

**CIVIL PROCEDURE I, SECTION 2**

Professor Ira Steven Nathenson, St. Thomas University School of Law

**FINAL EXAMINATION, FALL 2014**

Monday, Dec. 8, 2014

**Essay questions.** Please raise, discuss, and decide all issues presented by the call of the question, whether or not they are dispositive, and whether or not resolution of one issue makes discussion of other issues technically unnecessary. Write your answers to essay questions using a laptop or bluebook(s). Legibility, proper writing, and good organization are expected. If you use more than one bluebook, please number your bluebooks (e.g., “1 of 2,” “2 of 2”). When using bluebooks, write on every other line and, except where needed to make an addition or clarification, on only one side of each page. For essay questions, read the fact patterns and questions carefully before you begin to outline and write your answers. If you believe you have discovered an error in an essay question, identify the error and resolve it in a reasonable manner. If you believe that it is necessary to assume additional facts, state what those facts would be and how they would affect your analysis. However, unless there is an error in the facts, you may not change the facts.

**FACT PATTERN WITH TWO (2) QUESTIONS FOLLOWING**

**TOTAL TIME FOR THE TWO ESSAY QUESTIONS IS 120 MINUTES**

*Instructions relevant to BOTH essay questions:*

- 1) Regardless of the photos, assume that all parties are human beings.
- 2) The State of Thomas is a State of the U.S. and has one (1) federal judicial district (not shown on the map in the Supplement). It is located between Maryland and Virginia in the eastern United States.

**Luci Rabbit**



**Atticus Dog**



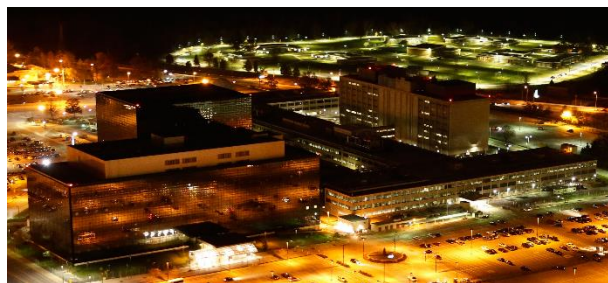
**Shelly Turtle**



Luci Rabbit was a brilliant inventor who was born in the State of Thomas and lived with her parents at home in the State of Thomas until 1990, when she left to go to college in California. Life was good for Luci in California. She bought a California house and she voted, registered her car, and made many friends in California. In 1995, she started working for Amazone, Inc., a large California company that sold books and other goods over the internet. She worked at Amazone's headquarters in Silicon Valley, California designing electronics.

In 2008, Luci's parents died. Luci inherited her parents' house in the State of Thomas. Every year, Luci flew to the State of Thomas for November and December to spend time with old friends and family from her childhood. However, Luci kept her California home, car registration, and voting. She also continued to work for Amazone. Starting in 2012, Luci decided to spend seven months every year in her parent's house in the State of Thomas, arriving November 1 and leaving the end of May. However, Luci kept her California home, car registration, and voter's registration. She also kept her job with Amazone, and worked as a "telecommuter" while in the State of Thomas. (This means that when she was in the State of Thomas, Luci worked for Amazone by using the phone and the internet.)

In March 2013, Luci drove past the headquarters of a powerful United States agency, the National Surveillance Agency (NSA). The NSA was a large federal agency based in the State of Thomas that spies on citizens with the goal of preventing terrorism. Luci was an inventor *and* a privacy advocate, and was angry that the government was spying on its own citizens. Later that day, Luci got an idea: she would protect people's privacy by inventing a phone that the NSA could *not* spy on.



*NSA Headquarters in the State of Thomas*

After Luci went back to California in early June 2013, she quit her job at Amazone and designed a new device, the DENI-PHONE. The DENI-PHONE was designed to "deny" the NSA access to communications made using the device. All communications were encrypted, and any information stored on the phone was encrypted and required a password. She hand-built each DENI-PHONE in her California home. Luci placed ads in national magazines touting the DENI-PHONE in the hopes of selling the DENI-PHONE nationally. The ads said: "Designed to stop NSA spying! Get the DENI-PHONE! Coming soon to a retailer near you." Because Luci was operating in business by herself (strangely, she did not bother to incorporate), she lacked the ability to distribute her goods. Therefore, she sold the DENI-PHONE to distributors, and those distributors sold the DENI-PHONE to interested retailers around the country. However, very few DENI-PHONES were ever bought by consumers. Of the few phones purchased, most were were bought in the States of Maryland, Virginia, and Thomas, close to NSA headquarters.

On November 28, 2014, Atticus Dog (a citizen of the State of Thomas) bought a DENI-PHONE. Atticus was “a good boy” but did not want the NSA to spy on him. He went to the local Mall-Mart retail store in the State of Thomas and spent \$499.99 to buy a fully functional DENI-PHONE. Atticus immediately activated his phone, put the phone into his back pocket, and got into his car to drive home. Atticus proudly drove a fully restored black 1967 Chevrolet Impala. Atticus’ Impala was extremely valuable because it had been previously used on a famous television show, *Super-Duper-Natural*.



*Atticus’ classic 1967 Chevrolet Impala, previously featured on television*

Unfortunately, the DENI-PHONE had a defect in its programming that caused it to overheat. While Atticus drove home, his DENI-PHONE got very hot, and severely burned Atticus’ backside (i.e., where his back pocket is located). Startled by the burning, Atticus accidentally drove through a red light and hit a tree. The front end of Atticus’ car was badly damaged. Atticus’ backside was also burned but he was otherwise unhurt.

Atticus pulled his car over to the side of the road, away from the traffic. Unfortunately, after Atticus pulled over, a green Lexus ES sedan smashed into Atticus’ car. Atticus did not get a good look at the license number of the Lexus. Also, Atticus could not see the driver’s face because the Lexus’ driver had a hand covering his or her face. The Lexus backed away from Atticus’ car and sped away. Unfortunately, the rest of Atticus’ car was destroyed beyond repair.

Atticus wondered who hit his car. On the one hand, the Lexus ES sedan was a popular vehicle in the State of Thomas, as it suggested that the driver was wealthy and important. On the other hand, Atticus wondered whether the green Lexus ES was being driven by his next-door neighbor in the State of Thomas, Shelly Turtle, who owned a green Lexus ES sedan. To Atticus’ memory, Shelly Turtle’s *green* Lexus ES sedan was the only green Lexus Atticus had ever seen. Atticus decided to investigate to determine whether Shelly Turtle hit Atticus’ car.

A week later, Atticus filed a complaint in the United States District Court for the District of Thomas against Luci Rabbit and Shelly Turtle for personal injuries and for damages to his vehicle. Count I (negligent design and manufacture) and Count II (strict liability) were against Luci Rabbit and sought relief for front-end car damages and physical injuries to Atticus’ backside. Count III (negligence) was against Shelly Turtle and sought damages for the rest of Atticus’ vehicle. Upon filing the complaint, Atticus also used THOM. CPLR § 5150(b) to attach to the suit the house in the State of Thomas that Luci Rabbit had inherited.

## ESSAY QUESTION ONE (70 MINUTES):

Luci Rabbit filed a timely motion to dismiss, arguing that the court lacked personal jurisdiction against her and her property. Discuss whether the court should grant Luci's motion. **Read carefully these additional instructions for Essay One:**

- Limited jurisdictional discovery has shown that only ten (10) DENI-PHONES have ever been sold in the State of Thomas, all sold by independent retailers located in Thomas.
- If domicile is an issue, use the majority approach.
- Do not discuss waiver or consent. You will receive no points for discussing those issues and will waste important time that you need to discuss other issues.
- [From Addendum:] As noted in the instructions, do not discuss waiver or consent. In addition, do not discuss “tag” (i.e., transient) jurisdiction or “bulge” jurisdiction. You will receive no points for discussing those issues and will waste important time that you need to discuss other issues.
- Analyze all bases for personal jurisdiction (whether based on jurisdiction over person or property) that are reasonably raised by the facts, regardless of your conclusion for any particular basis. If multiple bases for personal jurisdiction are reasonably raised by the facts but only one of them (or some or none of them) is satisfied, still discuss them all.
- The State of Thomas has two laws relevant to your analysis:
  - THOM. CPLR § 5150(a) states: “Courts in the State of Thomas may exercise personal jurisdiction to the full extent permitted by the Constitution of the United States.”
  - THOM. CPLR § 5150(b) states: “Courts in the State of Thomas may exercise in rem or quasi-in-rem jurisdiction over any property found within the State of Thomas so long as the property is attached to the suit prior to judgment.”
- [From Addendum:] The defendants were both properly served with process (i.e., service of the complaint and summons).

**ESSAY QUESTION TWO (50 MINUTES):**

Shelly Turtle filed a timely motion to dismiss Count III for failure to state a claim pursuant to Fed. Rule Civ. P. 12(b)(6). Discuss whether the court should grant Shelly's motion. Under the law of the State of Thomas, the elements of negligence are: 1) duty of reasonable care; 2) breach of duty; 3) cause in fact; 4) proximate cause; and 5) damages. Below are the relevant allegations from Atticus' complaint.

COUNT III (NEGLIGENCE) AGAINST DEFENDANT SHELLY TURTLE

51. Plaintiff Atticus Dog is the owner of a black 1967 Chevrolet Impala that he bought in 2012. According to an appraisal conducted in June of 2014, Dog's Impala was worth \$82,000 because it was in brand-new condition and had been prominently featured on a popular television show called *Super-Duper-Natural*.

52. On November 28, 2014 and in full compliance with all traffic laws, Dog pulled over to the side of the road. At that time, the only damaged portion of Dog's Impala was to the front end of his car, which was damaged from a collision with a tree that had occurred moments earlier. Dog pulled his vehicle into an area on the side of the road far away from any possible traffic.

53. Moments after Dog got out of his vehicle, another car drove into Dog's Impala. That vehicle was a green Lexus ES sedan. Without legal justification, the driver of the green Lexus ES sedan drove the vehicle out of the lawful lanes of traffic, and negligently hit Dog's vehicle. After hitting Dog's vehicle, the driver of the Lexus ES sedan covered his or her face with a hand and drove away from the scene of the accident.

54. The Lexus caused significant additional damage to Dog's 1967 Chevrolet Impala. As a result, Dog's car cannot be repaired.

55. Prior to November 28, 2014, defendant Shelly Turtle owned a green Lexus ES sedan that he purchased in 2010.

56. After November 28, 2014, defendant Turtle's green Lexus ES sedan was no longer parked outside his house.

57. On November 30, 2014, defendant Turtle bought a green 2015 BMW 325i.

58. At all relevant times for Count III, Dog acted lawfully, and did not engage in any contributory or comparative negligence.

59. Defendant Turtle is liable for negligence.

WHEREFORE, plaintiff Dog requests that this Honorable Court order defendant Turtle to pay damages for Dog's 1967 Chevrolet Impala in an amount to be determined at trial, along with attorney's fees, costs, and such other and further relief that the Court deems just and proper.