laws of another jurisdiction where decedent spouse testator was domiciled at the time (even if the will would not be valid under CA law). However, if the will attempts to gift

away CP / QCP owned by the surviving spouse, the surviving spouse can (at the cost of rejecting all gifts under the will), "take against the will" and claim all such CP / QCP (i.e., decedent testator spouse can only will away all of his SP and his 1/2 of CP / QCP without surviving spouse consent / acquiescence)

Application to Hank and Wendy

Here, Hank and Wendy were validly married in 2006 and living in State-X (a non-community property state) until 2016, when they moved to CA - Hank then died while the couple was domiciled in CA. So, all property acquired by the couple from 2006 to 2016 is generally QCP (unless it qualifies as SP - burden of proving SP would be on the SP proponent)).

Furthermore, Hank's 2008 will (which was validly made under State X law) can be probated under CA law (effect of 2017 codicil to be discussed below)

With these basics in mind, we now turn to each question

1. California Condo

Original Characterization of Condo

When a couple ultimately is domiciled in CA at the time of death of one spouse or dissolution of the MEC, property acquired while domiciled outside of CA is QCP if it would have been CP if the couple had been domiciled in CA at the time the property was acquired. This is true even if the purported QCP is real property located in CA. Wages / salary of each spouse during the MEC are CP - and property acquired using such CP funds is also CP, regardless of whether title to the asset is taken in the name of one spouse.

Here, even though Hank took title to the condo in his own name, he used CP funds (his salary during the marriage) to purchase, so the condo would have been CP -- since the couple was domiciled in State X at the time, and Hank is dead now, it is treated as QCP.

Effect of Inter Vivos Conveyance

QCP is generally treated as the acquiring spouse's SP until the time of the acquiring spouse's death (or, irrelevant here, the dissolution of the marriage). However, that does not mean that

the acquiring spouse is completely free to make inter vivos transfers of the QCP -- if the acquiring spouse transfers QCP during his life for less than fair value while retaining an income right, a right to revoke the transfer, or a right of survivorship, the other spouse has a right to clawback 1/2 of the value of the transferred QCP from the transferee.

Here, Hank transferred the QCP condo while retaining a right of survivorship - so Wendy has a right to 1/2 of the condo under this clawback rule. Sid does not have the right to own the entire condo (even that would otherwise be the result, due to the right of survivorship - if not for the QCP system, Hank's death would have extinguished his ownership rights in the condo, leaving nothing to pass by his will to Wendy, and giving Sid 100% ownership of the condo). Note that this is not "taking against the will", since this was a separate inter vivos transfer of QCP - so Wendy doesn't need to repudiate any rights under the will to assert this right to the CA condo.

2. State X House

Original Characterization of State X House

See above for rules.

Here, Hank also purchased the State X house using CP funds (his salary), so the State X house is also QCP.

Validity and Effect of 2017 Codicil

Under California law, a will can be amended, revoked or otherwise modified in whole or part by a subsequent codicil, provided it is validly executed. A validly appointed conservator can make a will or codicil for a now-disabled / incompetent person.

Here, Sid was properly appointed as conservator (when Hank become incapacitated from the skiing accident), signed the codicil, and had it properly witnessed (i.e., 2 witnesses who witness the will signing simultaneously and then sign the will) - so this a proper testamentary instrument that modifies Hank's 2008 will, even though Hank was not mentally competent. Furthermore, there are no facts that would allow Wendy to argue that Sid abused his power as conservator to improperly benefit himself. Instead he gave a gift to a close friend of Hank's,

and Hank expressly designated Sid to be his conservator, so there are no "bad facts" for Wendy to attack.

Wendy's Rights

See rules above

Because the will and codicil together only dispose of 1/2 of the State X house, and provide that Wendy receives the other 1/2, Wendy has no grounds (or reason) to "take against" the will here.

3. Creditor Rights with respect to Trust Assets

Trust Basics; Characterization of Trust Res

A Trust is fiduciary relationship in respect of property, where one party - the Trustee - is given legal title to certain property by another - the Settlor / Trustor; the Trustee holds the property subject to fiduciary duties, for the benefits of certain beneficiaries, who have equitable rights in the property.

A trust requires trust property and ascertainable beneficiaries, an act of creation (including an inter vivos transfer to a Trustee) by the Settlor with the intent to create a Trust, and a Trustee with duties (who can be selected by agreement between Settlor and Trustee, or Trustee can be designated by court if Settlor does not name or intended person declines to serve as trustee). Trust must also have a valid purpose

Settlor can name self as beneficiary and can reserve right to revoke trust. Providing income to a person (including Settlor) during lifetime is a valid trust purpose.

Here, Hank created a valid trust, with himself and Wendy as successive lifetime income beneficiaries, and Sid as the remainderman beneficiary. Since he funded the Trust with inheritance, this was SP, and there is no CP issue with Hank putting the money into trust (or designating Sid as remainderman) without Wendy's consent.

Rights of Creditors to Reach Assets In Revocable Trust; Rights of Creditors to Reach Assets in Trust After it Becomes Irrevocable

When Settlor puts money or other assets into trust and reserves the rights to revoke, creditors of the Settlor can generally reach these assets. However, a trust that that is revocable inter vivos becomes irrevocable upon death.

Here, Hank's creditors could have reached the trust assets during his life - if they obtained a judgment against him, they could have moved against his various assets (including his interests in the State X House and CA Condo, for that matter). But here the creditors have not acted promptly - Hank's estate does not have an interest in the trust; Wendy has an income interest for life, and then Sid has the remainder. Accordingly, Hank's creditors cannot reach the trust res.

As discussed above, however, the State X house is owned by Hank's estate, and due to go 1/2 to Wendy and 1/2 to Bill. Creditors could presumably move against that asset.

QUESTION 1: SELECTED ANSWER B

1. California condominium - Wendy & Sid's rights

Valid Will

A will is considered valid in California if it complies with the law of either: (i) California, (ii) the state where the will was executed, or (iii) the state of the decedent's domicile at death. H's will was executed in State X. Under the law of State X, which allowed only one witness to sign the will, the will was valid. Therefore, Hank (H)'s 2008 will is valid in California because it complied with the law of the state where it was executed (State X), even if it would not be valid under CA law, which requires two witnesses.

Community Property Law

California is a community property state. Under community property law, the marital economic community (MEC) begins with a valid marriage and ends with the death of a spouse, divorce, or permanent separation. Any property obtained during the marriage, as well as any labor and wages of the spouses during the marriage, is community property (CP). Property obtained prior to marriage, or after permanent separation, is considered separate property (SP). Property obtained by gift, inheritance or devise before or during the marriage is also considered SP. Property that is obtained with SP only will also be considered SP, because a change in form will not result in a change in characterization. Quasi-community property (QCP) is any property obtained by the spouses during marriage while living in a non-CP state, that would have been considered CP had the spouses been living in California. QCP will receive that classification on the death of the titled spouse or on divorce, prior to which the property will be governed by the law of the non-CP state. QCP will be divided on divorce just as CP is.

Hank (H) and Wendy (W) married in 2006 in State X, a non-CP state. Thus, the MEC was formed by at least 2006, when H and W were living together in State X. The California condo was bought after H and W married, thus during the marriage. Although

H and W were living in a non-CP state when they bought the California condo, the property would have been considered CP had the spouses been living in California because it was obtained during the marriage. Therefore, on H's death in 2018, the condo became QCP. However, prior to H's death, H and W's rights to the condo remained governed by State X law.

H took title to both the house and the condo in his name alone. Assuming this was valid in State X, H could then transfer his interest in the property to himself and Sid during life because the property was not yet classified as QCP. However, once H died, the property became classified as QCP, and will be treated as community property for the purpose of W's rights if she elects to take her CP law share instead of taking under the terms of the will.

a) SID

Joint Tenancy

A joint tenancy is characterized as having four unities: unity of possession, unity of transfer, unity of interest, and unity of time. This means that for a valid joint tenancy to be present, the tenants must have the right to possess all of the property together, they must receive those interests in the same instrument of transfer, and in equal shares, at the same time. A right of survivorship can only be created by express language in the deed. Consideration is not necessary to transfer an interest in real property. A right of survivorship vests the entire interest in the property to the surviving tenant after the other has deceased.

H transferred the condo to himself and Sid (S) as joint tenants with right of survivorship. H created these interests at the same time in the same transfer. Therefore, assuming also H granted Sid half, and himself the other half interest in the property, H and S had a valid joint tenancy with right of survivorship, as long as H also included express language that this was to be a joint tenancy with right of survivorship.

If W decides to take under the terms of the will, instead of her intestate share, S would receive the entire interest in the property because an interest in a right of survivorship

cannot be devised by will. S would own the condo in fee simple absolute as the surviving joint tenant because H's interest would vest in S upon H's death. The creditors will not be able to take the property in this case because S is not part of the MEC and not otherwise liable for H's debts.

However, if W decides to take her forced intestate share under CP law, she will be able to take the condo, but it will likely be subject to the claims of H's creditors as discussed below, because the CP is liable and the condo would be QCP, effectively treated as CP for the purposes of distribution and satisfaction of creditors.

b) WENDY

Spouse's Share

On the death of a spouse, a spouse can elect to either take under the terms of the deceased spouse's will, or take an intestate share. There is no elective share of the will in California. Rather, community property law provides for the distribution.

Electing under Community Property Law

Under California intestacy law, the spouse takes an intestate share that includes: the deceased spouse's 1/2 interest in the community property, in addition to the surviving spouse's own 1/2 interest in the CP, totaling to all of the CP. In addition, if the deceased spouse is surviving by one issue, parent, or issue of parent, the surviving spouse takes half of the deceased spouse's separate property.

H was survived by only one issue, his son, S. Therefore, if W chooses this option, W is entitled to all of the CP and half of H's SP. As discussed above and below, both the condo and the State X house will be considered QCP on H's death. Therefore, W can decide to take all of the CP, including both the State X house and the condo, as well as 1/2 of the interest in the trust as H's SP (\$50,000 worth).

Under the Will

If W decides to take under the terms of the will, she will not receive any interest in the condo because it would vest entirely in S due to the right of survivorship.

Spouse's Homestead Rights

In probating a will, a spouse can petition the court to allow for a homestead for the surviving spouse, essentially allowing the spouse to continue living in the family home.

If the California condo was H and W's family home, W could petition the court to allow it as her homestead. However, if W does not take her CP share, S will have a valid interest and claim to the condo and the court would not grant the petition.

2. State X house - Wendy & Bill's rights

a) Classification as Separate Property

(i) Community Property Presumption

See rule above.

H and W bought the house during their marriage while living in a non-CP state.

Therefore, the State X house will be presumed QCP on H's death, because H, the titled spouse, has died. Unless H's estate is able to rebut this presumption by a preponderance of the evidence by tracing the funds used to purchase the house to H's earnings before marriage, the State X house will be properly presumed QCP because a spouse's earnings *during* marriage are CP. Any property obtained with CP funds will also be considered CP.

However, a general presumption, such as the general community property presumption, can be overridden by application of a special presumption, such as those listed below.

H's estate, or Bill, or both, will likely argue that the special title presumption should apply such that the court should presume the property is H's SP.

(ii) Special Community Property Presumption

W might argue, fruitlessly, that under the special community property presumption, property that is held jointly at divorce or the death of a spouse is presumed to be CP.

This presumption can be rebutted by clear and convincing evidence. However,

because H and W did not own either the State X house or the California condo jointly at H's death, this presumption will not apply.

(iii) Special Title Presumption

On divorce or death of a spouse, property will be presumed to be held as stated in the title. This presumption can only be rebutted by clear and convincing evidence. In California, it must be rebutted by clear language in a deed or other document that indicates the spouse's intent to hold the property as not stated in the title, such as CP.

Because the property was held only in H's name, a court will presume that this is how the spouses intended to hold the property absent clear language otherwise. Because there is no clear language in the deed or other document indicated H and W's intent to hold the property in both of their names, or as CP, W will not be able to rebut this presumption, and the property will be considered H's SP.

Thus, the court should presume that the State X house was H's SP, and therefore could be properly devised by will without W's consent or knowledge. However, if W elects to take her forced share under CA community property law, she is still entitled to 1/2 of H's SP.

b) Devised by Will as Separate Property

2017 Codicil

A prior will can be revoked in whole or in part by subsequent instrument, such as a codicil.

By a Conservator

If the testator does not have capacity to make a will, a conservator can make a will if ordered to do so by a court. A conservator has fiduciary duties towards the incapacitated person. An incapacitated person can nominate someone to serve as their conservator prior to becoming incapacitated.

H nominated S, as part of his prior wishes. Thus, the appointment of S was valid. As conservator, S was required to act in H's best interests as to the disposition and care of H's property. In accordance with this role, S executed a codicil to H's prior will. H's 2017 codicil to his 2008 will transferred a 1/2 interest in the State X house to Bill. However, S was not ordered by a court to do so. There are no facts to suggest that S's action in changing H's prior will are supported by H's likely intent, as Bill was also likely H's best friend before he became incapacitated. This codicil impliedly revoked H's prior will in part by inconsistency because the prior will left all of H's property to W, and now Bill is being given a 1/2 interest in the State X house.

If W decides to take her intestate share under CP law instead of under the will, Bill will not be granted his 1/2 interest because the State X house will be considered QCP, as discussed above.

However, if W decides to take under the terms of the will, B will receive the 1/2 interest in the State X house.

Undue Influence - Confidential Relationship

A presumption of undue influence arises when a person in a confidential relationship with the testator participates in making a will, and an unnatural devise results. W could argue that S was in a confidential relationship with H when he became incapacitated, as S owed H fiduciary duties. S participated in making the codicil because he "prepared" and signed it as conservator for H. However, S will correctly counter-argue that no unnatural devise resulted because the devise of 1/2 of the interest in the State X house to Bill was natural, since Bill was H's best friend.

Therefore, W is unlikely to succeed in convincing the court to reject the codicil on this basis.

Conclusion - W's Rights Under the Will

A remainder beneficiary takes whatever is left in the testator's estate once all other devises have been satisfied.

If W does not choose to force her share under community property law, she will not own the California condo, but she could receive the other 1/2 interest in the State X house that was not transferred to Bill. If the court finds that the codicil is unenforceable, W will receive the State X house in fee simple absolute because she is the remainder beneficiary under the will. However, it is more likely that the condo and house will be taken by H's creditors in order to satisfy H's debts. Therefore, unless some portion of the trust remains after the debts have been satisfied, H is actually likely to get nothing.

3. Hank's creditors - Ability to reach the assets in the trust

Source of the Trust: Separate property

See rule above. Because H obtained the \$100,000 from an inheritance, even though he obtained it during the marriage, the \$100,000 will be considered H's SP. Therefore, interests to be given in the trust were subject to H's discretion because although spouses owe each other the highest duty of good faith and fair dealing in managing and controlling community property, the same is not true of a spouse's separate property.

Liability for Debts

The MEC is liable for debts of the spouses incurred both before and during the marriage. However, the SP of a spouse will not be liable for debts incurred by the other spouse prior to the marriage.

The facts state that H owed various creditors more than the value of the State X house and California condo combined. The MEC, and hence all of the community property, will be liable to pay these debts. Furthermore, in settling an estate, creditors are paid first, and any devises will abate proportionally to satisfy the testator's debts accordingly. Therefore, the creditors will be able to obtain both the State X and the California Condo. If this is the case, the devise to Bill will not occur because it will either abate or be eliminated due to the debt.

S's interest would not be reachable, and thus the California condo would not be reachable by the creditors, because H's 1/2 interest vested automatically in S on his

death. If any debt related to the condo itself, such as a mortgage, S would take on that debt.

Ability to Reach Trust

A creditor can reach the interest of a person in a trust if it is freely alienable, if the settlor retained a right to revoke the trust, or if the assets of a trust are subject to the demand of a current beneficiary.

Because H retained a right to revoke the trust, H had an interest in the trust that his creditors could reach upon his death. However, as discussed above, the MEC is also liable for the debts incurred by Hank and thus the creditors can reach the CP. If W elects to take her intestate share under CP law instead of under the terms of the will, she will be entitled to \$50,000 of the \$100,000 in the trust as 1/2 of H's SP. If her SP is also liable for the debts, such as if some of the debts were incurred for necessities of life or for the benefit of the community, the creditors could reach her interest because as a life tenant, she would be entitled to payment from the trust.

QUESTION 2

Dan, a dog breeder, had some eight-week-old puppies to sell. Bob and Carol went to his house to look at them. Dan invited them into the living room where the puppies were located and said, "Whatever you do, don't go into the room at the end of the hall." As they were examining the puppies, the largest puppy, without warning, gave Carol a nasty bite on her hand. Dan told Bob to go to the bathroom near the end of the hall to retrieve some bandages.

Forgetting Dan's earlier admonition, Bob opened the door at the end of the hall, thinking it was the bathroom, and entered a darkened room where Dan kept an enormous pet chimpanzee. The chimpanzee jumped between Bob and the door, beat its chest and made menacing hoots. Frightened, Bob stood still.

In attending to Carol's bite, Dan mistakenly grabbed a bottle of heavy-duty solvent, thinking it was a bottle of antiseptic. When Dan rubbed its contents into Carol's wound, she began to scream and shout in pain. Hearing Carol's cries, Bob barged past the chimpanzee, which gave him a deep gash to his head as he passed. Shaken and sore from their injuries, Bob and Carol fled Dan's house.

Bob and Carol filed a lawsuit against Dan to recover for their injuries.

1. What claims may Carol reasonably raise against Dan, what arguments may Dan reasonably make, and what is the likely outcome? Discuss.
2. What claims may Bob reasonably raise against Dan, what arguments may Dan reasonably make, and what is the likely outcome? Discuss.

QUESTION 2: SELECTED ANSWER A

1. Carol v. Dan

Strict Liability - Puppy Bite

Carol could claim that Dan is strictly liable for the injuries caused by the puppy who bit her hand. The owner of a wild animal is strictly liable for any injuries caused by the animal's dangerous propensities. A puppy would likely not be considered a wild animal for strict liability purposes. However, the owner of an animal with known dangerous propensities is also strictly liable for any damages caused by the animal's dangerous propensities. An owner will not be charged with knowing the dangerous propensities unless some circumstances exist which would give him reason to know of the animal's dangerous propensities, such as a prior incident of biting. Here, Carol will argue that Dan should have known that the largest puppy had dangerous propensities. However, this is unlikely to be successful, because the facts indicate that the puppy bit Carol "without warning." Further, it is generally known that puppies have a tendency to nip and chew, but they do not bite hard enough give "nasty bites" often enough that a reasonable person would know of a dangerous propensity to give nasty bites. Thus, Carol will not succeed in showing that Dan should be strictly liable on the basis of a known dangerous propensity. Carol will need to claim for her damages under a theory of negligence.

Negligence - Puppy Bite

Prima Facie Case

Carol can claim that Dan owes her damages for her hand injuries because he was negligent in allowing her to become bitten by the puppy. A prima facie case of negligence requires a showing of duty, breach, proximate and actual causation, and damages.

Duty

Carol must prove that Dan owed her a duty of care. A duty of care is owed to all foreseeable plaintiffs. Where defendant's conduct poses a risk to the plaintiff, his duty of care will run to her. Under the majority view, a plaintiff is foreseeable if she is within the zone of danger created by the defendant's conduct. Under the minority view, a plaintiff is foreseeable if she is injured by defendant's conduct, regardless of whether she was in the zone of danger. Here, Dan's conduct was in showcasing puppies for sale in his living room. Under either test, Carol was a foreseeable plaintiff because she was in the living room, and because she was injured while present there. Thus, Dan owed Carol a duty of care. His specific standard of care is determined by the surrounding circumstances.

Standard of Care

The standard of care applicable to the defendant is based on the circumstances. The default standard of care is to act as a reasonably prudent person would under the circumstances. The defendant's standard of care can be increased based on the setting and his relationship with the plaintiff. Owners or possessors of property are subject to stricter standards of care with respect to entrants upon their property. The specifically applicable standard depends upon the nature of the entry, and the nature of the entrant. Licensees are those who enter onto the land of another with permission, for social purposes. Invitees are those who enter with permission, either to bestow an economic benefit upon the owner, or because the premises are held open to the general public. Here, Carol entered into Dan's living room, and onto his property, with Dan's permission, and for the purpose of looking at the puppies that Dan was selling. It is unclear whether Bob and Carol were looking at the puppies with the intent to potentially purchase one, but because of the nature of the setting, the intent to evaluate for purchase can probably be assumed. In any case, Dan allowed them into the living room for the purpose of potentially selling his puppies. Thus, Carol and Bob were invitees and Dan owed them the duty of care required for invitees.

A landowner's duty of care owed to a business invitee requires him to: make reasonable inspections of the premises, warn of any concealed dangers, and make the premises safe for invitees. Here, Dan allowed Carol to be bitten while she was on the premises. Dan would be required to have inspected not only his premises, but to have observed the puppies and known whether any of them had a propensity to bite. Dan would also be required to take the necessary steps to ensure that business invitees would not be bitten by any of the dogs.

Breach

A defendant breaches his duty of care by failing to live up to the requisite standard of care. Carol will argue that Dan breached his duty of care by failing to observe the dogs sufficiently to determine if any of them posed a risk to the potential buyers who would be entering onto his land. Further, Carol will assert that Dan breached his duty by failing to warn Carol that one or more of the puppies was dangerous. Additionally, Carol will claim that Dan breached his duty by failing to remove the dangerous puppies from the pen where the rest of the puppies were, and where they were available for inspection. Dan will counter that he had no reason to know, despite dutifully watching the dogs, that any of them would bite or would bite hard enough to give a "nasty bite," and further, that the dog who bit Carol did so without warning. However, because Carol was bitten on Dan's premises by Dan's dog, it is likely that Carol can demonstrate that Dan breached the duty of care owed to her as a business invitee. Indeed, Carol can demonstrate that Dan should not have allowed the dogs to be in an open pen where Bob and Carol could freely access them because there was a potential for the puppies to pose a biting risk to invitees.

Actual Cause

Actual cause, or legal cause, is determined under the "but for" test. A defendant's breach will be the actual cause of the plaintiff's injuries if the plaintiff can demonstrate

that but for the defendant's breach, her injuries would not have occurred. If the court finds that Dan did indeed breach his duty of care to Carol, this test will be easily met. But for Dan's failure to warn Carol of the puppy's dangerous propensities, or failure to sufficiently observe the puppies to determine whether any of them had such propensities, as well as his failure to separate the dangerous puppy from the rest of the puppies which were available for inspection and sale, Carol would not have put her hands near the biting puppy such that she would have been bit. Indeed, even if the court finds that Dan breached his duties by leaving the puppies in an open pen where visitors could freely access the puppies, and put their hands near the puppies' mouths, but for this breach, Carol would not have been able to put her hands near the puppy's mouth and would not have been bitten. Thus, Dan's negligence was the actual cause of Carol's injuries.

Proximate Causation

The defendant's conduct will be the proximate cause of the plaintiff's injuries where the injuries suffered were within the increased risk created by the defendant's conduct, and were a foreseeable result of the defendant's conduct. The risk that a person would be bitten, and thus injured, was a foreseeable result of Dan's failure to adequately secure the puppies or ensure that they posed no danger to humans. Dan's failure to secure the dogs or ensure that they were not dangerous clearly created an increased risk that someone would be injured by a biting dog. Thus, Carol's injuries were a foreseeable result of Dan's alleged negligence.

Damages

Any personal injury or property damages are sufficient to support a claim of negligence. Here, Carol's hand injury will be sufficient to support her negligence claim.

In conclusion, if the court finds that Dan was negligent in his failure to ensure a safe premises for visitors who came to inspect his dogs for purchase, and as such breached

his duty to business invitees, Carol can demonstrate that Dan's negligence resulted in her dog bite and as such that Dan is liable for tort damages.

Negligence - Solvent Injury

As explained above, negligence requires a showing of duty, breach, causation and damages. Here, Carol will argue that Dan is also liable for whatever increased damage she incurred as a result of Dan's mistaken cleaning of her wound with heavy duty solvent.

Duty

In general, there is no duty to act affirmatively to come to a person's aid when they are injured. However, a land owner owes a duty of aid to injured business invitees on the premises. Further, where one does begin to render aid, he is under a duty to carry out the rendition of aid reasonably. Where a rescuer acts negligently in giving aid, he will be liable for damages caused by his negligence. Here, Dan's duty of care would be to reasonably render aid.

Breach

Dan failed to act reasonably when he mistakenly cleaned Carol's wound with solvent as opposed to antiseptic. This was not reasonable even under the circumstances. Dan will argue that it was a chaotic and hectic emergency situation, and thus that he did not breach his duty of care. However, any minor inspection of the bottle presumably would have led him to realize that it was solvent, and thus Dan failed to render aid reasonably under the circumstances.

Causation and Damages

But for Dan's using solvent instead of antiseptic, Carol would not have suffered any further aggravation of her injuries. Thus, Dan's negligence was the actual cause of her aggravated injuries. Further, Dan's negligence in failing to care for Carol's wounds created an increased risk that her injuries would be aggravated, and the aggravation of

her open wounds was a foreseeable result of Dan's exposing them to corrosive solvent. Thus, the element of causation will be met. As discussed above, Carol's injuries (as aggravated by the solvent) are sufficient to demonstrate damages. Dan will be liable to Carol for failing to render aid reasonably and exacerbating her injuries as a result.

Defenses-

Contributory Negligence

A plaintiff is also required to act reasonably to prevent her own injuries. Contributory negligence will bar the plaintiff from recovery if the defendant can demonstrate that the plaintiff failed to live up to her own standard of care. Here, Dan will argue that Carol was unreasonable in reaching into the puppy pen without consulting Dan as to whether the puppies were dangerous. If they are in a contributory negligence jurisdiction and the court agrees that Carol was negligent in so doing, she will be barred from recovering. However, it is unlikely that Carol was negligent in failing to inquire, because a reasonable person would not assume that puppies, especially those on open display and available for sale, posed a risk of biting such that it would cause a nasty injury. Thus, Dan will probably not succeed under a defense of contributory negligence.

Assumption of the risk

A plaintiff is similarly barred from recovering if the defendant can demonstrate that the plaintiff subjectively knew of the risk and proceeded anyway, despite that knowledge. Dan will argue that Carol knew there was a risk of being bitten in inspecting puppies. However, there is no indication that Carol knew that by inspecting the puppies she risked incurring a "nasty bite" like the one that she suffered. Dan did not warn of any such risk. Thus, Dan will likely fail to show that Carol was subjectively aware of the risk of being bitten with such severity. This defense will not succeed.

Comparative Negligence

Most jurisdictions have abandoned the harsh results of contributory negligence and assumption of the risk in favor of a comparative negligence regime. Under comparative negligence, if the jury finds that the plaintiff was at fault in causing her injuries, the jury will assign a percentage of fault to the plaintiff and her recovery will be reduced proportionately to her percentage of fault. Under pure comparative negligence, a plaintiff will still be able to recover some damages, so long as the defendant is also negligent, regardless of the percentage of fault assigned to her by the jury. Under partial comparative negligence, when the plaintiff's degree of fault exceeds a certain amount, (usually 51%), she will be barred from recovering.

Dan will argue that Carol was comparatively negligent in handling the puppies despite failing to inquire as to whether they were dangerous. As discussed above, it is unlikely that the jury will find Carol's actions to have been negligent under the circumstances. However, if the jury does so find, her recovery will be decreased accordingly.

In conclusion, Carol will likely succeed in suing Dan for damages for his negligence in failing to make his premises safe for business invitees, and for negligently tending to her wound with solvent instead of antiseptic.

2. Bob v. Dan

Strict Liability

As discussed above, the owner of wild animals is strictly liable for all injuries that occur as a result of the animal's dangerous propensities. Dan owned a chimpanzee, which is considered a wild animal. A chimpanzee's wild nature poses a risk of injury from contact inflicted by the chimpanzee. Here, the chimp inflicted a gash on Bob's head as Bob passed it. Thus, Dan will be held strictly liable for the gash that Bob suffered in moving past the chimpanzee.

Defenses

In jurisdictions that apply contributory negligence, contributory negligence is generally not a good defense to strict liability. However, recovery will be reduced according to the plaintiff's degree of fault in comparative negligence jurisdictions. Further, assumption of the risk may bar recovery under strict liability.

Dan will argue that Bob assumed the risk by entering the room that Dan had instructed him not to go into under any circumstances. However, Dan will not be able to show that Bob assumed the specific risk of the chimp attack because Dan told Bob to go into the bathroom "near the end of the hall," without any further instructions, and because Bob was not warned specifically of what was lurking in the room at the end of the hall. Indeed, a reasonable person would not know that Dan was warning of the danger lurking behind the door, a reasonable person could easily assume that Dan warned not to go into the room because it was messy, or because someone was sleeping inside. Thus, because Bob did not subjectively know there was a chimpanzee behind the door that he opened, he cannot be said to have assumed the risk of injury caused by the chimp under the circumstances.

Dan will also argue that Bob was comparatively negligent in going into the door that Dan had told Bob and Carol not to enter. Bob will counter with the fact that Dan's warning was not sufficiently serious to make Bob aware of the dangerous chimp in the room. Further Bob will argue that Dan's later instructions, to go to the bathroom "near the end of the hall" were so unclear as to nullify his prior warning. Indeed, Dan's failure to instruct Bob as to exactly which room was the bathroom will likely prevent a jury from finding that Bob acted negligently under the circumstances. Further, it was an emergency situation, so a reasonably prudent person under the circumstances would not have paused to question which door "at the end of the hall" was the bathroom and which was the one he was warned not to enter. Thus, Dan will not succeed in arguing that Bob was contributorily negligent and will be strictly liable for the damages Bob suffered.

Negligence

As discussed above, Dan owed a duty to inspect the premises, warn of any dangers, and make the premises safe, to both Bob and Carol. Bob will successfully argue that owning a vicious chimp and not securing the chimp, or warning Bob and Carol of its existence breached this duty of care. However, land owners owe no duty to business invitees where invitees exceed the scope of their invitation, i.e. by entering an area marked "do not enter," or "employees only." Dan will argue that when Bob entered the room, he exceeded the scope of his invitation because Dan had previously told both Bob and Carol not to enter the room with the chimp, "whatever [they did]."

Bob will counter that when Dan told Bob to go to the bathroom near the end of the hall, Dan's prior warning ceased to be effective. Indeed, Bob did not intend to exceed the scope of the invitation, and he was genuinely confused as to which door led to the bathroom. Dan's instructions were confusing and incomplete. Bob did not act unreasonably under the emergency circumstances in exceeding the scope of the invitation. Dan negligently failed to ensure that his premises were safe for visitors, and failed to warn Bob as to what danger lurked behind the bathroom door. Thus, Bob can also assert a successful claim for negligence against Dan.

Dan will argue the same defenses as under strict liability, with the addition of a contributory negligence defense, but for the reasons discussed above, they are unlikely to succeed.

So long as the jury does not determine that Bob exceeded the scope of his invitation, Dan will be liable for Bob's injuries under a theory of negligence. Dan will also be found liable for Bob's injuries under a theory of strict liability because a chimpanzee is a wild animal.

QUESTION 2: SELECTED ANSWER B

1. Claims of C against D

Strict Liability

An animal owner is strictly liable for injuries caused by a domestic pet, only if the owner had prior notice of a dangerous propensity by the animal. Some jurisdictions impose strict liability on owners for dog bites. Here, C received an injury caused by the puppy in the form of a nasty bite that required medical attention. However, it does not appear that D had notice of the puppy's propensity to bite. D is selling eight week old puppies. The puppies are domestic animals. They were very young, giving little opportunity for D to notice if the puppies had any dangerous propensities. The largest puppy bit C "without warning." Thus, it is unlikely that D had notice of the puppy's tendency to bite and D will not be held liable for strict liability in a majority of jurisdictions. D may be liable in a jurisdiction that imposes strict liability on owners for dog bites.

Negligence

A negligence action requires (1) duty; (2) breach of duty; (3) causation; and (4) harm.

Dog Bite

Duty

A landowner or possessor of land has a duty to invitees to inspect for dangerous conditions and take reasonable steps to cure any concealed dangers or warn the invitee of the danger. The landowner must also carry out activities on the land with due care to invitees. In some jurisdictions, a landowner owes a reasonable duty of care to all persons who enter the property. The standard of care depends on what a reasonably

prudent landowner would do under similar circumstances. A person with special knowledge or expertise must use that knowledge and skill in exercising their duty of care. Here, C and B were entering onto D's property as invitees to buy puppies that D had for sale. Thus, D owed a duty of care to C and B.

D also owed a duty of care to C and B as an animal owner. Under the majority (Cardozo) view, D has a duty to all foreseeable plaintiffs within the "zone of danger" created by D's animal ownership. Under the minority (Andrews) view, D had a duty to all plaintiffs. A person who is injured by a dog bite when interacting with a dog is a foreseeable plaintiff within the "zone of danger" of the dog's mouth. Thus, under both views, C was a foreseeable plaintiff.

Breach

Here, D had a duty of care to inspect for dangerous conditions and cure any concealed danger or properly warn C and B. The puppies were not obvious dangers, because puppies are generally considered to be "cute," friendly, and small. Here, D is a dog breeder. D must use his knowledge and skill as a dog breeder in exercising care. If D has learned that some puppies are dangerous, then D must exercise reasonable care in keeping the puppies behind a gate or in a kennel and bringing out puppies one at a time to meet potential buyers so the puppies do not become overexcited. Further, D could have warned C and B how to act around the puppies and how to take care in case the puppies do something unexpected. However, if the dog bite was truly unexpected, then D may not have breached his duty. However, the average dog breeder would likely take steps to keep the puppies calm and warn buyers of potential dangers. Thus D likely breached his duty of care.

Causation

The breach must be both the direct cause and the proximate cause to be the causation of the harm.

Direct Causation

A breach is the direct cause of an injury if the injury would not have occurred "but for" the breach. Here, C's injury would not have occurred if the puppy had been properly restrained. Thus, D's breach is the but for cause of C's injury.

Proximate Causation

Proximate causation requires that the injury not be too remote or attenuated from the breach that is the "but for" cause of the injury. For proximate causation, the harm must be of the type that is foreseeable or a natural or probable cause of the breach. Here, C was bitten by a dog. A dog bite is a foreseeable result of a dog owner's negligence.

Harm

Generally, the harm must be physical or property damage, rather than simply economic harm. Here, C suffered a physical injury in the form of a nasty bite to her hand. Thus, the element of harm is satisfied.

Negligent Rescue

See rules above re negligence cause of action.

Duty

Generally, a person has no affirmative duty to act to assist an injured person. However, a person who originally puts another in peril or who elects to assist a person in peril has a duty to assist the victim non-negligently. The rescuer must avoid any unreasonable harm to the victim by acting as a reasonably prudent person under the circumstances. Here, D arguably put C in peril by allowing her to interact with the puppies without restraints or proper warnings to C. Regardless, D elected to come to C's aid once he saw the dog bite. Thus, D owed a duty of care to C.

Breach

See rule above. Here, D grabbed a bottle of heavy duty solvent thinking it was a bottle of antiseptic and applied it to C's injuries. A reasonably prudent person would check the label before applying the chemical to C's wounds. Further, a reasonably prudent person may not have stored dangerous chemicals next to first aid agents in the first place to avoid such a situation. Thus, D did not act as a reasonably prudent person under the circumstances and breached his duty of care.

Causation

See rule above.

Direct Causation

Where there are two causes of an injury, a cause is a direct cause if it is a substantial factor in the injury. Here, C's initial injury was from the dog bite. D's application of chemical solvent to the wound caused C considerable additional pain and may cause additional damage because it is not meant to be applied to skin, let alone broken skin. Thus, D's action was a substantial factor in C's injury that satisfied direct causation.

Proximate Causation

See rule above. Here, it is foreseeable that application of chemical solvent to a wound will create extreme pain and will likely cause additional damage because it is not meant to be applied to human skin. Thus, causation was proximate.

Harm

See above. This element is satisfied.

In conclusion, C likely has a valid claim for negligence with respect to the dog bite and the subsequent negligent aid by D. C is unlikely to have a valid claim for strict liability due to the lack of notice to D of the particular puppy's dangerous tendencies, unless they are in a minority jurisdiction that holds owner's strictly liable for dog bites.

Defenses

Contributory Negligence

In a jurisdiction that applies contributory negligence, a plaintiff is barred from recovery if the plaintiff's own negligence contributed to her injury. Here, C had no warning the puppy would bite her or that she was in danger. C likely did not have an opportunity to see or object to the application of the solvent. Thus, this defense is unlikely to apply.

Comparative Negligence

In a majority of jurisdictions, the plaintiff's own negligence only reduces the plaintiff's total recovery in the case by the percentage of the plaintiff's own negligence compared to the defendant's. As noted, C likely did not contribute to her own injury. Thus, this defense is unlikely to apply.

Assumption of the Risk

A person who knowingly and voluntarily assumes the risk of her activity will be barred from recovery. In a comparative negligence jurisdiction, assumption of the risk usually only reduces the plaintiff's recovery. Here, C had no warning regarding the puppy's tendency to bite. As described above puppies are considered non-threatening to the average person. Thus, she could not have knowingly assumed the risk. This defense will fail.

Damages

A plaintiff in a tort action is entitled to damages that put them in the position they were in before the harm. Here, C will be entitled to medical expenses, pain and suffering, and lost past and future earnings if the dog bite causes her to miss work or reduces her ability to work.

2. Claims of B against D

Strict Liability

The owner of a wild animal is strictly liable for injuries cause by an unrestrained wild animal. Warnings will not suffice to prevent liability to the owner. Here, D owns a chimpanzee, a wild animal. The chimpanzee was confined to the back room in which the chimpanzee was unrestrained. Confinement to the back room is not restraining the chimpanzee because the door was not locked. As a result Bob, and probably the chimpanzee, was easily able to open the door. Thus, unless a defense applies, D will be strictly liable for the injuries the chimpanzee caused.

Negligence

See rules above. Here, D had a duty to B as a chimp owner and landowner. D breached that duty because D did not give Bob a proper warning because he simply told Bob not to go in the back room without informing him of the presence of a wild animal, which would have made more of an impression on Bob. D could have also locked the door to prevent access to the chimp. Thus, D breached his duty of care which caused B's gash by the chimp. In conclusion, D was negligent.

Defenses

Trespassers

An owner is not strictly liable for injuries by a wild animal to trespassers. Further, a landowner is generally not liable for injuries to an undiscovered trespasser. A trespasser physically invades property without the owner's consent, or exceeding the scope of the owner's consent. Here, B was told not to go into the back room, but he did so anyway. B exceeded the scope of D's consent and was therefore a trespasser. Thus, D is not liable to B because B trespassed into the back room.

Assumption of the Risk

See above. Assumption of the risk is generally not a defense to strict liability for wild animals. Further, Bob did not know about the concealed chimpanzee. Thus, this defense will not apply to either cause of action.

Contributory Negligence

See above. B went into a back room where D told him not to go. B's contribution is likely minimal, given B did not understand why he should not go into the back room. Thus, this defense is likely not to apply.

Comparative Negligence

See above.

Damages

See above.

QUESTION 3

Lois rented a furnished apartment in her building to Tammy, a medical student, for nine months, beginning June 1. Tammy prepaid the first month's rent. When Tammy arrived at the apartment on June 1, Ralph, the prior tenant, was still there despite the fact Ralph's rental term had ended on May 15. Tammy complained to Lois and Lois was able to evict Ralph by June 15. Tammy took possession of the apartment on June 16.

The apartment above Tammy's was occupied by Coco, a member of an up-and-coming band, The Gyrations. The band's daily rehearsals interfered with Tammy's studies so much that she complained repeatedly to Lois about the continuing noise. On July 15, The Gyrations were arrested at Coco's apartment for disturbing the peace. After that Tammy was spared the noise from rehearsals.

Beginning July 16, the shower in Tammy's apartment delivered only cold water. Tammy complained, and Lois promptly hired a plumber to fix the problem. The repair only worked for a week. Tammy was too busy with her studies to tell Lois.

On August 30, Tammy's stove in her apartment stopped working. On August 31, Tammy, disgusted with all these events, knocked on Lois's door, gave the key to Lois, and said, "This place is a zoo; I wouldn't live here if you paid me!" Lois took the key and said, "Sure, okay, if that's how you feel." Tammy stopped paying rent and never returned to the apartment.

Lois commenced a lawsuit against Tammy for breach of her lease and special damages for past due and prospective rent.

What arguments may Lois reasonably raise in support of her lawsuit, what counterclaims and defenses may Tammy reasonably assert, and what is the likely outcome? Discuss.

QUESTION 3: SELECTED ANSWER A

Rights and Duties of Lois and Tammy

Duties of Landlord

In general, landlords owe tenants a duty to deliver possession. Although the traditional rule required only the delivery of constructive possession, such as by providing a key to the property, most states follow the modern rule of requiring the delivery of actual, physical possession. Lois has therefore breached this duty by failing to evict or otherwise remove Ralph, the prior tenant who became a holdover tenant after the term of his lease ended. Although Tammy was able to take possession by June 16, her lease started on June 1. Ralph's lease had ended on May 15, and Lois failed to evict him for more than two weeks before Tammy's lease began. Tammy therefore has a valid claim/defense against Lois for being constructively evicted from her apartment from June 1 through June 15. Tammy should not be liable for payment of rent during this period.

Landlords in residential leases also generally have a duty to make repairs. Even if a lease places this duty on the tenants, courts will still find that it rests with the landlord. Landlords are permitted to engage professionals to make repairs - there is no obligation that they do so themselves. Lois likely satisfied this duty with respect to the hot water issue by immediately hiring a plumber. Lois was not made aware of the faulty stove (as discussed below) and therefore could not have reasonably arranged for its repair, such that she should not be found to have violated this duty.

Please see below (implied warranty) for further discussion of repairs.

Covenant of Quiet Enjoyment

Landlords also generally are required to comply with the covenant of quiet enjoyment. This doctrine requires that landlords not interfere, or permit others (such as other tenants in a multi-unit property) to interfere, with one's right to use, possess and enjoy their possessory interest. Tammy will argue that Lois breached this covenant by permitting *daily* band rehearsals in the upper floor apartment, as Lois had the right to stop such rehearsals in her capacity as landlord. Although Lois may respond that Tammy suffered only because of her unique study requirements as a medical student, such that Lois did not cause or permit the Gyration to surpass an objective level of loudness so as to interfere with Tammy's quiet enjoyment of her property, this is a failing argument because the Gyration was all arrested in the upper apartment during a rehearsal for disturbing the peace. In general, a tenant can suffer a breach of the covenant without giving rise to an arrest for disturbing the peace, but that should be completely sufficient for Tammy's claim. Moreover, Lois was on notice of the issue because Tammy had repeatedly complained to her.

Because Lois likely breached this covenant, Tammy could seek remedies. A tenant that has suffered a breach of this covenant must give notice to the landlord to take remedial action. Failing any remedial action, the tenant is permitted to give notice of her constructive eviction and cease paying rent. See below for discussion of damages. Although Tammy may be likely to reduce her rent during this period, the grounds for constructive eviction ceased once the Gyration was arrested.

Implied Warranty of Habitability

Residential leases only are subject to an implied warranty of habitability. This requires that the landlord deliver the property in a condition fit for ordinary residential use. This implied warranty generally requires landlords to provide electricity, heating, hot and running water. A tenant must give notice to the landlord if a breach has occurred, and they may either refuse rent during the period of breach, make repairs and deduct the costs from their rent, or vacate the premises until remedied. Here, the hot water failed

in Tammy's apartment on July 16. T promptly gave notice to Lois as required, and Lois promptly hired a plumber to repair the problem. The problem, however, occurred again in one week. Again, Tammy was obligated to give Lois notice of the issue. Tammy failed in this regard because she was too busy with her studies. Because Lois was not on notice of the problem (that she reasonably would have believed had been solved the previous week), Lois should not be found to have violated the implied warranty with respect to the water.

Tammy may also allege that Lois violated the implied warranty because the stove failed. This is not as critical a failure as a lack of heating or electricity, and the implied warranty does not typically extend to include household appliances, even those useful for making food. Further, although the stove did break, Tammy never informed Lois of that fact. Rather, Tammy instead moved out the next day without mentioning the stove, such that Lois should not be found to have violated the warranty.

Duties of Tenant

In general, a tenant has two key duties: pay rent and not commit waste. Lois may bring a claim against Tammy on both grounds.

Waste

First, Lois may argue that Tammy committed waste by failing to inform her of the second time the hot water failed. There are three types of waste: affirmative (tenant intentionally destroys or reduces value of property), permissive (tenant's negligence causes damage or otherwise reduces value of property), and ameliorative (tenant alters the property, even in an economically valuable way, without landlord's permission). Here, Lois may claim that Tammy committed permissive waste because Tammy was aware that the hot water did not work but did not take any steps to inform Lois or otherwise fix the issue because she was too busy. Her alleged negligence may cause

potential and ongoing problems with the water if it remains unfixed. Lois may therefore seek damages to satisfy this waste claim.

Rent

As noted, a tenant has the duty to pay rent. As discussed above, however, there are instances in which a tenant may refuse to pay, reduce, or otherwise withhold (such as in an escrow account) rent.

General

The facts indicate that Lois and Tammy entered into a lease or tenancy for years. Despite its name, this lease is simply a lease for a fixed period, such as nine months in this case. (Leases, because they are interests in real property, must generally be in writing to satisfy the statute of frauds even if under one year in length). This lease is different from a periodic lease, such as month-to-month, because it has a definite end-point that the parties have agreed upon.

Termination of Lease

A tenancy for years will automatically terminate at the expiration of its term. Continued tenancy following the lease can give rise to a periodic tenancy or a holdover tenancy. A lease can also terminate through an action for eviction or by mutual agreement of the parties. Here, Tammy will allege that the lease terminated instead on August 31.

Tammy will assert that because she made evident her desire to end the lease by saying the "place was a zoo" in which she could not be "paid" to live, and because Lois responded by saying "sure, okay" and taking back the key, the parties mutually agreed to terminate the lease on August 31. Lois may aver that her expression was not an affirmative agreement to end the lease but rather a surprised reaction to "how [Tammy] feels," such that the lease should not be viewed as terminated. But in light of Tammy's

express statement that she would not continue living there and turning over the key, Lois's actions may be seen as an agreement by silence, such that any reasonable landlord would challenge it if they wanted to. Because Tammy stopped paying rent and never returned to the apartment, she will argue that she does not owe any more rent. Regardless of the ultimate disposition of Tammy's defense, Lois is required to mitigate damages by taking reasonable steps to rent out the property once Tammy leaves, but Lois will not be responsible if she cannot find a suitable renter after taking reasonable steps.

Damages

As discussed above, Tammy was within her rights to withhold rent because of her constructive eviction during Ralph's holdover tenancy. Tammy would then be responsible for rent from June 16 onward. But because Tammy also has a valid claim for breach of the covenant of quiet enjoyment from June 16 through July 15, Tammy's rent obligations would thus begin on July 15 instead. Tammy would not have a claim to breach of the implied warrant with respect to the water or stove as discussed, so her obligation to pay rent would continue from July 15 through the end of her lease. The lease ended at earliest on August 31 as discussed above. But because Tammy paid only one month's advance rent, she is still at least a half-month behind in her rental payment. Further, Tammy's claim to being constructively evicted appears either irrelevant or moot on August 31: the hot water does not work likely as a result of Tammy failing to inform Lois; Tammy never gave notice to Lois about the stove; and the issue with the Gyration's stopped more than a month previously. Tammy's constructive eviction claim has been resolved after which she continued living in the apartment, and Tammy has no other grounds to terminate the lease. But if the lease is found to have mutually terminated, Lois can still claim back rent but not prospective rent.

QUESTION 3: SELECTED ANSWER B

Lois's Claim Against Tammy

Type of Lease

A term of years lease is one that terminates on a specific date.

Here, the lease was for a specific nine month period starting on June 1. This makes it a term of years lease.

Duties of Tenant

In a term of years lease, the tenant is obligated to pay rent for the period of the lease unless that duty is relieved by some breach of duty by the landlord. Traditionally, the duties under a lease were independent of each other such that a breach of one duty would not relieve the other of their obligations. However, modernly, the duties under a lease are dependent on each other. Therefore, if the landlord breaches her duties under a lease, that may relieve the tenant of her obligation to continue paying rent. If, however, the tenant breaches her duty without an appropriate reason, the landlord is entitled to damages for the unpaid rent for the remainder of the lease term, subject to the landlord's duty to mitigate losses by re-letting the premises.

Here, Lois will argue that Tammy breached the lease improperly and without justification and therefore, Tammy is liable to Lois for the rent for the remainder of the lease term. Tammy paid rent for three months until her abandonment of the lease on August 30. This would leave a remaining 6 months of rent that Tammy would owe to Lois.

Surrender

When a tenant breaks a lease and surrenders, it generally must be in writing if the lease term was over 1 year. Because this lease was for only nine months, the surrender did not need to be in writing.

When a tenant surrenders the lease, and the landlord accepts the surrender, the landlord owes a duty to mitigate losses. Here, Lois responded to Tammy's surrender by

stating, "sure, ok, if that's how you feel." This would imply acceptance of the surrender, and would obligate Lois to mitigate her damages by attempting to re-let the premises.

Tammy's Defenses

Tammy's duty to pay rent for the remainder of the term may be mitigated or eliminated if she can show that Lois breached her duties under the lease.

Duties of Landlord

Duty of Possession

A landlord owes a duty to deliver possession of the premises to the tenant.

Traditionally, this simply required providing the right to possession, but not actual possession. However, modernly, the landlord is required to deliver actual possession of the property and is required to remove any holdover tenants prior to the commencement of the lease.

Here, Lois did not provide possession of the premises at the beginning of the lease. Instead, Ralph was in possession of the property at commencement of the lease. Lois did finally remove Ralph 15 days later and Tammy was able to possess the premises. Technically, Lois was in violation of her duties under the lease by failing to provide possession. This could have given Tammy the opportunity to break the lease, however, she did not pursue this action.

Duty to repair

Generally, there is no general duty of a landlord to repair or maintain the property. However, there are special duties in relation to the duty of habitability and quiet enjoyment as discussed below which may create a duty to repair.

Implied Warranty of Habitability

In every residential lease, a landlord owes an implied duty of habitability to make the premises suitable for human habitation.

Here, Tammy may be able to establish that Lois breached this duty when the shower started delivering only cold water, or when the stove stopped working. However, it is unlikely that either of these issues would render the apartment unsuitable for human habitation. In addition, when Tammy notified Lois of the shower issue, she promptly sent a plumber to fix the problem. And, when the fix did not work, Tammy failed to notify Lois again of the issue.

With regard to the stove, Tammy never notified Lois of the problem so she had no opportunity to repair

Because the issues were minor and likely did not render the facility unsuitable for human habitation, and because Tammy failed to pursue the issue and notify Lois of the continuing problems, it is unlikely that a court would find that Lois was in breach of the warranty of habitability in such a way that it would allow Tammy to terminate payment of rent.

If, a court did find these issues to be sufficient, however, Tammy's obligation to pay rent may have been terminated, or Tammy could have remained and sued for the cost or repair, or withheld the cost of repair from her rent.

Implied Warranty of Quiet Enjoyment

Implied in every lease is a warranty of quiet enjoyment where the landlord will not disturb the tenant from their ability to use and enjoy the property. A breach of this covenant may exist when the landlord fully or partially evicts the tenant, or if the landlord fails to repair a condition that significantly impairs the tenant's ability to use and enjoy the property.

Constructive Eviction

There are no facts to show that there was an actual eviction of Tammy, such that Lois prevented Tammy from using all or part of the property. However, Tammy may argue constructive eviction under two theories. Constructive eviction exists when 1) there is a wrongful action by the landlord such as a breach of duty, 2) the tenant timely notifies the landlord of the issue, 3) the breach or issue significantly interferes with the tenant's use and enjoyment of the property, and 4) the tenant abandons the property.

The Band

First, Tammy may argue that the band practices of The Gyration's significantly interfered with her use and enjoyment of the property because the practices interfered with her ability to study. However, it is unlikely that Tammy will succeed on this claim because, although Tammy complained repeatedly about the issue to Lois, it is not totally apparent that Lois breached her duty to Tammy. The band was removed from the premises only one month after Tammy moved in. It is not immediately clear whether their removal was instituted by Lois or another tenant. However, it is not immediately clear from the facts that Lois failed to heed Tammy's complaints about the band. In addition, even though the band interfered with her use and enjoyment of the property, Tammy failed to abandon the property at the time. She did not abandon the property until a month and a half later, after the band had been removed and her enjoyment was no longer disturbed.

Therefore, it is not likely that Tammy can show constructive eviction due to the band's noise because she did not abandon the property in a sufficient time, and the issue was remedied shortly after it began.

Issues in the Apartment

Second, Tammy may assert constructive eviction due to Lois's lack of repairs of the issues in the apartment which substantially interfered with her use and enjoyment of the property. However, this theory is also not likely to succeed because, as discussed above, Tammy failed to notify Lois of the fact that the shower continued not to work, or that the stove was broken. When the stove stopped working, she simply moved out without notifying Lois or giving her an opportunity to fix the issue. Without proper notice,

Lois could not have breached her duty to Tammy because she did not know of the issue.

Because there was lack of notice and lack of a breach of duty by Lois, it is unlikely that Tammy will succeed on a claim of constructive eviction against Lois.

Lois's Damages

Here, the damages to which Lois is entitled are based on her duty to mitigate. Contract damages must be causal, foreseeable, certain, and unavoidable. Under a lease contract, the landlord owes a duty to mitigate damages by re-letting the premises. In addition, the landlord is only entitled to those damages that are certain and unavoidable.

Therefore, Tammy should not be liable for any future rent on the premises if Lois was able to re-let the premises to someone else in order to mitigate her damages, and she definitely is not liable for any prospective rent that she did not owe under the lease because those prospective rent damages were not foreseeable from the lease contract. In addition, the prospective rent damages are likely not certain.

The facts do not indicate whether Lois attempted to re-let the premises. However, if she failed to do so, Tammy may assert this as a defense in order to reduce the damages that she owed to Lois under the lease.

Statute of Frauds

The statute of frauds requires that contracts creating interests in land, including leases over one year, must be in writing.

Because this lease is for nine months, it is not subject to a statute of frauds defense. Therefore, if it was not in writing, this defense could not be asserted.

QUESTION 4

Dave is domiciled and owns a house in California on the state line adjacent to Petra's house in Nevada. Petra is domiciled in Nevada.

Dave installed a large rainwater tank near the property line, which leaked. One day, the water tank fell over onto Petra's property, landing on her retaining wall, which buckled. Petra sued Dave for negligence in federal court seeking \$100,000 to replace the retaining wall, claiming it failed because the water tank, weakened by leaks, landed on it.

At the jury trial, Petra testified that she had complained to Dave several times over the prior decade that the water tank leaked and that he had done nothing. She also testified that the retaining wall was only a couple of years old.

Petra then called Walt, a water tank repairman, who testified that when he repaired Dave's water tank after it fell over, Dave instructed him to caulk all the joints so that it wouldn't leak. Petra rested her case.

Dave called Gwen, Petra's gardener, who testified that she had met with Petra the day before the water tank fell and, while they inspected the retaining wall at issue, she saw it was old and had structural cracks that could cause it to fail, pointed this out to Petra, and told her that it would cost at least \$100,000 to replace it. Gwen testified that Petra had replied, "You're right. It's at least 30 years old."

The jury returned a verdict in favor of Petra and awarded her \$20,000 in damages. Dave filed a motion to dismiss based on lack of subject matter jurisdiction, which was denied. Dave properly appealed the verdict.

Assume all appropriate objections and motions were timely made.

1. Should the court have admitted:

A. Petra's testimony about her complaints to Dave about the leaks? Discuss.

B. Walt's testimony that Dave instructed him to caulk all the joints so that the water tank wouldn't leak? Discuss.

C. Gwen's testimony

- i) That the retaining wall was old? Discuss.
- ii) That the retaining wall had structural cracks that could cause it to fail and that it would cost \$100,000 to replace it? Discuss.

D. Gwen's testimony about Petra's reply, "You're right. It's at least 30 years old." Discuss.

2. Did the court properly deny Dave's motion to dismiss based on lack of subject matter jurisdiction? Discuss.

Answer all questions according to federal law.

QUESTION 4: SELECTED ANSWER A

A.) PETRA'S TESTIMONY ABOUT HER COMPLAINTS TO DAVE

In order to be properly admitted all evidence must be relevant and not be excluded under the Federal Rules of Evidence.

RELEVANCE

All evidence must be logically and legally relevant. Logical relevance means that the evidence tends to make a material fact more or less likely. Legal relevance refers to a judge's discretion to exclude evidence if its probative value substantially outweighed by the risk of unfair prejudice, confusion to the jury, or unreasonable delay.

Here, the evidence is relevant because the issue in the case is whether Dave was negligent in maintaining the water tank that landed on Petra's retaining wall. Petra also contends that the failure of the water tank was due to leaks. The fact that she notified him of the leaking would tend to make it more likely that Dave was negligent in not repairing the tank before it fell. Thus, the evidence is logically relevant. There also does not appear to be any obvious risk of unfair prejudice to the defendant, so it would not be excluded under legal relevance balancing.

HEARSAY

Hearsay is an out of court statement offered to prove the truth of the matter asserted. This applies even to the testifying witness's own statements if they were made out of court. If a statement offered by a witness is offered to prove something other than the truth of the matter asserted, it will be admitted as non hearsay. Otherwise, if it is hearsay, it must fall within an exception to be admissible.

Here, Petra is testifying that she had complained to Dave several times over a decade that the water tank leaked. If offered to prove that the tank did in fact leak, then it would be hearsay and would need to fall under an exception. However, if it is not offered for that purpose, it may be admissible for the other limited purpose.

EFFECT ON THE LISTENER

Statements offered to show the effect on the listener are classified as non hearsay under the FRE. However, the defendant has a right to request a limiting instruction so that the jury does not use the statement to prove the truth of the matter asserted (i.e. inadmissible hearsay).

Here, Petra's complaints can be offered to show that Dave knew about something and did not act in response; thus it is offered to show the effect it had on Dave.

CONCLUSION

Therefore, the testimony is admissible for this purpose and if Dave requested a limiting instruction, it should have been granted. The court did not err in admitting this testimony.

B.) WALT'S TESTIMONY THAT DAVE INSTRUCTED HIM TO CAULK THE JOINTS SO THAT THE WATER WOULDN'T LEAK

RELEVANCE

See rule above. Here the testimony is relevant because it tends to make it more likely that there was problems with the water tank and that Dave requested to have the leaking joints repaired. There also does not appear to be any significant risk of unfair prejudice here. Thus, the evidence is relevant.

HEARSAY

See rule above. Here, Walt is testifying regarding what Dave said to him in requesting repair of the water tank after it fell over. It is being offered to prove that the water tank was in fact leaking, which is at issue in the case. Therefore, it is hearsay and must fall within an exception.

PARTY ADMISSION

A statement by a party opponent is admissible as a hearsay exemption when offered against that party. Here, Dave is a party opponent and his statements are being used against him in this testimony. Thus, the party admission exemption would apply.

SUBSEQUENT REMEDIAL MEASURES

There is a public policy exclusion for evidence of subsequent remedial measures taken when offered to show fault. Here, Dave's statements ordering Walt to caulk the joints so that it wouldn't leak after the water tank fell over onto Petra's property is evidence of a subsequent remedial measure taken in order to show fault. Thus, it should be excluded under the public policy exclusion.

CONCLUSION

The court erred in allowing Walt's testimony, as it should have been excluded as evidence of a subsequent remedial measure.

C.) GWENS TESTIMONY

i) TESTIMONY THAT THE RETAINING WALL WAS OLD

RELEVANCE

See rule above. Here the evidence is relevant because it tends to make show that the wall was old and fell due to that, rather than due to Dave's negligence. As with the previous evidence, there does not appear to be a risk of unfair prejudice that the judge should have determined inadmissibility based on those grounds.

EXPERT WITNESS TESTIMONY

In order to properly admit testimony as expert witness testimony, the following must be met: (i) it must be helpful to the jury, (ii) the expert must be qualified in the field, (iii) the

expert must have a proper factual basis, (iv) and the expert must have used reliable methods and applied them reliably.

Here, Gwen is a gardener who is testifying about her inspection of the retaining wall with Petra. While the testimony would be helpful to the jury in determining whether the wall fell due to its age, it is unlikely that Gwen can meet the other requirements to qualify as an expert witness. There is no evidence offered that shows that Gwen had a proper factual basis for her testimony, nor that she is qualified in determining the age of the wall. Thus, the testimony would not be properly admitted as expert witness testimony.

LAY WITNESS TESTIMONY

In order for a witnesses testimony to qualify as lay witness opinion testimony, it must be (i) helpful to the jury, (ii) be reasonably ascertainable based on the perceptions of a layperson, and (iii) not based on any scientific fact or specialized knowledge.

Here, Gwen is stating that she saw the wall was old. This is helpful for determining the quality of the wall and whether the wall fell due to its age or Dave's negligence. The age of a wall would be reasonably ascertainable by an average person, as plenty of signs can signal a wall's age, such as cracks, or growth of ivy, and the like. The opinion does not appear to be based on any specialized knowledge. Thus, it is lay witness testimony.

CONCLUSION

The court properly admitted the testimony regarding the wall's age as lay witness testimony.

ii) TESTIMONY THAT THE WALL HAD STRUCTURAL CRACKS AND IT WOULD CAUSE \$100,000 TO REPLACE IT

RELEVANCE

See rule above. Here, the testimony is relevant for the same reasons as the testimony regarding the age of the wall above. Thus, it is relevant.

EXPERT WITNESS TESTIMONY

See rule above. Here, again, Gwen does not appear to have the qualifications to be able to speak authoritatively on the structural soundness of the wall or the price to repair it. If Gwen was in fact a builder of retaining walls, then she would be qualified. However, this qualification was not established in the facts given.

Therefore, Gwen likely doesn't qualify as a proper expert witness on these issues.

LAY WITNESS TESTIMONY

See rule above. Here, Gwen's testimony is helpful for the same reasons as the age of the wall. However, the structural soundness of the wall and the cost to replace it are not matters that would be reasonably ascertainable by a layperson. If this perception was in fact based on some kind of specialized knowledge, that it definitely does not qualify as lay witness testimony.

CONCLUSION

The court erred in admitting the testimony regarding that structural cracks and cost to replace the wall, as a proper factual and qualification basis was not established for expert testimony and it does not qualify as admissible lay witness testimony.

D. GWEN'S TESTIMONY ABOUT PETRA'S REPLY TO HER

RELEVANCE

See rule above. Here, the testimony is relevant as it tends to discredit Petra as a witness since she claimed in her testimony that the wall was only a couple of years old. It also tends to prove that the wall was in fact old, which could have led to its collapse and would reduce Dave's liability in negligence. There does not appear to be any risk of unfair prejudice. Thus, the evidence is relevant.

HEARSAY

See rule above. Here, the testimony regarding Petra's statement, if offered to prove both the age of the wall and that Petra knew the wall was old and needed replacing,

would be hearsay as it would be offered to prove the matter asserted. Thus, it must fall under an exemption or exception, or be used for a non hearsay purpose.

PARTY ADMISSION

See rule above. Here, Petra admitting that the wall was old is being offered against her by the defendant. Thus, it would be admissible under this exemption to hearsay.

PRIOR INCONSISTENT STATEMENT

A witness can be impeached based on prior inconsistent statements, however, the witness must be available and they must be given a chance to explain the statement.

Here, Petra is an available witness who testified that the water tank was only a couple of years old. The statement she said to Gwen is inconsistent with this statement.

However, since the other statement was not given under oath, it cannot be used for substantive purposes. It can only be offered for the limited purpose of impeachment. However, the statement falls under a party admission, so it can be admissible for both.

CONCLUSION

The court properly admitted the testimony regarding Petra's statement as a party admission and an impeachment based on a prior inconsistent statement.

2) MOTION TO DISMISS BASED ON LACK OF SUBJECT MATTER JURISDICTION

A party can file a motion to dismiss for lack of subject matter jurisdiction at any time. In order to determine whether the motion was denied improperly, it must be determined whether the court, in fact, had subject matter jurisdiction over the case at issue.

SUBJECT MATTER JURISDICTION

In order for a federal court to have subject matter jurisdiction, it must either have federal question jurisdiction or diversity jurisdiction.

Federal Question Jurisdiction

Federal question jurisdiction exists when the claim arises out of federal law, including Constitutional rights, treaties, and the like. Here, the claim is based on negligence which is based on state tort law. Thus, federal question jurisdiction is not present and there must be diversity jurisdiction in order to hear the case.

Diversity Jurisdiction

Diversity jurisdiction requires (i) complete diversity between the plaintiffs and the defendants, and (ii) an amount in controversy exceeding \$75,000.

Complete Diversity

Complete diversity means that each plaintiff is a resident of a different state than each defendant. Residency is determined by domicile which is shown by a physical presence in a state and an intent to remain there.

Here, Dave is domiciled and owns a house in California. Although it is on the state line, the facts state that it is in fact in California, thus he is a California resident for the purposes of diversity. Petra is domiciled in Nevada.

Thus, there is complete diversity between the plaintiff and the defendant.

Amount in Controversy

The amount in controversy must exceed \$75,000. This only requires that it be legally plausible that the defendant could receive those damages based on the injury. The actual amount of damages awarded has no bearing on whether the amount in controversy is satisfied for purposes of diversity jurisdiction.

Here, the amount in controversy is \$100,000. There appears to be evidence supporting the legal plausibility of this claim, given that Petra's gardener stated that it would cause \$100,000 to replace to retaining wall when called by Dave on the stand. Given that there is no reason to doubt that there is a legal plausibility of Petra's claim, the amount in controversy is also satisfied.

CONCLUSION

The court properly denied Dave's motion to dismiss based on lack of subject matter jurisdiction, as the federal court had diversity jurisdiction over the claim.

QUESTION 4: SELECTED ANSWER B

1A. PETRA'S TESTIMONY

Relevance

All evidence must be logically and legally relevant to be admissible. Evidence is logically relevant if it has any tendency to prove or disprove a material fact. Otherwise relevant evidence may be excluded for lack of legal relevance, where its probative value is substantially outweighed by the danger of unfair prejudice, waste of time, or confusing the jury. Here, Petra's testimony that she had complained to Dave several times over the prior decade that the water tank had leaked and that he had not done anything is relevant because it makes it more likely that Dave was negligent in not repairing the water tank. Therefore, the testimony is relevant.

Personal Knowledge

A witness must have personal knowledge regarding what the witness wishes to testify to. Here, Petra has personal knowledge because she is testifying to what she has observed and commented on to her neighbor, Dave. Thus she has sufficient personal knowledge.

Hearsay

Hearsay is an out of court statement made by a declarant, and offered in court to prove the truth of the matter asserted. Generally, hearsay is inadmissible, unless it is not offered for its truth, qualifies for an exemption, or an exception. Here, Petra is offering evidence that she had "complained" to Dave several times over the prior decade. If offered to show the truth of the matter asserted, namely that she did in fact complain to Dave, then the testimony is hearsay and will not be admissible, unless an exception applies.

Non-Hearsay Purpose - Notice

An otherwise hearsay statement may qualify as non-hearsay if offered to show the effect on the listener or the declarant's state of mind. Here, Petra will argue that she is offered the evidence to show the effect on Dave, namely that he had notice that the water tank had been leaking. As such, the evidence is admissible as non-hearsay to show the effect on the listener.

Admission

An admission constitutes an exemption to the hearsay rule and is considered non-hearsay. An admission is a statement by a party and offered in court against that party. Here, Petra may argue that the statement is an admission. However, Petra is the declarant and the evidence is not being offered against her. Therefore, the statement would not constitute an admission.

Conclusion

Petra's testimony is likely admissible as non-hearsay to show the effect on the listener.

1B. WALT'S TESTIMONY

Relevance

Walt's testimony is relevant because it has a tendency to prove that Dave's water tank did in fact fall over, and that it had previously leaked. Therefore, the testimony is relevant.

Personal Knowledge

Walt has personal knowledge because he is testifying to what Dave told him. Therefore, he has sufficient personal knowledge.

Public Policy - Subsequent Remedial Measure

As public policy, generally evidence of subsequent remedial measures are not permitted, except to show ownership or where the defendant has claimed that there was no way to make something more safe. Here, Petra would like to admit into evidence Dave's instruction for Walt to caulk all the joints so that it wouldn't leak, which is likely evidence of a subsequent remedial measure showing that it did in fact leak before. There is no dispute that Dave owned the water tank. Additionally, there is no evidence that Dave has testified or asserted that the water tank was as safe as possible. As such, none of the exception would apply and Walt's testimony that Dave instructed him to caulk the joints would be inadmissible for public policy reasons.

Hearsay

This testimony constitutes hearsay because Walt is testifying to what Dave told him when he was repairing the water tank. The testimony is likely offered to show that Dave did in fact instruct Walt to caulk all the joints, so therefore, unless an exemption or exception applies, this testimony will be inadmissible.

Admission

An admission constitutes an exemption to the hearsay rule and is considered non-hearsay. An admission is a statement by a party and offered in court against that party. Here, Walt is testifying as to what Dave - the declarant and defendant - said outside of court. Petra is offering the statement against Dave in court. Thus, the statement would be permitted as an admission of a party opponent.

Conclusion

While the statement qualifies as an admission, since it constitutes a subsequent remedial measure, the court would not admit Walt's testimony.

1C. GWEN'S TESTIMONY

Retaining Wall Was Old

Relevance

Gwen's testimony that the retaining wall was old is relevant because it has a tendency to prove that the wall was not only a couple years old, and that it is possible that the water tank was not the reason for the wall failing. Thus, the evidence is relevant.

Personal Knowledge

Gwen has personal knowledge because she is testifying as to what she told Petra, and what she observed when she was at Petra's house. Therefore, Gwen has sufficient personal knowledge.

Lay Opinion

A lay witness is permitted to give opinion testimony which is helpful to the trier of fact, and not based on scientific or specialized knowledge. Here, Gwen seeks to testify that she noted that the retaining wall was old. This is helpful to the trier of fact because it would help the trier determine whether the falling of the water tank was the cause in fact of the failure of the retaining wall. Additionally, an observation that a wall is old, while an opinion, is not based on scientific or specialized knowledge because it is simply an observation that any person could make. As such, Gwen will be permitted to testify that the wall was old.

Retaining Wall Structural Cracks

Relevance

Gwen's testimony regarding the retaining wall having structural cracks is relevant because it has a tendency to prove that the wall did not fail simply because the water tank fell on it. Therefore, the testimony is relevant.

Personal Knowledge

As discussed above, Gwen has personal knowledge because she is testifying to what she observed and what she told Petra. Therefore, she has sufficient personal knowledge.

Lay Opinion Testimony

A lay witness may give opinion testimony where it is helpful to the trier of fact, and not based on scientific or specialized knowledge. Here, the testimony that the wall had "structural cracks" that could cause it to fall and that it would cost \$100,000 to replace, is not something a lay witness would be permitted to testify to because whether a retaining wall has structural cracks, and the amount to replace is based on specialized knowledge. Therefore, for this testimony to be admissible, Gwen would need to be qualified as an expert witness.

Expert Witness Testimony

To qualify expert witnesses, the federal courts use the *Daubert* standard, which requires that the expert have sufficient expertise and training, rely on commonly used treatises and materials relied on in that field, and that the expert's opinion is based on such knowledge. Here, Gwen is a gardener and therefore, it is unlikely that Gwen would be qualified as an expert to render an opinion on structural integrity of retaining walls and the cost to replace them because that is outside of the knowledge and purview of a gardener. While a gardener may have a working knowledge of retaining walls based working around them or with them, it is unlikely such experience would qualify Gwen as an expert witness. Thus, Gwen would not be qualified as an expert witness.

Conclusion

Since Gwen does not qualify as an expert witness, she will not be permitted to testify as to her opinion that the retaining wall had structural cracks and would cost \$100,000 to replace. As such, Gwen's testimony regarding those issues would be inadmissible.

1D. GWEN'S TESTIMONY ABOUT PETRA'S REPLY

Relevance

Gwen's testimony that the Petra said the retaining wall was 30 years old is relevant because it has a tendency to prove that the wall was not only a few years old, as Gwen had testified, and that it was susceptible to damage because it was old. Thus, the testimony is relevant.

Personal Knowledge

Gwen has personal knowledge because she is testifying as to what Petra said to her. Therefore, Gwen has sufficient personal knowledge.

Hearsay

Gwen seeks to testify as to what Petra told her, which is hearsay, and is likely offered to prove the truth of the matter asserted, namely that the wall is in fact old. Thus, to be admissible, the statement must qualify for an exemption or an exception.

Admission

Here, the statement was made by Petra, a party, and is being offered against Petra in court. Therefore, the statement qualifies as an admission of a party opponent and will be admissible substantively.

Impeachment - Prior Inconsistent Statement

A party may be impeached with a prior inconsistent statement. Here, Petra had testified in court that the wall was only a couple of years old. Thus, Gwen's testimony that Petra told her it was at least 30 years old, is admissible as a prior inconsistent statement to impeach Petra's testimony.

Conclusion

Gwen's testimony regarding Petra's statement will be admitted to impeach and substantively to prove the truth of the matter asserted.

2. DAVE'S MOTION TO DISMISS BASED ON LACK OF SUBJECT MATTER JURISDICTION

The issue is whether the court properly denied Dave's motion to dismiss based on lack of subject matter jurisdiction. A motion to dismiss for lack of subject matter jurisdiction should be granted where the court lacks subject matter jurisdiction. A federal court must have subject matter jurisdiction to hear a case. Federal courts are courts of limited subject matter jurisdiction, and are authorized to hear federal questions, or diversity of citizenship cases. A federal question is a cause of action which arises under federal law. A diversity of citizenship case is where the plaintiff is completely diverse from all defendants, and the amount of controversy exceeds \$75,000, exclusive of interests and costs. An individual's citizenship for diversity purposes is based on their domicile, or where the individual is physically present with the subjective intent to remain.

Timing

A motion to dismiss for lack of subject matter jurisdiction can be brought at any time, including for the first time on appeal. Here, Dave brought the motion after the jury rendered the verdict. While a claim of lack of subject matter jurisdiction is not barred, the proper remedy would be to base the appeal on lack of subject matter jurisdiction, since the jury had already rendered the verdict. However, as discussed below, the court had proper subject matter jurisdiction, so the motion to dismiss was properly denied, regardless.

Federal Question

Here, the claim is for negligence, so there is no federal question.

Diversity of Citizenship

As noted, all plaintiffs must be diverse, or of different domiciles, from all defendants. Here, Petra is domiciled in Nevada. Dave is domiciled in California. Therefore, Petra and Dave are of different domiciles and are completely diverse.

Amount in Controversy

The amount in controversy must exceed \$75,000, exclusive of interests and costs, based on the plaintiff's well-pleaded complaint. Here, Petra has plead \$100,000 in damages, which exceeds \$75,000. It does not affect the amount in controversy where the recovery is less than \$75,000, as long as the amount was plead in good faith. Therefore, the amount in controversy element has been met.

Since Petra and Dave are completely diverse, and the amount in controversy is met, the action qualifies for diversity of citizenship jurisdiction. As such, the federal court had proper subject matter jurisdiction and the court properly denied Dave's motion to dismiss based on lack of subject matter jurisdiction.

QUESTION 5

Attorney Anne shared a law practice with Kelly representing professional athletes. In the past Kelly represented professional athlete Player, but Kelly was disbarred several months ago. Kelly immediately resigned from the firm, and was re-hired by Anne as a litigation support clerk. Anne now represents Player.

Player is currently involved in a dispute with the professional team that employs him. Despite a valid and enforceable contract, Player refused to play because he wanted to re-negotiate his salary. The team obtained a preliminary injunction requiring Player to play under the terms of his current contract. Player sent Kelly an email asking for advice as to his next move.

Kelly referred Player to Anne who told Player to ignore the court order and to continue to refuse to play. To put pressure on the team to re-negotiate Player's contract, Anne also called the team owner, and implied that she could file a discrimination complaint against the team with a federal administrative agency that handles civil rights matters. Anne and Kelly agreed that there wasn't really a basis to file this complaint.

After the team refused to re-negotiate Player's contract, Anne filed a counterclaim drafted primarily by Kelly so as to "get the team owner's attention" for "tortious interference with contractual relations."

As part of the civil lawsuit, the team owner (Owner) was deposed. Before the deposition, Kelly drafted questions for Anne to ask Owner. During the deposition, Kelly sat next to Anne and passed her notes with further suggested questions for Owner.

What ethical violations, if any, has Anne committed? Discuss.

Answer according to California and ABA authorities.

QUESTION 5: SELECTED ANSWER A

The issue is whether Anne committed any ethical violations. Based on the facts, Anne has in fact committed several violations.

Hiring and Use of Kelly's Services

Under both the ABA and California rules, a lawyer may not assist another in the unauthorized practice of law. This rule extends to the hiring and employment of disbarred attorneys. Here, Anne engaged in several activities involving Kelly, who was disbarred several months ago. Thus, these actions must be examined to determine whether Anne violated any ethical obligations.

Hiring of Kelly.

A lawyer may employ a disbarred lawyer as a clerk or paralegal to assist in certain activities that do not involve the practice of law. However, the lawyer must take care to prevent the disbarred attorney from conducting activities that constitute the unauthorized practice of law. For example, a disbarred attorney can conduct research, draft documents reviewed and supervised by the lawyer, and conduct other administrative tasks such as communicating with the client concerning billing. The disbarred lawyer may not engage in counseling of the client, appear before any tribunal, or communicate with the client or adversaries concerning substantive matters that constitute the practice of law.

Here, Kelly previously shared a law practice with Anne but, after being disbarred, Kelly resigned from the firm (as required). Anne hired Kelly as a litigation support clerk. There is nothing inherently improper about Anne's hiring of Kelly. However, under the California rules, where a lawyer retains a disbarred attorney as an employee, the lawyer must notify the state bar of the employment, as well as the client. Here, there are no facts indicating that Anne notified the bar that Kelly was employed by Anne, or disclosed to Player that Anne had retained a disbarred attorney to perform clerical duties. To the contrary, Player appears to have believed that Kelly was still a lawyer because he emailed Kelly for advice regarding the preliminary injunction. Anne should not have

permitted Kelly to communicate with Player directly about substantive legal advice, although it appears that Kelly properly referred Player to Anne to answer his question. Nevertheless, Anne should have made it clear to Player that Kelly was disbarred and that all substantive communications should be directed to Anne.

Therefore, although Anne's retention of Kelly did not itself constitute an ethical violation, Anne failed to notify the bar and the client of Kelly's involvement. This constituted an ethical violation under California law.

Filing of Counterclaim Drafted by Kelly

After the team refused to renegotiate Player's contract, Anne filed a counterclaim that was drafted primarily by Kelly. As a disbarred attorney, Kelly cannot engage in activities that constitute the unauthorized practice of law.

As stated above, a lawyer may allow a disbarred attorney to draft documents so long as the attorney properly reviews, supervises, and takes ownership of the activity. Here, it appears that Kelly primarily drafted the counterclaim, but it is not clear whether Anne provided appropriate supervision and review of Kelly's work. If Kelly was the sole drafter and Anne did not review or supervise her work, which is possible given that they were formerly partners and/or co-workers, then Anne will have committed an ethical violation by allowing Kelly to engage in the unauthorized practice of law. If, however, Anne closely reviewed, edited, and supervised Kelly's work, and had the ultimate authority over the filing of the counterclaim, she will not likely have committed any ethical violations by permitting Kelly to engage in the drafting.

Based on the facts, it appears that Anne may have also committed an ethical violation if Kelly was primarily responsible for the filing.

Kelly's presence at deposition

As part of the civil lawsuit between Player and the professional team that employs him, the team owner (Owner) was deposed. Kelly assisted Anne in preparing for the deposition by preparing draft questions for Anne to ask Owner during the deposition. Here, Kelly's assistance in drafting deposition questions may have violated the ABA and

California rules depending on the level of supervision and management by Anne, similar to the drafting of the counterclaim. A lawyer may use a non-lawyer (including a disbarred lawyer) to draft documents and conduct research. However, the disbarred lawyer may not engage in activities that constitute the practice of law. Drafting deposition questions requires legal skill and judgment and would likely constitute the unauthorized practice of law unless Anne merely used Kelly's work for reference and supervised and edited her work. However, it is not clear from the facts the extent to which Anne played a part.

Kelly also attended the deposition, and sat next to Anne and passed her notes with further suggested questions for Owner. This likely constituted an ethical violation under the ABA and California rules because Kelly was participating in the deposition, even though she was not directly asking questions. Depositions are typically limited to counsel, the witness, and the court reporter; the parties also typically make their appearance on the record, and the opposing side would have understood Kelly to be second-chairing the deposition on the facts. Therefore, Kelly's appearance at - and passing of notes to Anne during - the deposition likely constituted an ethical violation. Even though she was not directly asking questions, Kelly's feeding of questions to Anne and serving as the second chair would likely be deemed to be the unauthorized practice of law.

In short, it is likely that Anne did not violate any ethical duties in using Kelly to prepare for the deposition, but her presence and assistance at the deposition likely constituted an ethical violation.

Filing of Counterclaim

A lawyer may not assert a legal claim for the purpose of harassing another party or gaining an unfair litigation advantage. Here, after the team refused to re-negotiate her client's contract, Anne filed a counterclaim with the purpose of "get[ting] the team owner's attention" for "tortious interference with contractual relations."

Accordingly, because the purpose of the claim was solely to get the team's attention, Anne likely committed a violation when she filed the counterclaim for tortious interference with contractual relations.

Advising Player to Ignore the Court Order

Here, after the team obtained a preliminary injunction requiring Player to play under the terms of his current contract, Anne told Player to ignore the court order and to continue to refuse to play. This likely constituted a violation of both the ABA and California rules.

A lawyer must not counsel a client to violate a court order. Although Anne could have counseled Player to push back on his contractual obligations if she had a good faith basis for doing so, here the court had imposed a preliminary injunction requiring Player to perform under the contract. Thus, Anne directly advised her client to violate the court order without any good faith basis for doing so.

In addition to breaching her duty to the tribunal, this likely constituted a breach of her duty of competence owed to Player because a reasonably prudent lawyer would not counsel their client to disregard a court order that is likely to subject them to contempt charges.

Accordingly, Anne likely committed an ethical violation when she advised Player to ignore the court order.

Threatening to file a discrimination complaint

In order to put pressure on the team to re-negotiate Player's contract, Anne called Owner and implied that she could file a discrimination complaint against the team with a federal administrative agency that handles civil rights matters. Anne knew that there was not a legal basis to file the complaint but made the threat in order to put pressure on the team.

Under California rules, a lawyer may not threaten to report another person for disciplinary purposes in order to gain an advantage in a litigation. Where the lawyer has a good faith belief that a violation has occurred, the lawyer may advise the party that they might file a complaint. But the lawyer must not do so in order to gain a litigation advantage.

Here, Anne knew that there was no basis to file a discrimination complaint, yet made the complaint in order to put pressure on the team. This constituted a violation of the California rules because Anne lacked any good faith basis for making the complaint and did so solely in order to advance her client's position in the contractual negotiations.

QUESTION 5: SELECTED ANSWER B

Anne (A) has committed several ethical violations, as discussed below.

Disbarred Attorney/Resigning

A disbarred attorney must resign from their law firm and cannot associate with that firm as an attorney.

Here, A and K shared a law practice. Thereafter, K was disbarred and immediately resigned from the firm. Assuming that the firm name was changed to recognize that K was no longer associated with the firm then A did violate the ABA or CA RPC.

Employing Disbarred Attorney

The issue is whether it is permissible to hire a disbarred attorney to work in one's law firm. In CA, a disbarred attorney can be hired to work as a litigation support clerk or in a similar support. The disbarred attorney can only work in this limited capacity; moreover, the CA State Bar must be notified if an attorney seeks to hire a disbarred attorney. Additionally, the disbarred attorney is prohibited from interacting with clients in a manner that would reasonably lead the client to believe the disbarred attorney was an attorney. Therefore, their client contact must be minimal.

Here, A hired K to work as a litigation support clerk. A did not notify the CA bar that she had hired K, who was a disbarred attorney. A was required to notify the CA State Bar, but failed to do so. Therefore, she violated her duties under the Cal RPC.

Also, the facts indicate that K's former clients may have still been contacting her for legal advice. As a disbarred attorney, K is prohibited from providing legal advice and can only interact with clients in an administrative capacity. Because K referred Player to A after he emailed her, this conduct would likely not create separate grounds for an ethical violation.

Telling Client to Ignore Court Order

A lawyer has a duty to the court and the profession to act with integrity, in good-faith, and ethically. Failure to do is a violation of both the CA and ABA RPC.

Here, A told Player that he should ignore the court order that required him to play under the terms of his current contract. This advice by A was in direct contravention to a legitimate court order. There are no facts - such as a stay of the court's order - that indicate that Player was bound by the court order and obligated to comply with. The fact that he disagreed with what it required, or that A may have believed that his noncompliance would create leverage in the negotiation of his contract are not sufficient bases for not complying with a lawful court order. Moreover, a litigant is liable to be held in contempt for failing to comply with a preliminary injunction. Therefore, A's legal advice to Player was to ignore a court order, the consequences of which could result in her client being ordered to jail or to pay a fine until he begins to comply with the order. Consequently, A did not act with integrity because she told her client to ignore the court's order without a legitimate basis for doing so.

This conduct by A violated both the ABA and CA RPC.

A lawyer also has a duty of competence. A lawyer must act with the knowledge and skill reasonably necessary to provide competent and diligent legal services. Under the ABA, the standard for a breach of this duty is reasonableness. In CA, a lawyer breaches their duty of competence if they act intentionally, recklessly, or with gross negligence.

Based on the above facts, A acted intentionally when she told Player not to comply with the order. Because failure to comply with a lawful order of a preliminary injunction has the consequences of contempt, it seems grossly negligent by A to give her client legal advice that would result in him violating the law.

As a result, A breached her duty of competence under both the ABA and CA RPC.

Calling and Threatening Team Owner

A lawyer cannot have contact with an opposing party that the lawyer knows is represented by counsel, unless opposing counsel consents.

Here, A called Team Owner and spoke with him without his lawyer present. A likely knew that Team Owner had retained counsel since he was engaged in a contract dispute with Player. There are also no facts that show that Team Owner's counsel consented to this call without him.

A also threatened Team Owner that she would file a civil rights complaint against him. The purpose of this threat was to create leverage in her dispute with Team Owner, as A and K "agreed there wasn't really any basis for the complaint." A lawyer must not threaten to bring an administrative complaint against a lawyer or non-lawyer absent a good-faith basis for filing the complaint. It is unethical to threaten or pursue such a complaint purely for the purposes of harassing the subject of the complaint.

As a result, A violated her ethical duties under both ABA and CA RPC by talking with an opposing party who has counsel and also by threatening someone with filing an administrative complaint against solely as a means of negotiating.

Duty of Good-faith/Candor re Counter Claim

A lawyer must have a reasonable, good-faith basis for pursuing a legal claim. In other words, they must have a reasonable belief in the merits of the claim and they must be pursuing the litigation for a legitimate basis (i.e., remedying a legal right and not to harass)

Here, A filed a counter claim against Team Owner. Presumably, this counter claim was filed as part of strategy by A and K to be in a better position to negotiate Player's contract dispute. Generally, such a counter claim would be permissible and not constitute an ethics violation. However, it is not clear that A believed the claims asserted had merit. The fact that the court ruled in the PI in Team Owner's favor weighs against a finding that this counter claim had merit. Moreover, if the only purpose for bringing the claim was to "get the team owner's attention", then it seems likely that A's

motivation was not to necessarily vindicate Player's contract rights, but to impermissibly harass and create leverage in negotiating a better contract for Player. In sum, it is not clear that A had a good faith basis in prosecuting this action.

Therefore, A may have committed an ethical violation if she filed this counter claim with a good faith based as to the merits of the case. If it was done purely to harass, then A committed an ethical violation under both the ABA and CA RPC.

Duty to Supervise

A lawyer may delegate tasks to their nonlawyer employees. However, the lawyer must closely supervise the nonlawyer's work and the lawyer remains ultimately responsible for the work product.

- Drafting Complaint

Here, K was primarily responsible for drafting the complaint. For the reasons discussed above, the filing of this counter claim could be the basis for a violation of the ABA and CA RPC. If so, then A clearly failed to supervise K. If she had done so, they would have thoroughly discussed the theory of the counter claim and whether the facts support that theory. A should not have filed the counter claim if this was not satisfied. Moreover, because an attorney is ultimately responsible for the work delegated to a nonlawyer, A can argue as a defense that K was "primarily responsible."

Therefore, A may have breached her duty to supervise her nonlawyer employee.

- Drafting deposition questions

Here, A's nonlawyer employee K drafted questions for A to ask during the depositions. The facts do not indicate how closely, or whether at all, A supervised K in this process. It is likely that A provided limited oversight over K in this process since she probably reasoned that this was something that K had experience doing and could be trusted. It is not impermissible for the nonlawyer to provide a draft of deposition questions to the attorney. A likely exercised supervision by using her discretion as to which questions drafted by K she chose to ask. However, if A did not do this and simply followed K's

deposition outline without exercising her own independent judgment and, as a result, she asked impermissible questions, there could be a basis for finding that A breached her duty to supervise. Moreover, although K is a disbarred attorney, this type of conduct is not impermissible for a disbarred attorney. A litigation support clerk, under the supervision of an attorney, can draft deposition questions to help the attorney prepare for a deposition.

Therefore, it was likely permissible for A to allow her non-lawyer employee to draft the deposition questions.

K's participation in the Depo

A lawyer is liable for ethical violations of their employees. Moreover, as discussed above, a disbarred attorney is limited in the type of employment that they may engage in as it relates to working for a law firm.

Here, A and K jointly participated in the deposition of Team Owner. K is carrying on in the capacity as a licensed attorney would during a deposition - actively participating and thinking of additional questions to ask the deponent. This type of conduct would lead a reasonable person to believe that K was an attorney. However, it is not clear that a nonlawyer cannot participate and assist during a deposition.

As a result, this conduct may have violated the CA RPC because the CA state bar was not notified that a disbarred attorney was being employed by A and A allowed her to work in a capacity greater than administrative.