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Exam ID: 291
Course: Civil Procedure I
Professor Name: Occhialino
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Question One

Abogado stated taht Bell Atlantic required specificity in complaint writing. Bell Atlantic was decided in 2007 and it is still unclear whether Bell Atlantic requires a plausible set of facts in a complaint to overcome a 12b6 motion for all cases or just for Sherman Anti trust cases. In a decision decided by the Supreme Court two weeks after Bell Atlantic, Erikson the court stated that a pro se litigant's complaint should be liberally construed and did not have to meet the Bell Atlantic plausibility with facts standard. Yet, that does not answer the question of if all cases which are not pro se should have to meet the standard. In a case decided in the second circuit, Iqbal, the circuit court stated reasons that Bell Atlantic should apply to all cases including that the Supreme Court retired Conley, the statement of Conley that :no set of facts" applied to all cases, that the court seemed to mistrust the courts ability to case manage and that the plausibility standard is discussed 15 times. This the court argued could be cited that it should apply to all cases, but then the circuit court stated that it thtere are reaons one could argue that Bell Atlantic should be limited to anti trust cases. These reasons include that the Supreme court did not overrule Swiercowitz which validated Form 11, that the reason for the plausibility holding included the cost in large cases, that the court still had a check through summary judgment and that Erickson allowed a simple compalint to meet the 8a2 standard. Thus the court in Iqbal argued that Bell Atlantic should be limited and upheld the complaint. The policy reason for limiting Bell Atlantic is that the FRCP was created to have a low entry barrier and to let plaintiffs complete discovery before having there case thrown out. Bell Atlantic would raise the bar and plaintiffs would have to bear the cost of doing research before filing. However there are poilicy reasons for increasing the barrier to a higher standard as Bell Atlantic did including limiting the cost of discovery and frivilous claims. However it is likley that the court will find like the court in Iqbal that Bell Atlantic is limited and thus, Abogado was not required to plead plausible facts. Furthermore, Abogado should not include facts that he does not know are true because 8a 2 has such a low barrier as evidenced by Dioguardi. Even with his concerns of Bell Atlantic he should be concerned with Rule 11 as well.

Rule 11 in NM requires an empty head and a pure heart and therefore this subjective test could possibly be met by Abogado because he had not seen the medical records. But Abogado filed in Federal Court and thereofre he is subject to FRCP Rule 11 which is an objective test. The federal rules require that a person do reasonable injury into their assertions in their complaint. Therefore, it could be argued that Abogado should have read the medical records before making hte asseertion that he did. However he could counter with the statute of limitations concern, but again as stated above he could probably have written a claim without those specific facts and argued that it met 8a2. Also, without the medical records it could be argued that the doctors named in the letter were not the doctors who treated Nora and thus it was wrong to name them but if the parents remembered them treating her it would likely be sufficient to name them as that is reasonable inquiry. However it could be argued that reasonable inquiry required reading the report.

However since we are in Federal Court the federal rule 11 also requires a safe harbor. In Elliott the court did not apply rule 11 sanctions because the plaintiff was not

provided with the safe harbor. Assuming that the motion was also filed with the court, Abogado could argue that the safe harbor provision was not followed and thus sanctions are in appropriate. However, he likely should ask to amend his complaint as well using rule 15 a (amendment as a matter of right) to disregard that statement unless it is now supported by the medical records.

If the motion has not been filed with the court then Abogado can amend within the 20 period for the safe harbor if he needs to. Rule 11 requires reasonable inquiry and thus if Abogado has obtained the medical records and can support his statement of the sedative and support his naming of Dr. Hermoso with evidence then he has not violated Rule 11. However if he has no evidence or has evidence to the contrary then he must amend his complaint. Again, he could amend as a matter of right under rule 15a1.

However even with the safe harbor provision the court can impose sanctions as in De La Fuente. In that case the court imposed sanctions without the safe harbor. The court coudd do so in this case. However the statement was included because of Abogados belief about Bell Atlantic. The rule plainly stated that the sanction should be "limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated." Therefore it is unlikley that hte court will dismiss the claim because Abogado made his statement based on a recent Supreme Court case. Instead the court will likely impose a sanction at the most of asking Abogado to cover the fees associated with this motion and instead to follow the rules as set forth in the FRCP and look to the court to clear up any misunderstandings of case law. However this is difficudlt since the Supreme Court did not speak with clarity. Thus, it is likely that a sanction will be light if any. Again, an amendment to the complaint might be ordered if Abogado should do so after reasonable inquiry.

Question Two

When a person misnames a defendant and the statute of limitations has run, the complaint must be amended using amendments relating back Rule 15c. To relate back an amendment the claim must arise out of the same transaction and the changed name of the party must be within the period provided by Rule 4 m which is 120 days in FRCP. Since the case was filed on February 4 and Dr. Artuor Hermoso recieved the complaint with the misnomer on February 11 it is clear that he recieved notice within the 120 days. It is also clear that he was put on notice because he hired an attorney who made these motions. Therefore, Abogado can relate back the amendment if the claim arose out of the same cause of action. The test for this is the Plant test which looks to seek if the claim will have the same facts and law, if res judicada would bar a sub suit, and if the same evidence would be used at trial, and if there is a logical realtionship. It is clear that this is the same transaction because the claim is based on the medical treatment provided by Dr. Arturo Hermoso accidently named Angel in the complaint. Therefore the amendment would relate back to the time the orginal complaint was filed.
Also, under 15a Dr. Hermoso has not made a responsive pleading by filing a motion , as was the case in Moffat v. Branch, and thus it could be argued that as a matter of right the plaintiff can amend the complaint to change the name since it relates back.

As to the insufficiency of process and imporper service of process motions the court will look to see if adequate notice to meet the constitutional test as well as notice provided by rule 4 was met. While it could be argued that it was insufficient because it named the wrong defendant, he actually recieved it and hired an attorney. Thus it is likley that the court will hold as in Hawkins v. Department of Mental Health where the court basically said no harm no foul. Also, since the amendment relates back because the doctor was on notice and it is from the same transaction then he will be served again with the amended complaint. Thus, it is likely that the court will dismiss the motion. The rules are in place to ensure that each person has due process and an opportunity to be heard. Clearly Dr. Hermoso is getting an opportunity to be heard.

Question Three

Service of process requires a constitutional test as well as following procedures outlined in FRCP 4. In Mullane the court held that the constituional test for adequate service is reasonably calculated under all the circumstances. Therefore, whatever method Abogado choses it should be reasonably calculated to appraise Dr. Hamdam of the impending action.
In NM the rule 4 options are hierarchical, but in Federal court they are not. Thus, if it is unreasonable to try the gold standard of in hand in state service then FRCP does not require an attempt to do so and the reasonable method could be chosen first.
The next option is to leave a copy at the individual's dweling or usual place of abode with someone of sutable age and discretion who resides there. Thus, it could be suggested that the complaint and summons could be served on the wife. This would comply with Rule 4 but it could be argued that it would not meet the constitutional test because she has stated that she will not speak to him for months. Another option would be to deliver a copy to an agent authorized to recive service of process, but there is no evidence that he appointed an agent before he left the country.
Rule 4 also provides for serving an individual in a foreign country and this allows for those recognized by international law and includes personal delivery or delivery by mail with a signed reciept. However again, these are not likley to be reasonable since his location is unknown.
Thus, this case is similar to the case of Rio Properties where the court ordered service by mail to an agent and by email to the actual company who was overseas. Since the companies main source of communication was email the court reasoned this would be most reasonable to appraise the party. Similarly it appears from statements that Dr. Hamdam's main source of communication is email through his driver.
While I would not suggest that Abogado just email the complaint and call it sufficient, I would suggest that he ask the court to order a reasonable method and that perhaps he ask for email and to back it up by also serving the wife as this is a valid form under Rule 4. If the court would provide such order it is likely that this would be found to be successful. IT is not important that the driver does not speak English as the case in Maso stated that a person recieving important documents should understand that they need to be translated. Furthermore, it could be aruged that these are not for the driver to understand and the doctor will. Perhaps it could be argued that a statement in the drivers native language could be put in the email to ask him to deliver the document but it is likely that this would not be required because Dusenbury clearly stands for the proposition that acutal notice is not required as long as it is reasonably calculated to achieve success.
Therefore, it is likely that a court order should be obtained since the traditional methods of service are unavailable in this case. As in Rio Properties it is likley that the court will authorize email service along with a mail service to a second person (the wife) and that it should be sufficient. However Cordova stated that a second look should be taken. Therefore if Abogado becomes aware of new facts he should take a second look to see if the service was still reasonably calculated to achieve success.

Question Four

Under traditional notions of state soveriegnty the service of an agent when a business registered to do business was considered sufficient to obtain service under the Pennoyer Power Principles. However in 1945 the Supreme court decided International Shoe and based personal jurisidiction on notions of fairness and justice. Furthermore in Shaffer the court stated that all personal jurisidiction in state courts should be applied to the principals articulated in International Shoe. This was limited in Burnham to not include in hand in state service, but as far as agent or registered to do business the court has not spoken and for policy reasons it is likely that the court will hold that due process is a major concern and thus International Shoe should apply. Abogado could argue the National Renters case that cited that a contract clause consenting to an agent in the state was upheld to be adequate service on that agent but that was preInternational Shoe and also that agent, even though unknown to the plaintiff, did follow through and appraise the plaintiff of the action. Thus, perhaps it would be upheld if Florence followed through on her duties but I would argue that it is too risky because it is likley that the court will hold the agent/consent power principle ot the standards of due process.

Since Burnham upheld in hand in state service without International Shoe principals it is likely that the equivalent of Doing Business for a corporation would be upheld as well. Thus if Abogado could show that the hospiatl was doing business as defined by Tauza, regular, systematic, continuous shipment of goods into the forum state to establish a degree of permance then perhaps this would be upheld but this would not be just serving Florence.

It is likely that Abogado would have to meet the International Shoe criteria. Therefore, simply by serviing Florence Weinberg in Santa Fe Abogado would not be assured of having obtained jursdiction over the hospital. To obtain jurisdiction he would also have to show that the hospital had minimum contacts in the state and that fairness and justice would be served to the defendant as well by haling the hospital into New Mexico.

Question Five
Opinion by District Court Judge # 291

The defendant hospital has made a motion to dismiss for lack of personal jurisdiction under rule 12(b)(2). The plaintiff asserts that personal jurisdiction exists pursuant to the New Mexico Long Arm Statute. The plaintiff can use the New Mexico long arm statute in federal court to assert jurisdiction because for personal jurisdiction the court looks to the state law in which the court is sitting, in this case New Mexico.
In the 1800s the Pennoyer Power Principals created standards for personal jurisdiction based on state soveriegnty and the full faith and credit clause but I will not address these principals since they have not been raised by the parties. It is unlikely that the Hospital would meet this (doing business, incorporated, agent (see question four) and property). Furthermore in Shaffer it was decided that even if there is a power principal it must meet the due process concerns articluated in International Shoe. Threreofre as an extension of International Shoe states created long arm statutes to extend there jurisdiction. The New Mexico long arm statute lists specific acts that can create specific jurisdicton for the court.
Under the Long Arm statute a two part test must be met. First the defendant must have committed one of the enumerated acts and second the cause of action must arise there from. Then if the statute is met the constitutional question of due process as originally articulated in International Shoe must be met for there to be personal jurisdiciton.
The New Mexico long arm statute has five enumerated acts in the statute but the one that appears to apply to the hospital is the transaction of business. Therefore, it must be determined if the hopsital transacted any business in New Mexico. The leading case on this issue is CABA v. Mustang. In CABA the court adopted the Peltin factors to identify if a contract constituted the transaction of business. Here the hospital entered into a contract with the Silver City Memorial Medical Center and thus we could analyze using the factors. The first factor is who the contract was intitiated. We don't know who initiated the contract thus we can not determien this factor. The second factor is where the contract was entered into. We don't know if someone initiated the conversation in NM but there is evidence that it was negotiated and signed in El Paso and thus the first factor is not met. The third factor is where the performance was to take place. While no transfers have ahppened yet it appears that the contract is to transfer patients from Silver City to have operations in Texas. Thus it appears that this facotr would not meet NM transaction of business.
Therefore, as in CABA it is likley that the court will conclude that the Hospital who entered into a contract in Texas and was to perform in Texas likely did not transact business in NM. However this contract is not the only thing that the hospital has done. Furthermore New Mexico has equated the transaction of business with due process and thus if the Hospital has minimum contacts and fairness and justice would be served to the defendant then there could be transaction of business and due process.
Thus, looking to cases who have examined the due process clause, which is equated to the transaction of business, Worldwide and Asahi we must determine if the hospital has minimum contacts and meets the fairness factors. Therefore, for minimum contacts in Worldwide Justice White stated that mere foreseeability of putting an item into the

stream of commerce was not enough but reasonable foreseeability that the defendant would be haled into the forum state was. Thus it could be argued that the Hospital had reasonable foreseeability that it would be haled into NM court. The president stated that it was foreseable that the Hospital would treat some New Mexicans ant thus it could be argued that it would be more than just mere foreseability to be haled in there. In Asahi the court stated that foreeability alone was not enough but it listed some exceptions which included marketing to the forum, advertising in the foum, marketing for a particularized need, and offering advice in the forum. Thus, it could be argued that some of these exceptions are met by the hospital and thus it has minimum contacts. For instance the hopstial states that it has never advertised in New Mexico but it does have a website that is available in N?ew Mexico. If not advertising perhaps it could be argued to be giving advice to New Mexico. Also it could be argued that the hospital marketed to New Mexco as being accredited as the regional trauma center and the only Level I trauma facility within a 250 mile radius of El Paso. Therefore sthis is more than foreseeability alone. Also the hsopital is makreting for a specialized market because it has an annual refresher program for a New Mexico concern. Thus this could be argued as meeting one of the exceptions in Asahi.

Perhaps the 200 billing statements annually mailed to the state could be argued to be meeting the exceptions or to be more than just mere foreseeability.

Also, it could be argued that this is Tauza (regular systematic continous delivery of goods into the state) and would be doing business and thus would not need to analyze based on due process citing Burnham as if in hand in state is sufficient alone. Yet, this was not argued by the parties.

There are strong arguments, based on Asahi and other cases, that the hospital had minimum contacts in the state. It could be cited that it registered to do business there as well. However for due process and in turn transaction of business there must also be fairness. In Worldwide six factors were listed inclduing fairness to the defendant, interest of the forum court, interest of the plaintiff, interest of the judicial system, furthering social policies, and efficient resolution. While it might be argued that it is unfair for the defendant to be haled to NM court, El Paso if forty five minutes from Las Cruces and thus there is not a huge burden on the defendant. Also, the defendant has availed itself of the used of patients from New Mexico and thus shoudl foresee athat it would be haled into court. Thus the fairness to the defendant is met espcially considering the burden the palintiff would suffer if it had to travel to east Texas to have their case herad. The interest of the forum state is great because New Mexico wants to have resolution for the death of one of its own. Unlike Asahi where CA had no interest in the dispute between two foriern countries, NM does have an interest in theis litigation. Also, the plaintiff has a strong interest in having the case heard where the death occurred and the social policy of making sure that victims of wrognful deaths are able to have compensation to their families is furthered if the case is heard because it might be too burdensome to have the family triy the case elsewhere. Also, the efficeincy of the resolution would occur in New Mexico since the defendant and the witnesses are so close.

Therefore it is likly that it is fair to hale the hospiatl into NM. Even if it is determined that there is no minimum contacts it could be argued that as Justice Brennan suggested the minimum contacts rule is archiac and should be dismissed only for fairness and justice.

However as a district court judge I will not be able to throw out what the majority has held to be necessary and thus must find both.
I would find that there is minimum contacts and that it is fair and just and thus due process and transaction of business under the long arm statute has been met.
However there is one concern. The long arm statute is one of specific jurisdiciton and thus the cause of action must arise out of the transaction of business. And while it is possible that the hopsital transacted business thorugh the exceptions in Asahi it is unlikely that the cause of action arouse out of it. It could be argued that hte cause of action did in fact arise out of the marketing done by the hopsital and that the hospital in Las Cruces knew of the statuts of the El Paso hospital and thus transferred the patient. However, this is a stretch. In Campos the court clearly stated that hte cause of action must arise out the transaction of business. A franchise agreement was not upheld there and in this case the marketing and providing advice did not lead to the cause of action. Thus, the second portion of the long arm statute is not met.
Thereofore as judge I must dismiss for lack of personal jurisidciton because the cause of action did not arise from the transaction of business.
It could be argued that the tortous act enumeration of the statue could be met. The girl died in New Mexico and this was the last act. In Roberts v Piper aircraft eh court stated that the last act necessary meets the standard. With the act of dying in New Mexico the tortious act occured. Thus,

Question Six

A motion for summary judgment is based in Rule 56 of the FRCP. Celotex provided a four step process that must occur when a motion is made by the party that does not bear the burden of proof at trial (as is the case hear)

The first step is that the defendant must make the motion and support it. In Celotex five justices stated that a naked summary judgment motion is not valid. In this case the motion was supported with an affadvit, three excerpts from depositions and a disclosure document.

The second step is up to us 56e2- we must respond an rely on more than our pleading but support it with affidavits or other items showing that there is a specific genuine issue of material fact.

Therefore, we must show through affidavits or evidence obtained in discovery that there is a mterial issue of fact as to whethere Dr. Hermoso treated Nora

Thus, we must respond and we can do so by presenting our own affadivits or we can call the witnesses credibility into question. Lundeen stated that in summary judgment there is a presumption of credibility but that presumption can be overcome by a positive showing. Thus we could show that she has made conflicting statements and we could also present the letter she sent to the family. This positive showing could call her credibilty into question. Yet, we also have to rebut the other evidence. If the family can remember what doctors treated Nora we could have them provide an affadivit stating so and this coudl create a material issue of fact. Also, we could assert that we need an opportunity to depose Dr. Hamdam ourself . This would be a motion under 56 asking for more time to complete discovery. Perhaps the court would allow us to do so. Also, we could assert that the affadivit should be struck because Dr. Hamdam is not available at trial but this is likely to fial because 56 provides for the use of affadavits.

However under Blackford, you can get a partial summary judgement so it is possible to dismiss just part of the claim perhaps against the one doctor.

Once we present our stuff the hopsital will have an opportunity to rebut and then the court will apply the Goodman v. Brock Test asking if there is sufficient evidence to create a prima facie case. If we have evidence that shows there there is a possibity that Dr. Hermoso treated Nora in some capactity this would create a genuine issue of material fact. We would also want to ask for a hearing and under National Exess if a hearing is garnted both parties must be given the opportunity to be heard. We would want to aruge the policy articulated by New Mexico in Blaukamp that summary judgment is a drastic remedy and that in Barlett some issues of fact are sffucient to deny a summary judgemtn motion because the case should be heard on the meits. However it is likley that the court will grant the motion based on the policy articulated by the federal courts. In Celotex the court called summary judgment an integral part of the FRCP. And in Anderson v. Liberty Lobby the court equated the test for a directed verdict with the test for summary judgment and thus allowed more to be granted. Thus, it is likely, unless we can find stuff to support our response besides calling credibility into question that the motion will be granted.

Also, we would need to argue that Dr. Warner is qualified as an expert. Under the Case Lay v. VIP an expert must be admissible at trial to support a summary judgment motion. Therefore to use his statement in response to their motion we would have to certify that

he is an expert. This will be difficutl since tort law usually requires that hte expert have local knowledge and be trained in a similar area. Thus, this is an issue that we will ahve to address to use his statement in our response. His statement would be helpful show we should address his admissilbity. IT could be argued that he is qualified because he is aware of the standard of practice but htis is a stretch because like the meterologist in Lay he is not a family physician and thus is not likely to be qualified as the meterologist was not qualfied to testify about window strenght. Thus this is a barrier we must overcome and perhaps get a new expert to support our response.
Yet, the next step for us is to prepare a response supported with stuff that negates their evidence and puts forth our own to create a material issue of fact.

Question Seven

At this late date a motion can be made for the Hamdam statement under Rule 34 production of documents. However it is likely that the hospital will calim that this was material prepared in anticipation of litigation under rule 26b3. Under this rule material that was prepared by someone on behalf of the party in anticipation of litigation is protected from discovery. The hospital will have to make a showing that his material was created in anticiaption of litigation but it is likley that the statement by the attorney will support this proposition as Hickman v. Taylor cites the need to encourage advocacy. However there is an exception as this is only a qualified privelege. Thus we must argue that we have a substantial need for the materials to prepare our case and cannot without undue hardship obtain the substantial equivalent. IT could be argued that we need his statement since we do not have an opportunity to speak with him now. However, they coudl argue that we could use Rule 31 and email him the written questions or use interrogatories. Also, it could be argued that while we do need his statement we had the opporunityt to depose him and had a court order to do so. Thus, the rule was created to protect the hard work of lawyers for their side and not to encourage lazy lawyering. The motion was filed and the hearing was set. Thus, it could be argued that he should have obtained the statement prior to his departure. However rule 27 provides for 20 days of notice and it could be argued that he filed a motion within four days of hearing of the case and thus he is not a lazy lawyer. He could argue that he was follwoing the rules. Therefore, it is likelyt hat the court will find that this was not lazy lawyering and that there is a substantial need for it without an opporutnity to ge the substantial equivalent. Yet there is one issue and that could be that the motion for summary judgement is already being considered. If we needed more time for discovery we should have asked for it prior to the court considering the motion. In Chavez v. Ronquillo the court said that a motion must be made before the summary judgment is considered. Thus, it is more difficult to make the arguemtn for it now because the court is already considering the motion. We could ask for it but it likley should have been asked for in our response to the summary judgement. We should have asked for more time to complete discovery as provided for in Rule 56. Thus, it is lilkey that the court will reject our request for the production of the document as we should have made the request earlier.

QUESTION TWO

Question One

There are four type of experts and Rule 26 provides for what is discoverable. An expert who is consulted without being retain or even on that is retain but not going to testify is not discoverable. The facts of this case are that a six pack of beer was promised in a joke but never given. Thus it could be argued that this is a casual contact with an expert especially since it is his neighbor. This expert is not discoverable. IF it was argued that this is a retained expert because of the beer that was promised this expert too is protected from discovery except in exceptional circumstances. It could be argued that he lost eth medical bills and thus that he should have to be deposed to state what was on them. Yet it is liklely taht the rural care has a copy of the bill and it appears that there is no dispute that the bill stated #1111. Thus, it is likely that the court will rule that he is not discoverable. However, if the bill is not obtainable or the court finds that the original copy is so necessary to the case Dr. Xavier might be required to be divulged so that he could testify as to the bills contents.

If Dr. Xavier will testify (not likely) then his name would have to be turned over especially in compliance with disclosure under rule 26. However since he is not likley testifying and there si most liklley another copy of the bill then he is not discoverable. However it could be argued that since Parcell admitted to this conversation with Dr. Xavier in deposition he is more discoverable because he is now known. This likely will fail because he is not testifying and is not discoverableexcept in exceptional circumstances (which as explained above do not exist here).

Question Two
To: Attorney
From: 291
Re: Spoilation
Date: May 14, 2008

A likely defendant is required to keep possible evidence and to do so is spoliation. If it is intentional then the defendant can be sued for the tort of intentional spoilation. There is nothing in the facts to support this. However a defendant can be sanctioned for spoilation as well. The defendnat can be sanctions in accordance to rule 37 even though this happened prior to the lawsuit being filed.
In the Kmart case the court ordered that sanctions be imposed because Kmnart was negligent in not keeping the STL bottle that had leaked and caused a man to fall. Similarly it could be argued that rural care was negligent in failing to keep a rod that was purported to be negligent.
If the court agrees that rural care is negligent they can impose sanctions. The harshest sanction is entering a judgement as a matter of law in accordance with 37b2 to making the party pay costs. However as in the KMART case Parcell's case is severely hindered by the absence of this evidence and thus it is likely that a similar sanction will be imposed. In Kmart the court ordered that kmarts failure to keep the bottle was to result in an instruction to the jury that by not keeping it they were to infer the kmart was in fact negligent. Thus, the only issue left to remain was comparative negligence and damages. The same sanction could be imposed here. While Kmart argued that they should not have this because they lose the ability to argue the merits the court deemed this appropriate. Similarly, rural care dould have maintained the rod to put of blame on someone else but the plaintiff should not bear the burden of the defendant's negligence. Thus a similar sanction is liekly.
It is possible to obtain a sanction and it is likely if it can be shown that rural care was negligent as kmart was.

Respectfully
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Question Three:

Motion Granted – Counterclaimed dismissed due to lack of subject matter jurisdiction

To have subject matter jurisdiction in a federal court which is one of limited jurisdiction you must meet one of the nine criteria. This is not a federal question because it is a failure to pay which is not a federal question but a state contract question. Thus the option is diversity jurisidction. While the defendant and the plaintiff are of differing citizen ships (primcipal place of business – New York and Parcell from Texas) this has been limited by Congress which is allowed because they have the power to create the courts and give the jurisdiction within what is provided by the constitution. Thus it must be a claim over $75000. This is not and thus it would appear that rural care does not have subject matter jurisdiction.

However if a counterclaim is compulsive it can piggyback on the jurisdiction of the claim. (This idea comes from Williams v. Arcoa). Thus, it must be determined if this is a compulsory counterclaim. To be compulsory it must arise out of the same transaction. Plant listed a case that puts out a same transaction test. In Plant the court must find that the claim is based in the same law and facts, that it would be barred by res judcada in a sub suit, that the same evidence would be used or that there is a logical relationship. The first three of this test are not met. The contract claim would have different facts, law, evidence and would not be barred. While it could be argued that there is a logical relationship because the two surgeries were tied together from the same injury, precedent and policy concerns would not lead to this conclusion. For policy reasons, a contract claim that is based in a seperate surgery should not be used in the claim for medical malpractice however there are concerns of efficency that would be promoted by combining the two claims. However the other parts of the test are not met. Thus, it is likely that this would be deemed a permissive counter claim. If it is deemed to be a permissive counterclaim then the court would not allow it to piggy back on jurisdiction and thus rural care would not have subject matter jurisdiction.

Respectuflly,

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Question Four
Motion Allowed – Judge #291

To amend the pleading to change its admission would most likely not have occurred within 20 days of its serving its answer. If it had Widget could amend as a matter of right yet this more likely goes to Rule 15b. Under 15b the right to amend should be freely given. In Beeck v. Aquaslide the court allowed a company to amend its pleading from an admittance that ti was its slide to a denial after the statute of limitations had run. The court stated that a defendant should not be responsbile for what it did not do. This case is very similar, Widget shoudl not be held responsbile for the 1111 rod if it was not sent to rural care. This should be freely given.

While Parcell argues that he is prejudiced by this amendment because he cannot prepare a defense and the statute has run. He can still argue that the rod was defective, although this was made harder by the actions of rural care disposing of the rod, and he could prepare a defense and use the bill to argue that it was in fact a 1111 rod. This was the same analysis the court in Aquaslide gave.

The admission can be used in court as evidence of the contradiction made by Widget. Thus, while there will be a slight burden on the plaintiff the defendant deserves to only be held responsible for his actions and thus as the rules states the leave to amend shall be freely given. As judge I would grant the motion to amend the anser to change the admittance to a denial. The policy of making those responsible for the action to be held accountable is served by the decision, while the policy of giving releif to the poor plaintiff might be harmed. Yet, the plaintiff should only be allowed to recover from the defendant if they are responsible for the injury.

However it could be argued that this should meet 15c as well since the statute of limitations has run. An amendment of relating back occurs if the statute of limitation has run and it asserts a claim or defense that arose out of the same transaction. Under this if it is deemed to be a defense to deny that the rod was a 1111, then the amendment would have to relate back if it was from the same transaction. Plant set forth a same transaction test that asks if the claim uses the same law and facts, would be barred by res judicada, uses the same evidence, and has a logical relationship. It is clear that all of these factors are met in this case since it is the same injury and rod in concern. Thus, it is the same transaction and the amendment would relate back.

Thus as in Beeck v. Aquaslide the leave to amend should be freely given and the defendant should be allowed to amend his answer.

Question Five
To: Parcell
From: Rural Care Attorney
Re: Affirmative Defense
Date: May 14, 2008

Under Rule 8c a defendant must plead all affirmative defenses or he loses them. It is clear that rural care did not plead soveriegn immunity. Furthermore soverieng immunity is not listed in 8 c as a defense but this list is not exclusive. Thus, it must be determined if it is in fact an affirmative defense. In the case of City of Davis the court stated that soveriegn immunity was an affirmative defense but in Ciry of Portland the court said that it was not and in fact that it was an element that the plaintiff must prove.
The clear question is whether soveriegn immunity should be an affirmative defense. The Cleary Article states that you should look to policy, fairness and probability to determine affirmative defenses. As for policy, while it might be stated that claims should not be barred unless the state can prove soveriegn immunity, the more likely policy argument is that the state should be protected from lawsuits unless the plaintiff can show that immunity can be waived. The government is an integral part of our functioning and submitting it to suit should not be done lightly. Thus, the plaintiff should bear the burden as the court found in City of Portland.
As for fairness, it could be argued taht it is unfair to make the plaintiff bear the burden of asserting this element since the plaintiff bears the burden of all the other elements and that soverieng immunity is a protection of the state. Thus, the state should bear the burden. Yet, the true issue of fairness comes down to the citizens of the state. Is it fair to let the citizens of the state suffer from lack of funds because the state has to pay out judgements when the plaintiff did not even show it was entitled to one. Thus, the fairness argument again cites withe the Portland case.
Finally, the issue of proabability. Is it probable that a state would have to argue soveriegn immunity or the plaintiff. It could be said since it is a protection of the state that the state should argue it but it is more likely that this bars suit completely unless the plaintiff shows that it should be waived. Thus, it is more proabalbe that the plaintiff must show that it has a right to sue than the defendnat showing that it is protected from suit. Thus, the factor of probablity also states that it is not an affirmative defense.
For the reasons outlined above, I would argue that soveriegn immunity is not an affirmative defense and thus was not waived when it was not put in the answer. The case of City v. Portland should be followed.

Respectfully,

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