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Answer-to-Question-_1_

Question One

One of the first issues that jumps out of this fact pattern is the subject matter jurisdiction of the orignal suit brought by Mr. and Mrs. O. (Plaintiffs, O from now on.) This suit was filed in Federal Court, which are courts of limited SMJ. This is opposed to state courts which are courts of general jurisicition and can hear basically any type of suit except ones explicitly withheld by congress (like patents/trademarks.) As being such a Federal court suit, it must fall within the 9 enumerated areas in the constitution. The most important are federal question and diversity type suits. this case is not a federal question, as it is a tort and does not arise under US law or constitution or a treaty. Thus, as diversity, the matter in controversy must exceed 75000 and there must be complete diversity between the parties.

Here is one good potential test question: was there complete diversity between the parties? For purposes of SMJ diversity, we must not look at the residence of the party (which is where they are living) nor their habitation (which is where they are tonight). We must look at their domicile, which is a fancy legal word for a permant place one intents to live at and return to. The thing about domicile is that UNTIL you create a new domicile you have to go with your old one. Here, the O's were domiciallaries of TX (the same principle place of business and incorporation as defendant). They did move to NM but had only done a few external manifestations of domicile like in the Bell v. Bell case. There, he registerd to vote, got an apartment, got new drivers license, got new car insurance, and maybe even joined a bowling league. Here, all the O's did was get an aparntment and try to sell their old home. It could be argued that this is not enough to show the INTENT needed to switch a domicile. In this case it would be domicile by choice because they moved by choice. However, I think the better arguemnt would be that they did in fact have the intent to move, and they got a new place and tried to sell their old place. They didn't do as much as in Bell, but in Bell it was a farce probably and the dude just wanted to swith domiciles so he could get

divorced. As a policy, even though O's didnt do as much as Bells, their reasons for moving were much more legitimate. He movied to go with this new job, he wasnt trying to scheme out of his marriage. Therefore, i would say diversity existed. Plus the amount in controversy was 700,000 K so that req is met.

Another issue that could be tested is the Personal Jurisdiciton of the New Mexico court over the Texas defendant. Personal jurisdiction has it's roots in the Pennoyer Power Principles, that state every state has jurisdiciton over person and property in its boundaries, and no state has jurisidciton over persons/property outside the boundaries. however, the case made 4 excpetions, where D appears and doesnt object (consent), where you get D in hand, in state service (like Grace v. Mcaruthur in the plane over AK), where D is domiciiled in the jurisdiciton (discussed above) and the 4th "below the line" if D owns property in the jurisidcion. This was based on the old principles of territorial jurisdicion back when people didn't travel too much and it was important to respect state soverighnty. Howver, this case was added to by International Shoe which added fairness and minimun contacts into this power based issue. There must be enough minimun contancts to bring D into court so that it wouldnt offend fair play and justice. This markes a huge shift away from power towards fairness to D. this is absolutly crucial in our ever faster paced world. There's more travel with cars and more interstate commmerce. those Old PPP's just dont give states the ability they need to protect people.

For this analysis I will look at the Corporation of Dr. S's. Finding PJ for corps is done by making analogies to the requrirments fo persons in 1-4. In this case, in hand in state service was not done b/c D was served at her place of business in El Paso. Also, her PPB and incorpoartion is in TX (meaning suing in TX could be done no problem, also was served there). However, like in the Tauza case, some corps end up doing business in a jurisdiction without actually being cool and registering about it. In Tauza, doing business meant "systematic and continutous flow of goods and services in state such that there's a fair amount of permanance." It is more important to look as the quality, not the quantity of the contacts here especially. It is argueable that Dr. S does this because O was told by a nieghbor that she sees all the people in the apartment complex. Also, she gave them a 10% discount which shows her incentive to get

new Mexicans into her office. This is common with boarder busnisses like the hospital in Zavala. In that case however, the court found they weren't doing business b/c they had a website NMers could get on, they were a regional truama center, they had a deal with neighboring hospitals to get ppl from NM transfered. Here there is a similar circumstance, so on a test I would probably say she was doing business. However, that doesnt mean we can have PJ because under the Int. Shoe and its progeny and the LOng arm statutes of many states, it is possible to get PJ is someone is TABing or if they do a tort in NM. Here, the tortious conduct (negligent persciption of drugs was done in TX) however the harm or injury occured in NM, so we could get PJ throguh that LAS. But also, Dr. S was likely Tabing (transacting any business) which = minimun contancts and fair play/justice. For the diversity suit using NM PJ rules would be okay by the way.

The minimun contacts and fairness and justice is often referred to (at UNM anyway) as the great taste-less filling arguement. The Supreme court justices cant seem to agree on which one is more importnat or exactly on how to define and quantify each. They do agree on one thing though, that either way you go, you've got beer. To satifsy the fairness requiremtn though there are some things to look at. Is the burden (cost, inconvience) on D too much? Is the forum state's interst high? What's P's interest in getting relief? What is the judicial system interst? Here, I think all these wiegh in favor of finding fairness and justice and one step closer to PJ. Here, the D is in el paso so there is not real inequtiy in making her defend herslf in NM. Also, NM has a great deal of interest in protecting the right of it's people (injured by tort could be compared to injured while driving which is of high interest). Also, P suffered a great deal of pain and injury so her interest in vindicating her rights is really up there.

As far as minimun contacts goes, again the justices cant get together and agree, but there are still a number of considerations. One is, is there any foreseeabiltiy that D could be hauled into the forum state court? I think here there is a good deal of foreseeability. the Dr. even offerd NM residents a discount to come, so it was at least forseeable and even desired that they'd be here. then, the only question is is it foreseeable that a malpractice suit would occur? I think that again is yes as its just as likely a med-mal suit would happen with a texan as it would with a NMer. Also, was there only a unilater act by plaintiff

with no purposeful availment by D? Here there could be arguements on both sides of the coin. It is true that the P went to the Texas office on purpose without any direct cojolement from D. However, Dr. S did seek out NM patiants and was super close to NM boarder, so there argument for no availment would be very weak. Unlike the case where the woman went to Florida and the only connection that D have with Florida was P's unilateral act of going, here, it is more like they wanted NM people to come.

In this case, P filed in Federal District court of NM.

Another issue that could easily be tested was the amended complaint by P's atty Conestoga (C.) Rule 15 allows for the amending of complaints in 3 different ways. Once as a matter of right such as in Moffat v. Branch. Or, with leave of the court, such as in Beeck v. Aquaslide, but here, what is likly to ahve to have happened was a 15c, relation back after the SofL has run. Here, the SofL was tolled by the filing of the suit on Dec. 3. That means the SofL will run on Jan. 3. However,t he amendnemt was filed on jan. 10, one week later. This amendment also added a new defendant, which makes it similar to the Galiion v. Conmaco case. There a subsidiary company was put in instead of the parent company. The court allowed the amendment because of 3 things: the amendmnet arose from the same transaction, notice to D was such that it didn't unduly prejudice them, and they knew that but-for the mistake they would have been the actual one named. Being fromt he same transaction one can look to the plant test; is there an overlap of evidence, are issues of fact/law the same, would res judicata bar subsequent suit, and is there a logical relationhship?

In this analysis shows that a similar result would likely happen in here as it did in Conmaco. Dr. S owns Sena Smiles Inc (SSI). therefore, it is similar to being the "parent company" in comanaco. It means that Dr. S was put on notice of the suit b/c she was the actual D named in the original complaint. Therefore, she would not be prejudiced from defending herself on the merits, becuase she knew the darn suit was coming. Also, the amandment definatly results from the same instance, the tortios dental care to O. Therefore, if this problem were tested I think the amendment would sufficiently relate back. On a

policy level, this would be most fair to plaintiff and not really unfair at all to D. Unlike the Beeck case where the entirley wrong defendant wanted to amend it's admission of construction, here it is the correct D and her company, so there would even be less unfairness.

Also, becuase the amendment was doen on jan 10,it was more than 21 days afters serving it.

Another obvious issue that could be tested here was the sufficiency of service to Dr. D. This is a fundament constitutional right of all people. No person shall be deprived of life/liberty/probperty w/o due process of law. This includes notice and an opportuinty to be heard. FRCP rule 4 contains methods to effect service in a Fed court. there are several key differneces from fed and NM courts. The Feds have no heirarchy of service methods (whereas NM does). However, fed court may apply state rules of the state where the fed court sits, so the question is solid gold because it provides a good look into how FRCP and NMRCP are different. Also, actual notice need not be made, only what is reasonable under the circumstances. Looking at notice there is always a two part analysis: is it constitutional and does it meet a statute (in FEd) or a rule (in NM, b/c rules trump inconsistant statutes thanks to the Ammerman case.)

D was served on Dec. 13 by a certified letter at Dr. D's home. She was not there so her stupid husband signed the thing and the return recipet was gotten. In Fed court where there is no heirachy, Mullane has construed the constitutionally requerment as "notice reasonably calculated under the circumstances to achieve the goal of actual notice." Fed courts have gone on to construe this more (like one where they nailed it to the apt. complex door and that wasn't enough) or in the hospital as a credotir case where publication wasn't enought b/c they knew who the creditor was. Here, if we were following Fed rules this seems like it would satisfy rule 4e, leaving a copy at the person's usual place of abode w/ someone of suitable age. Here, it seems this is met. We could argue it wasn't her usual place of abode because maybe she was a real workoholic like the trucker in that one case who lived with his sister 'sometimes'. However, there is nothing in the facts about that so we don't know. Also, it could be argued that her husband is not a person of suitable age and discretion (his is an attorney after all, you never know) however this would also be a pretty weak arguement. As a policy rational, it's important to

remember that the Supremem court said plaintiffs need not go to "heroic efforst" to get notice across. They have to do what's reasoanbly calculated to achive notice. However, mere gestures dont count.

HOWEVER, if we were to be using the NM ruls this method of serivce would not have been good enough. In New Mexico, the gold standard, in hand serivce must be attempted OR by delievering something to the actual place of business with a person who appears to be look in charge, mailing to their last know address and to their actual place of business. Here, it is pretty clear they did not do enough to meet the rules. Again, it must be constitutional and meet the rules. So, one potential test question would be what should O have done using NM rules to get service?

This question could make one look at the heirachry. Here, it seems entirely possible the in hand service (the gold standard) could have been made. Perhaps waiting and trying again at a later time for the good Dr. could have been done. However if that had failed (or if the Dr had refused to accept servive like the couple in Alb who had property being forecleosed on) then they could done the mailing methods. If either of these failed then they could ahve moved on to the silver standard of delivering to the usual place of abode with someone 15 years old and by mailing a certified copy to their last known address. Here we should hope to God that her husband was over the age of 15, I'll assume he was cause I don't know family law. If this method failed, then and only then could they move onto the bronze standard by leaving it at her job with someone who looks in charge. The amended complaint was left with her secretary, who could argueably not have looked to be in charge of the place. P would argue that she did, espcecially since the dr was out of the office.

Also, New Mexico has the 2nd look doctrine. This forces a plaintiff who knows that the first method of service they tired of effect didn't work, must stop and say "knowing what i know now, should I do something different?" If the answer is yes, then it's best to do soemthing else. IF there were something on the fact pattern that made it look as if a 2nd look was needed (such as Dr. S was leaving the country to go be a densist in Iraq) then it might be necessary. This adds another level of fairness and professionalism to the notice game. Courts really disfavor "gesturing" in notice. It makes the whole system look better if we assume potential defendants actually want to have notice of a suit and actual platintiff's want the D's to

know their sueing them (not hide it in a publication just so they can get a default judgemnet).

However, some forums don't really care how bad service was is it did the goal of actual notice. Here, this is the case that notice was gotten because Dr. S filed a 55c. As the courts have noted, a lawsuit is not a child's game. So it could be found that because she got actual notice she should get down to the business of the merits and not try to get a temporary victory by making a 12b 4 0r 5 motion which would only force the plaintiff to go back and serve all over agian. However, becuase due process is that the very very heart of hearts fairness of our legal systsem, I think that this arugment might not work. ON a policy reason, it's just best if gamesmanship is left out, and idiotic service attempts are not rewarded by the courts.

Another issue that could be tested on such an exam would be the validity of the default judgment awarded to the O's on 3-2. Rule 55 governs default judgments and has some differences in NM and the Fed. In NM a party has 30 days to reply to a complaint, whereas in Fed they have 20. That initially means that the complaint filed on Dec. 3 means that the time limit was up in both forums. Default judgment must be distinguished from entry of default, like in the defillipo case where only an entry of default was made. The question on the test could be something like should the 55c be set aside?

Setting aside an entry of default uses rule 55c and requires good cause. The reasons for this include a legit reason for missing deadline (that's not human error), a meritourious defense, and no prejuduce to plaintiff. After all plaintiff played by the rules in getting the DJ, maybe the D could pay the lawyer costs associated with getting it and overturning it to make a showing of good faith to the court. However, Dr. S's husband/atty had filed an entry of appearance on Jan 22, and when an entry of apprearance has been filed, 7 days notice must be given to the other party. This notice needs be actual and not comply with rule four. IN NM all DJ cases must have a subsequent hearing on damages, however in the Federal system only unliquidated (sum uncertain) damages must go jury. Here, we have a case of sum uncertain because these are loss of consortium and pain and suffing which can't easily be added up like a late rent action. At this trial however, D can present evidence and participate just like at a real trial to try

and mitigate his damages losses. (He's already admitted to liabilty, so he can only fight on that one ground). In this fact pattern, we don't exaqcly know why D failed to respond to the complaint or even if she had a meritourious defense. She claimed the SofL but with the Rule 15 relation back discussed above this would likely be tossed. On a policy level, without knowing specifics about why the D dropped the ball so hard, I think it would be way unfair to plaintiff to overturn. Even thought courts like to get to trials on the merits and even some dont like to give big damage awards on default judgments, here we just dont know why. It could be argued that because of the insufficienty of process it should be turned over, but not knowing if Federal or NM rules are being applied that would I think too would fail. Lesson: dont drop the ball so hard or you might not be able to pick it up. Also, if this was a through and through defeault judgment, D would have to use a rule 60b which has a higher threshold than does the 55c.

Another issue that could be tested is the counterclaim of Dr. S. Cross claims can be permissive or compulsory, the difference being that compulsory ones have to be put in the answer or motion and permissive ones can be raised at any point because they ddint come fromt he same transaction or occurance. The plant test helps us see if it's compulaory or permissive by looking at same law/facts will be applied to both? Will the same evidence be applied to both? Would res judicata bar a subsequent suit and lastly is there a logical relationship? Here, I think it is evident that this is not a complusory, as it is about a supposed defamation occurance that P's did. This is a counterclaim because it's going across the v.

Here, it could be argued that this did occur from teh same transaction, however that would be a pretty weak arguemtn. There would really be no overlap of evidence for the med-mal case and the def case. Also, the same law would not be used or facts. The only logical relation between these two is that it's the same characters in the fact pattern. Also, Res judicia would not bar this, D could bring it anytime. However, by bringing this suit, D submitted to personal jurisdiction (discussed above). therefore, by doing this kinda dumb thing defenandant basically asked the court for help with the counterclaim, and then would likely aruge no PJ. so this was a bad move no matter which way you slice it. this allegation could have been brought later without gumming up the works for the present suit.

Also, on a policy note, the truthufllness of the suit might be an element of the PF case for Dr. S or it could be a defense for O. The Cleary article provides some insight into looking at whether something is a defense or an alement of a claim. Because we like freedom of speech, the untruthfullness would probably be forced on defendant because making it harder for him to prove would be good b/c we like our freedom of speech. But also, you cna look at the probability of the suit going one way or another and giving the burden to that person. Also you can look at the fairness about who has the evidence and give the burden to that person. So, in this little thing I think it would be best to make Dr. D prove the untruthufllness, which she could easily do by showin that she didn't get disbarred or someother think the fact pattern doesnt contain.

Question 2

Q-1

A TRO, or temporary restraing order, is a protective legal manuear that effectlivy deprives someone of their constitutional right to notice. These are often given in cases where the notice requiremnt has to be circumvented (a thing that is not lovely for judges to do but sometimes needed) and prevent someone from doing something even thought they have no notice. The requrments are an affidavit showing that immediate and irreprable harm will occur w/o TRO and that notice was attempted to be given or give a reaason why it shouldnt have to be given (like a wife beater will beat her more if he knows.)

rule 27 is about taking a deposition to pertpetuate testimoney. Like in Inre Town of Amena, there was this old dude who was about to die and the suspected defendant (who wasn't a D yet b/c there was no suit filed) got a depo from him to freeze his testimony. For these you ahve to show that you won't be able to get the testimony elsewhere and there's a real chance the person will die/leave country and you wont be able to get it. I think you need a court order for these. Also the subject matter is in petitioners interest they

want to perpetuate it, and the names/addressses and expected substance of the testimony from people, also descrition of persons expected to be adverse partyes.

In this case I think it would be much safer for Padre to get rule 27 thing. Here, getting a TRO and showing immediate and irreprable harm would be tough becuuse if he just suspected she would destory her thing it wouldnt be enough. This isn't like the statley trees example in class where the cutting down of the trees was the immediate harm. Here, the harm is much more ambiguous and not obvious. However, in that regard it could be compared to the Carrol v. Princess Ann case with the white supremacsity rally. The harm those idiots could have caused was untold. Here, the only harm would be to defendant, but still in a way that might be arguable for a TRO. Plus, he'd have to warn her so she could just do it anyway. The problem with warning her is that she might trash the thing right when he told her that or pretend she'd never heard of it. Plus, if he didn't warn her he'd have to give a good reason to the court not too. This wouldn't be doable like in the white supremacy case becasue he knows who she is and could notify her very easily. this wouldn't have to be rul3 4 notice, but still. Plus, on a flat out policy ground, i dont really see how you'd enforce that. Rule 27 could be used to impeach her later if she said she had the diary in depo and later said she didn't. Plus, it just seems wrong on a policy level to force someone to be restrained from their diary. the idea actual grosses me out a little bit. rule 27 would just be a more civillized (which is what we're going for, right?) way to protect himself even though the suit hadn't started yet.

If she dstoryed it she could get popped for spoiltation, which has elements to look at in deciding to give a sanction or not. Look at the degree of fault fo the spoiler, the degree of prejuecdice to other party, and when looking at sanctions look to see if a lesser sanction would deter this conduct in the fututre and avoid present unfairness. Here, if she intentionally spoiled the diary she could get hit with the ultimate sanction or a presumtion of guilt. However, like in Kmart, unintetnial spoiling isnt as bad but can still get something. This would be a really bad case of spoilation and I would imagine a heavy sanction would be imposed. It's just low down for a plaintiff to bring a suit and then destroy the evidence that would make her lose. At least in Kmart it was the defendant who did it.

Q-2

As atty for the hospital, it is important to remember the rules about discovery. Things have to be relevant (in NM relevant to the subject matter of litigation) and not privileged. This is where we might be able to come up with some sort of arugment that we shouldnt have to. If we were to say that this material was MPAL (materials prepared in preperation of litigation) it might be protect. The policy behind the creation of this quasi-privildge is to prevent lazy attys from not doing discovery then forcing their opponant to just turn everything over. This is rule 26b3. We could argue that the 41-9-5 statute was made to protect MPAL. The problem agian here is that the Ammerman cases makes inconsistent statutes trumped by rules, so for us this might not work. the only way we might be able to get it is if we argued, like the Albuquerque Rape Crisis case, that the statute was actually in the very spirit of the rule and acted to construe it (there it equated counselors to Dr's for the purposes of privilege). We could arge that the spirit of this rule was to clarify the MPAL rule on not create some extra thing. However, I think this would fail, as the statute doesn't mention anything about litigation, just about keeping things private. Also, MPAL, even if protected, can be gotten with a showing of substaintial need. That means the party cant get it somewhere else, it's not easily accessible in some other place, and they really really need it. Like a child with a popsicle, they realy really need it. So, i think overall the liklihood of us protecting this information would be slim to none.

Q-3

First of all, I would remind my client that plaintiff's actually control the scope of discovery because plaintiffs are the ones that actually put things at issue. In this regard, this is very similar to the Macklin case in which the female police officer brought a sexaul harasment suit and the opposing side then tried to discover a great deal about her sexual history. IN the end she was only allowed a protective order for the sexaul history that occured outside the workplace,a nd all the at the workplace stuff was still

good to discover. This raises huge policy concerns, like it might make womean in such a paternity suit fearful to bring suit and vindicate their rights for fear that they're whole sexual past would be hung out like dirty laundry.

However, for my client, this is almost an advantage. Here, plaintiff, a married woman, put her sexual life at issue by alleging the baby's daddy was some other man than her husband. Thus, saying that this violated her privacy (whild morraly true, might not matter in court). Also, the plaintiff can't just refuse to answer an interoggatory, she must go get a protevtive order under 26c. However, as we looked at above in Macklin, these often dont afford much help in the way of protecting a person's privacy once they have put it at issue.

Also, as far as not wanting to respond for the 5th Amd "I don't want to incriminate myself" this case would look a whole lot like the case I forget the name but where there was a reasonable, not fanciful expectation that he would be hauled in on criminal charges. Here, that seems to at least be a possiblity, although in that case I cant remember the name of there was something more serious going on than adultery. So, it's at least possible. However, this would allow us to make a negative inference against her at trial (while not dispositive, we'd still have to prove our case), but it would help. We might have to do a rule 37 motion to compel discovery to make her answer the questions, which if she didn't get a protective order would give a wide variety of sanction possibilities like ultimate, atty fees, or even parts of admittance. this case is somewhat distiguishable from the case we read about 5th amd because it is clear here that the woman cheated on her husband. She has a kid. My parents were liars when they said a stork drops em down the chimeny. So if this woman's husband didn't father the baby and she has one then she had to have done something. The evidnce of her guilt is obvious so it might be a good policy arguement to say "look, we know she's guilty, all we wanna prove is that my client wasn't the one who helped!" Because her guilt is already so obvious she couldn't incriminate herself any more if she tried.

We could request a Rule 36 request for admission which is given teeth by rule 37 c that could give us sanctions such as fees and what not.

Q-4

Summary judgment in the state of New Mexico is a drastic measure. Unlike the Federal courts, beginning with Celotex and its progeny, summary judgment in New Mexico is not an "integral part of the system." Being a plaintiff in federal court is getting more and more difficult, and trend which new mexico has consciously avoided. To get one there must be no genuine issue of material fact and the moving party must be entitled to one as a matter of law. However, NM has a huge difference that the fed courts have. IN Federal courts the directed verdict standard has been equated to the summary judgement standard and thus, in cases where clear and convincing evidence is the standard, summary judgments are often being allowed in more and more numbers. This means if a movant (typicaly defendant) shows that plaintiff doesnt have enough evidence to meet the C+C standard or that it has been overwhelmed, then the SJ is likely to be granted more often b/c plaintiff must show more evidence than they would have previously. There is just a humongous problem with this proposition though, and that is that it forces federal judges to wiegh evidence, which used to be something only a jury would do. the federal system is just going berzerck, wheter it be the 8a2 revolution or the SJ one, eitherway, efficiency is trumping access to the courts time and time again, and New Mexico is resisting this trend.

Being in NM, this summary judgement standard has not been equated to the directed verdict standard. Plaintiff, with one affidavit (which is enough to not make a naked motion and satisfy the first step of the SJ process). Then, D, following the second step, rebutts this and tries to show with his own stuff that there is a genuine issue of material fact and that plaintiff didnt meat their burden to show there wasnt.

Step 3, which it doesn't appear was done, would be for the movant to again attack the non movants stuff. IN this case, she could have attacks his affidavits by one of three ways. She could show they don't have personal knowledge, they arent compitent, and one other way I can't think of right now dangit. Either way, it doesn't really matter because she didn't do this. she could have shown that PP's buddy SS was not able to make a good affidavit for some reason. Oh yeah it also has to be admissible as evidence. So for some reason she could show that it wouldn't fly as eviddnce and negate his affidavits.

Honestly, if we were in federal court I would probably grant this SJ motion. There is a 99.9% chance that PP is the father of this baby, and all he can say is that he wasn't there and he had a vaseectomy. Even by a clear and convincing standard, she met it. Also, in Fed court there needs to be some substaintal evidence on all elements of a claim. 90% of the time it is the defendant that moves for this but it's not every time.

However, being in NM, and having the affinity we have for trials on the merits and by jury and disfavoring judges wighing the evidence, I would deny this motion. NM doesn't quite have a scintilla test, but he was one that harkens back to it, and the defandant here has at least a scintilla of evidence that he is not the father.