Q-185

1)

1. Motion to Change Venue

28 USC 1404 allows a plaintiff to change venue when venue is not unlawful but is not entirely appropriate for convenience of the parties and the efficient administration of justice. 28 USC 1391(b) covers venue requirements for Federal Question cases, which this is. The statute states that venue is proper 1) where the defendant resides, 2) where the events occuring took place, or 3) wherever the defendant may be found. Alice would not have grounds for a 28 USC 1406 motion to transfer, because venue is lawful and proper. San Francisco is venue where a significant portion of the acts in dispute took place, and is a convenient forum located in a place where there is personal jursdiction over her. In this case, venue is not inappropriate by a 1404 standard either because it was filed San Francisco, which is not any further from Stockton than Sacramento is. Under 28 USC 1391 Alice would have to show either that the evidence, parties, and sites for examination were all in Sacramento, that witnesses lived there, and that interests of efficient administration of justice would be served by transferring there. Although she does an alternative method, she could claim *Forum Non Conveniens*, which just means that the forum is really inconvenient to the defendant. This requires an even stronger showing of hardship than 1404 however, therefore it wouldn't work either. There appears to be no reason to consider a change of venue, therefore the court was correct in denying her motion.

2. Motion Challenging SMJ

28 USC 1331 and 1332 create jurisdiction for federal courts over Federal Questions of Law (statutes, constitution, or treaties of the United States) and diverse claims (plaintiffs from different forums and amount in question over 75,000). Although the claim itself does not meet the jurisdictional limit for diversity jurisdiction, and the parties are completely non-diverse, it matters not, because the claim is being brought under 1331 Federal Question jurisdiction. The Civil Rights Act is the law giving rise to the right violated, and that is a federal statute, so this is a Federal Question. The second claim, the tort cause of action, is a state law claim, and does not meet the jurisdictional limit, however, 28 USC 1367 allows for "supplemental" jurisdiction over any claim arising out the same transaction and occurence, the same "nucleus of operative facts" as the original claim to be joined. The discrimination was part-and-parcel to her conversion of the deposit, in fact by her own admission one gave rise to the other. Therefore this is a series of related occurences stemming from one conflict, and in the eyes of the constitutional framers, is the kind of thing people would expect to litigate together as one suit. Therefore jurisdiciton is also proper over the tort claim. However the last claim - for public nuisance, is entirely unrelated, does ask a federal question, and is not of the nature to satisfy the requirements for diversity jurisidiction, and should be barred for lack of jurisdiction. There for the court erred in denying her motion as to the third claim, but was correct as to the first two.

3. Motion for Summary Judgment - Choice of Law

FRCP 56(a) allows for a party to move after the close of discovery but before the trial starts - soon enough not to delay trial - to have the court grant judgment without trial. The essence of the motion is to assert that there is no genuine dispute of fact, or otherwise no reason to go to trial or waste court resources. Presumably, if Alice's argument is correct, it would mean that to go to trial without first enforcing mediation rules would be a waste of court resources (at least in the eyes of California's policy) and therefore this could be an appropriate device for disposing of the case without trial if she is correct. The question here is not whether there is sufficient evidence to conduct a trial - which it normally is - but whether Bob is entitled to one yet. This comes down to a choice of law between the two forums; California and Federal. Therefore the Erie doctrine is implicated. The Court in Erie held that were the selection of law could lead to forum shopping or unequal administration of justice, the State law should be used. Later, the Court changed it's policy, and said that where the choice of law will "outcome determinative,"

the state law should be used. Meaning, if changing to Federal law would change the outcome of the case, use the state rule. Later still the Court measured this policy with a countervailing notion that the court should still consider if there are any prevailing federal interests (York). Finally, the Court synthesized the modern test used to determine choice of law, which was decided in Hanna. The first important rule in Hanna acknowledge the power of the Rules Enabling Act and said that where a legitimate Federal rule or court practice is on point, to use it. The second important rule of Hanna said that if no Federal Rule is on point, then you must look to the Byrd test, through the eyes of the Erie doctrine, to determine which rule to use. In this case, the facts say nothing about an affirmative federal rule on point. Therefore the second Hanna test must be used. In this case, the outcome would be different in Federal Court, because Bob be able to go directly to trial instead of having to mediate. However, neither of the twin aims of erie are really implicated. There is no proof that the difference would lead to forum shopping, as some people may prefer mediation and others not, and there is no guarantee that mediation will lead to lower or higher awards than a jury trial. As well, there is no proof that justice would be administered unequally, as in either case all parties get the benefit of full due process and a trial in the end if they want. Therefore, it is not improper for the court to go with the federal "no mediation" practice. Now, in deciding the 56(a) motion, the judge will not that all evidence taken in favor of the non-moving party would *easily* lead a jury to find in their favor, and because the choice of law does not require Bob to mediate, the case should go to trial, and the judge was correct in denying the motion.

4. Jury Selection

FRCP 47 and 48, along with 28 USC 1861-1878, provide for the rules regarding jury size, selection, function, and conduct. Rule 47 states a jury must have at least 6 members and no more than 12, and must return a verdict unanimously. Rule 48 expressly states that a) a party can use the number of peremptory challenges authorized by 28 USC 1870 (which is 3) and b) states that a party can remove any number of jurors for good cause. Alice can use her peremptory challenges however she likes, but if Bob thinks she is discriminating and wants to prove it, he can use the ruling in *Batson* to help him. The court in Batson held that the jury statutes clearly prohibit discrimination in jury selection - it is a fundamental violation of equal protection and benefit of the laws - therefore, it will not be permitted. Where a party can show that a cognizable class has been purposefully removed the jury, and the circumstances to show that it gives rise to an inference of discrimination, it puts the onus on the other party to explain why they removed those jurors in a class-neutral way. Typically, cognizable classes are considered race, gender, religion, ethnicity or origin. If the court considers marital status to be such a group then they may agree with Bob's objection and prevent her from removing the unmarried jurors. It's doubtful that rational, marriage-neutral reason exists for why she wants them exluded, but it's possible that they could be biased against her because of her views. Since that isn't likely to fly, and it's only two of 12 or 6, the court should grant her use of peremptories, and not make her go down the road of Batson. That's what peremptories or for, and it's not likely that anyone on the jury, married or not, is going to be sympathetic to this lady. The court should deny Bob's objection and let her have her harmless little peremptories if she really thinks they will help her.

2)

1. New Trial

Under FRCP 59 a new trial can be granted for any reason which has previously allowed for a new trial within 10 days of the verdict. In the alternative the judge may grant a conditional new trial only if the plaintiff (P) declines a remittitur (decrease in the damage reward). Here the failure to give the comparative negligence Jury instruction could have been of great consequence, since comparative negligence might severely curtail the damages. Thus if the failure to give a proper jury instruction would be grounds for a new trial this should be allowed. Also the Jury talked about the case and received opinions from someone outside the case, as

such this would be highly prejudicial to the P and if used in the past as a reason for new trial this too should allow for it to be granted. Finally on the damages, the judge could, if the damages are so high as to shock and offend the conscience of the court allow for a new trial only if the P fails to take a reduction in the damage award (remittitur). If the P takes the reduction then there wont be a new trial.

Conclusion - Since there were multiple valid reasons for a new trial, if they have been reasons for the granting of a new trial in the past, then the new trial should be granted.

2. Collateral Estoppel/ Summary Judgement

Under FRCP 56 a party is allowed to submit a motion for Summary Judgment within 30 days of the close of discovery. The judge then will look behind the pleadings at all the evidence to determine whether or not in the light most favorable to the non-moving party that there is any genuine dispute as to any material fact. If the answer is yes then the motion will be denied.

Collateral Estoppel (CE) allows a party to invoke as already determined an identical issue from a prior action which was necessarily determined as part of a final valid adjudication. Since it would be a violation of a parties rights under the Due Process Clause CE can't be used against one who wasn't a party to the prior action. However, CE doesn't require the mutuality of parties. Here we have a P who is seeking to use CE against a D, the D having been a party to the prior action. This type of CE is Non-Mutual Offensive Collateral Estoppel (or CE as a Sword). Under *Parklane Hosiery* this is a proper use of CE, but the judge will look to see if: 1) the party wishing to use CE used the wait and see approach; 2) the D had a full and fair faith opportunity in which to litigate with every reason for doing so; 3) whether there are procedurals which the parties have access to which weren't available prior. Here after the close of discovery under FRCP 56 Denise the Plaintiff is now hoping to invoke CE as to the issue of liability stating that it has already been determined in the prior action. The judge then will look to see if the issue is identical (probably the negligence of Betty and so yes); next whether there was a special verdict in the prior trial where the Jury actually necessarily determined Betty to be liable or not. If the court finds CE to be proper then the issue of liability will be invoked and there will no longer be any genuine dispute in regards to liability as such the summary judgement motion would be granted.

If the issue of liability was necessarily determined in the prior action then the judge will further employ the test under Parklane Hosiery regarding Non-Mutual Offensive CE. Here the fact that Denise is now no longer in CA and as such may not want to travel all the way to Sonoma county in which to litigate might be reason that he wasn't just using the wait and see approach. He did have a common issue of law or fact, and as such in state court most likely would have been allowed to intervene. The judge will also look to see the measure of damages being sought by Denise as compared to the prior action. This will help the Judge asses whether there would have been a similar compelling reason to defend for Betty in the Prior action as in this one. If for instance Denise's damages are measured in the Millions then Betty might put on a stronger defense then she did in the prior action.

Conclusion - The judge will most likely rest his decision as to the use of CE based upon

whether or not he/she feels that Denise used the wait and see approach and the measure of damages that he would be seeking. If his measure of damages far outstrips what Allen was seeking then there would be a more compelling reason for Betty to litigate.

3. Discovery

FRCP 26 Discovery is allowed on any non-privileged matter which is reasonably related (relevant) to the parties claim or defense including - custody, condition, description, identity and location of any materials and the location and identity of any person likely to have information regarding discoverable material. The discovery alone doesn't have to be admissible so long as there is a reasonable chance that it will lead to admissible evidence. Under FRCP 37 a court can compel a party to hand over discoverable material if the party seeking it certifies that they have made a good faith effort in order to obtain it and the adverse party has still not provided it. Failure to provide the discovery after a court order requiring it to be handed over can result in sanctions.

Here however Betty's attorney is stating that the material is her work product and thus *Hickman* is implicated. Under *Hickman* work product (material prepared in anticipation of litigation) carries a conditional privilege and is not discoverable unless the party seeking it can show a substantial need paired with no other reasonable way to get the discoverable material (Undue Hardship). Also, even if the court finds the undue hardship, the court should be careful not to allow discovery on the attorney's thought's, mental impressions, or legal conclusions as these are absolutely privileged and never discoverable.

Here first the court should decide if Denise can show a substantial need and no other reasonable alternative to get the discoverable information. Skid marks are a good indication of what occurred during an accident. Thus if there is no other comparable material there would be a substantial need for the discovery. Here there is no way for Denise's representation to get this evidence on their own as the skid marks no longer exists, thus there is no reasonable alternative to get the discoverable material (except possibly to ask Allen's and his attorney for it). If they can't get the materials from Allen (since he is under no obligation to hand it over) then this would qualify as undue hardship which would defeat the conditional portion of the work product privilege. Next the court should figure out if the requested discovery has the absolute privilege of being the attorney's, thought's, ideas and mental impressions. The court might compel discovery on all portions of it which can be disclosed without disclosing the attorney's thoughts, while restricting the portions which contain them as they are absolutely privileged.

4. Impleader/Diversity/Amending a Complaint

Subject Matter Jurisdiction (SMJ) is the power or authority of the court to hear and determine a particular claim or controversy. State courts have general SMJ and can hear most cases not

specifically reserved for the federal courts (i.e. bankruptcy). Federal courts are of limited SMJ and can typically hear two types of cases, those arising out of federal question (28 USCA s1331) and those which there is diversity between the parties and the amount in controversy exceeds $75,000 (28 USCA s1332).In order for diversity exists diversity must be complete, that is no D can be a citizen of the same state as any P. (Strawbridge)

If there is no independent basis for federal SMJ then the court must dismiss the case unless it can assert Supplemental Jurisdiction (28 USCA 1367). Supplemental Jurisdiction allows the court to hear claims which don't have independent federal SMJ but which arise out of the same nucleus of operative fact as one which does.

FRCP 14 A defendant may implead a third party (third party defendant) who is partially or totally responsible for the original P's claims, for the purpose of indemnity or contribution.

FRCP 13 A party may properly cross complain against another co-party to the same action, as long as the cross complaint arises out of the same transaction or occurrence as that of the original complaint.

Under FRCP 15 a party may amend their complaint within 21 days of the initial action, or before the responsive pleading whichever is first. After which the party seeking to amend may get leave from the court where justice would be done.

Here the D betty is seeking to implead a third party into the action due to the fact that she believes that Allen is partially to blame for Denise's damages and thus for indemnity and contribution. Thus this would be a proper impleader under FRCP 14. Since the impleader necessarily involves the same transaction or occurrence the court here will allow for supplemental jurisdiction in hearing the action.

However, next Denise is hopping to amend her pleading in order to sue Allen directly. This would be fine since under *Strawbridge* diversity would remain complete (and this action is a PI claim and as such wouldn't involve a substantial federal question on it's face thus it is in federal court thru diversity). Here since the P (Nevada) is a citizen of a different state as the two D's (CA) the diversity remains complete.

5

Blue Book

NAME

SUBJECT Civil Procedure

INSTRUCTOR Seeger

EXAM SEAT NO. SECTION

DATE 4/19/11 GRADE

75

10 7/8 x 8 1/4
50 - 16 PAGE

Question #3

1. CHALLENGING PERSONAL JURISDICTION

PERSONAL JURISDICTION IS THE POWER OF THE COURT OVER AN INDIVIDUAL. THIS CONCEPT STEMS FROM THE 14th AMENDMENT DUE PROCESS OF NOT CREATING A BURDEN ON A Defendant.

Pennoyer set out THAT EACH STATE HAS EXCLUSIVE JURISDICTION OVER people WITHIN state + MAY NOT ESTABLISH JURISDICTION OF People outside THEIR State

INTERNATIONAL SHOE expanded ON THIS BY Creating ~~MINIMUM~~ MINIMUM Contacts, which tests

Whether A Forum State has personal jurisdiction over A out of state individual based on the nature + quality of Δ's contacts or activities within the state.

WWV set out that it is not enough that a product will reach A Forum State because it has reached the stream of commerce, But foreseability that A Δ should reasonably anticipate litigating in Forum State because they have purposely availed themselves to the privileges within that Forum state.

BASED ON these tests, AND THAT BRIAN ONLY DOES REPAIR WORK IN SMALL SHOP IN OREGON, + DOESN'T PURPOSELY AVAIL HIMSELF. TO PRIVILEGES OF CALIFORNIA, PERSONAL JURISDICTION WILL NOT BE / ESTABLISHED. JUST B/C THE CAR HAPPEN to REACH CALIFORNIA DOESN'T Mean BRIAN SHOULD BE FORCED TO LITIGATE there, AS THAT WOULD OFFEND OUR TRADITIONAL NOTION OF FAIRPLAY + SUBSTANTIAL JUSTICE Set OUT IN International SHOE.

2. Three Affirmative Defenses

Under 12b1, personal jurisdiction may never be waived as set out in (12h1), which states motions (12b2-5) are waived if omitted under (12g2) or Denied. (12h2) is more detailed and states personal jurisdiction may never be waived. Therefore, this challenge should be granted as set forth in analysis of personal jurisdiction.

The claim of Adeline's check can constitute a counter-claim under (Rule 13). It may not qualify as a

Rule 13a Compulsory counter-claim because it doesn't derive from the same transaction or occurrence set out in the original claim, being the CAA accident + negligence. This would therefore act as a (13b) Permissive counter-claim, and would therefore need to meet the amount in controversy minimum for (1332) diversity being $75,000. In addition, this claim is not included in the pretrial motions that are waived in 129(1). (Rule 19), necessary party under 126 is also never waived as set out in (129).

(Rule 19A) states A PARTY, IF FEASIBLE WHICH WOULD APPEAR FROM THE FACTS, IS NECESSARY TO AN ACTION IF THE COURTS MAY NOT ~~APPEAR~~ ACCORD Complete Relief among existing PARTIES, OR IF NECESSARY PARTIES HAS SUCH AN INTEREST THAT ALLOWING OR DISMISSING LITIGATION WOULD IMPAIR THEIR RIGHTS TO Defend interests OR IF the EXISTING PARTY WILL FACE MULTIPLE, OR INCONSISTENT OBLIGATIONS WHICH WILL APPLY HERE BECAUSE TITAN BRAKE CO., IS PARTY AT FAULT FOR THE Accident. Therefore, this AFFIRMATIVE defense

WOULD BE GRANTED.

3. COMPEL DISCOVERY

DISCOVERY IS THE PROCESS OF OBTAINING OR PRESERVING INFORMATION, WHICH BOTH WOULD APPLY IN THESE FACTS. UNDER (Rule 26a1), INITIAL DISCLOSURE, A PARTY MAY SEEK TO DISCOVER THE NAMES + ADDRESSES OF INDIVIDUALS WHO MAY HAVE DISCOVERABLE + RELEVANT INFORMATION. AND UNDER (26b1) A PARTY MAY DISCOVER ALL NON-PRIVILEGED MATTER, which does appear to be here being that it is not work-product, THAT

IS Relevant TO A claim or defense,

OR AND) Relevant Evidence need NOT

Be ADMISSIBLE IN TRIAL IF REASONABLY

CALCULATED TO Lead TO the DISCOVERY

OF ADMISSIBLE evidence. Customers

information may be relevant to Pl's

claim and therefore the Req.

FOR PRODUCTION OF DOCUMENTS SHOULD

Be granted.

4. Amended Pleading

(Rule 15C) THE Relation BACK-DOCTRINE States

A PARTY MAY Amend A Pleading before

A Responsive pleading HAS Been SUBMITTED OR

WITHIN 21 DAYS OF FILING ORIGINAL Pleading, But IF THE STATUTE OR LIMITATIONS IS expired, SUCH A claim MAY BE Made under (RULE 15C) IF THE claim arises out of the same transaction, ACT, OR OCCURENCE set out in original pleading.

BASED ON THIS Rule, FRAUD IN Receiving ~~BUYING~~ A defective CAR WHICH ULTIMATELY LED TO THE ACCIDENT WOULD BE INCLUDED IN the same transaction OR OCCURENCE, AND THEREFORE MAY ADD THIS claim UNDER (Rule 18), JOINDER OF claims, and be granted under (13(A)) SUPPLEMENTAL JURISDICTION.

The Motion to amend the Complaint should be granted.