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1. Should the court have admitted:

A. Petra's testimony about her complaints to Dave about the leaks according to federal law?

This is a case sitting in diversity, the FRCP will apply to the procedural rules and the state where the federal court is sitting will apply the state substantive rules. However the facts do not state which state this lawsuit was filed in so if it was filed in CA, then CEC will apply to the negligence claim or if filed in Nevada, NE's civil procedure rules would apply.

Since FRCP and FRE applies to admission of evidence because evidence is procedural, the evidence must be relevant.

Logical relevance

Under the FRE, relevant evidence is any evidence that is a fact of consequence of the negligence. Petra must prove all the elements of negligence with no defenses against Dave.

Here, Petra testified that she had complained to Dave over the prior decade that the water tank leaked and that Dave had done nothing. Petra is trying to prove that Dave was aware of the leak, and that his duty to repair so that the water tank which fell and damaged her fence was a breach of duty to maintain items on his property so that her property would not be damaged. The evidence should be allowed as relevant.

Legal relevance

Is the evidence submitted more probable to prove a fact of consequence than without it and will it not prejudice the jury under FRE 403. Here, the evidence of the leaking water tank to prove negligence is probative and it should not confuse or prejudice the jury or the judge if this is a bench trial.

Logical relevance

Under the FRE, relevant evidence is any evidence that is a fact of consequence of the negligence. Petra must prove all the elements of negligence with no defenses against Dave.

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Here, Petra also testified that she had received substantial damages to her retaining wall which was only a couple of years old. Petra is trying to prove damages, which are also necessary, since she has claimed \$100,000 in damages. In order to have a case in federal court, the case must meet the amount in controversy of over \$75,000. It is also to show her damages the injury suffered under the negligence.

Therefore, Petra's entire testimonial statement is relevant under the logical relevance.

Legal relevance

Is the evidence submitted more probable to prove a fact of consequence than without it and will it not prejudice the jury under FRE 403. Here, the evidence of the damages is an element necessary to prove negligence so it is very probative and again, it should not confuse or prejudice the jury or the judge if this is a bench trial.

Therefore, the court should find all of Petra's statement relevant, to prove elements and also to establish the amount in controversy.

Competent to testify, foundation steps have been met.

In order to allow the evidence to come in, the FRE states that the witness must have knowledge, perceived through the senses. Eye witness testimony is allowed. The person must take an oath basically that the information submitted is the truth. A person who has an opinion can be based on knowledge and experience as a reasonable person to know that a leaky tank may fall.

Here, Petra does show knowledge as she saw the leaky tank, she has knowledge of the damage that resulted and as long as she can communicate to the jury her perceptions and the foundation has been laid to the evidence, the court will deem the evidence as admissible.

Therefore, as long as the foundation is laid and Petra relays the information to the jury for the jury to understand Petra's perceptions.

B. Should the court have admitted Walt's testimony regarding caulking the joints so that the water tank wouldn't leak?

Logical and Legal Relevance

Defined above. Here, Petra is purporting to show the breach of a duty to maintain the tank in a reasonable manner and that Dave knew that the leaks caused the tank weakened by the leaks is the reason it fell over. The information is relevant but the legal

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relevance may confuse the jury so the court will have to instruct the jury that it cannot use this information to determine that Dave was negligent based on the remedial measure taken.

### Subsequent Remedial Measures

Normally, Subsequent Remedial Measures are kept out of court on public policy reasons to make sure people, businesses make necessary repairs so future harm is avoided and because if they allowed them in no one would make repairs that would be used in court against them in a negligence case.

Here, the court must weigh the probative value because the fact is that the repairs that prejudices the jury in believing that the tank was about to fall resulting in the negligence act may not be found with remedial measures.

### Exceptions

There are exceptions, to show ownership, or absence of mistake.

Ownership could apply because the water tank was on Dave's property, but the facts do not state that Dave has made an affirmative defense in his answer that he doesn't own the water tank.

Absence of mistake may be the better assertion by Petra if Dave objected to this evidence being submitted, as to show notice because she had complained to Dave several times over 10 years that the water tank leaked and he did nothing.

Therefore, the court did not err because the jury should not be confused by the remedial measure, it shows ownership and that Dave knew the leaks where in the tank, so absent of mistake will allow this evidence in.

If Competency to testify and foundation steps have been met.

Defined above.

Here, Walt does show knowledge as he repaired the leaky tank, he has knowledge of the damage and can communicate to the jury his perceptions and the foundation has been laid to the evidence, the court will deem the evidence as admissible.

### Hearsay

Hearsay is an out of court statement offered for the truth of the matter asserted. Hearsay is inadmissible unless it is exempt or falls under one of the hearsay exceptions.

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Walt is attempting to testify that Dave instructed him to caulk all the joints so that it wouldn't leak. This statement was made out of court, is being offered to prove the tank leaked prior to Walt fixing it and Dave said it.

An admission by a party opponent is exempt under the FRE.

Here, Dave is a party opponent so this out of court statement to fix the leaks is considered nonhearsay and will be allowed in.

Therefore, if the foundation was laid and Walt relays the information to the jury for the jury to understand his perceptions and because the non hearsay exempts a party opponent admission, the court did not err in admitting the testimony by Walt.

C. Should the court have admitted Gwen's testimony?

i) That the retaining wall was old?

Relevant

the Wall age is relevant to the cost of fixing as an older wall is more likely to fall down. It will not confuse the jury, it should be allowed under both logical and legal relevance by the court.

Character evidence

A character trait to show the defendant has the propensity to be negligent is not allowed, but character evidence can be used for either the defendant or the plaintiff to impeach if they are not trustworthy.

Impeachment purposes

This testimony should also be allowed because, Petra previously stated that the wall was NEW. This evidence can be used to impeach her testimony to show that Petra should not be believed.

Opinion

Opinion evidence of an expert is allowed, if it is based on the skills, knowledge and experience of the expert. Here, Gwen is said to be Petra's gardener. It doesn't say she is an expert, but she may have been Petra's gardener for years and may have knowledge about fences, repairs and costs if that is in her skill level.

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Therefore, Petra should be allowed to testify if a proper foundation is laid and she is found to be competent to testify based on her skill set as a gardener.

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

Relevant

To show the cost of the damages, and should not confuse the jury.

Opinion

Expert opinion of this sort require the review of the elements in daubert to prove the evidence is based on the general knowledge of the scientific community at large but also requires Gwen testifying to how she came up with the conclusions. The court will look at her testing, if it can be validated by the testing methods she used, the rate of error and the test if it is peer reviewed, and generally accepted. Daubert is broader than CA CEC, Frye's test as it allowed for an expert to present the evidence even if the testing and procedures are newer as long as the results can be repeated. Also, the expert must be able to communicate the result just like any witness must meet the foundational and competency requirements. Here, it is not to hard for a gardener to research and determine what the cost of the wall should be with current scientific methods available. Samples of the actual cracks could also be researched to make conclusions of this nature if one has the expertise. And the testing may be something that would have to be considered for the court to allow this testimony.

It is unknown as to where Gwen received expertise in fences, but as long as she can show that the testing qualifies under the Daubert theories, her testimony will be helpful to the jury.

Therefore, if Gwen is an expert, this testimony should be allowed in.

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

Relevant to the age of the wall and helpful to the jury.

Impeachment as stated above would apply.

To impeach Petra for truthfulness.

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Hearsay would apply, but as stated above, is exempt as non hearsay of a party opponent.

This testimony should be allowed.

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

For the federal court to hear a case the matter must either falls under the court's subject matter jurisdiction based on federal law or based on diversity. This case is for negligence and is not a federal question enumerated under the constitution. However, federal courts are also allowed to hear cases in diversity if diversity of citizenship and the amount in controversy is met.

Diversity in citizenship is met if the plaintiff and the defendant are citizens of differing states. Here, Dave is domiciled in California and Petra is domiciled in Nevada so citizenship diversity is met.

Amount in controversy is determined at the time of the filing and it must be \$75,000 or more. Here, Petra is claiming \$100,000 so the subject matter jurisdiction for the amount is met. The fact she only received \$20,000 does not destroy the amount in controversy that she filed in her complaint.

The court also has to have personal jurisdiction over the defendant. Here, the court has jurisdiction over Dave if Dave resides in the state where the claim was filed. If the claim was filed in California, the personal jurisdiction applies.

If the claim was filed in Nevada, Dave may be found to be hailed to the state if he has a presence in Nevada at anytime, or under the International Shoe doctrine, if the negligence action occurred in Nevada and Dave either has systematic contacts with the state or if Dave in any way purposefully availed to the protections of Nevada law. Here, it is unknown in the facts. But because Dave did not waive the personal jurisdiction if filed in Nevada, in his answer or a pre-answer motion, that defense was waived.

Therefore, the court should not dismiss the lack of subject matter jurisdiction because diversity of citizenship were met when Petra filed her claim and Dave did not object to pj in his answer.

Question #4 Final Word Count = 2043

**END OF EXAM**