

1)

88

=====**Start of Answer #1 (1191 words)**=====

Question 1 - Paula and Dan

1. How should the court rule on Dan's challenge to jurisdiction over him?

Dan is challenging the US District Court in San Francisco's personal jurisdiction over him under Rule 12(b)2. It is implied in the facts that he is timely objecting to the personal jurisdiction in his first responsive pleading, so it has not been waived and he can indeed challenge the case on this basis. Personal jurisdiction (PJx) is the power of the court over a party sufficient to issue binding judgment. Historically, *Pennoyer* established PJx in three ways - in personam, in rem, and quasi in rem. The first deals with the person or entity and found jurisdiction where you found the person; the latter two types refer to real property matters. *International Shoe* later established that a defendant have minimum contacts with the forum state in order to be subject to that state's PJx so as not to offend traditional notions of fair play and substantial justice. *WWW* and *Burger King* set forth standards for evaluating the quality of these contacts. Although McGee found one contact to be sufficient because of the specific nature of the contract, one contact is almost universally deemed not enough. The higher quality of contacts, or the more directly related the contact with the forum state is to the transaction or occurrence which gives rise to this claim, the fewer contacts are required (specific jurisdiction). The lower quality contacts (general jurisdiction), the more contacts will be required to find PJx appropriate. Here, Dan is the owner of the store where the incident occurred, in Las Vegas, NV, so we can assume that he is not a California resident; or, if he is, he does not live in or very near San Francisco where the case is filed. Dan's only contact with California, then, appears to be the fact that he has written a book and placed it into the stream of commerce. Generally, the stream of commerce alone is not enough to find PJx but he also sent several copies of his book to California residents who called and personally asked for that; this could be continued distribution that might indicated personally availing himself of the benefits and protections of the forum state, but that seems like a longshot. HOWEVER, the book

and its distribution are unique to Dan himself and are not a part of the store he owns, nor did the book in any way give rise to the occurrences set forth here - these actions are wholly unrelated to the claims and do not give rise to a reasonable assumption that he would be haled into court for battery and false imprisonment. So the court will not find that it has PJx over Dan himself. Dan might be pulled into the court's jx through a respondeat superior theory of liability for the actions of whatever store employee battered and detained Paula. Then it would be the store's contacts with the forum state at issue in determining PJx. The store can be assumed not to be the publisher of Dan's book, didn't advertise in California, and as a mom and pop shop, may not have advertised at all. It is presumed that the company is validly formed in Nevada and not even registered in California, so both its muscle and nerve centers are in Nevada. As a small business, it may be operating as an LLC or pass-through entity rather than a corporation, meaning that the court would go back to Dan's PJx to define the matter anyway. The events occurred on the store property in Nevada. For all the foregoing reasons, the court should rule in Dan's favor on the challenge to PJx.

2. How should the court rule on Dan's challenge to subject matter jurisdiction (SMJx)?

Paula has filed suit in US District Court in San Francisco, for state law claims (battery and false imprisonment). Since she filed in a federal court but not on a federal question under 28 USC 1331, she must meet the SMJx criteria under 28 USC 1332 requiring diversity of the parties and an amount in controversy over \$75,000. As established above, Dan and the store are firmly rooted in Nevada and Paula is a resident of San Francisco, so their citizenship criteria are met. Paula claims personal injuries of \$50k, property damage of \$10k, and mental/emotional distress damages of \$30k for fear she felt. Federal diversity matters allow for aggregation of the claim amounts in order to meet the \$75k minimum amount in controversy to be heard, as long as the amounts are based on a good faith belief that the sum is appropriate regardless of later outcome/recovery. However, this aggregation doesn't generally include punitive damages like fear. So it matters if she is asserting a claim for punitive damages based

on the underlying events or if she is suing for intentional infliction of emotional distress in the amount of \$30k, tied in with the underlying events; if it is the former then Dan will prevail because the damages will not be included in the aggregation, and if it is the latter then she meets and exceeds the amount needed and Dan's challenge to SMJx will fail. Incidentally, \$10k in property damage to clothing seems excessive and not reasonable or based on good faith. Dan's dismissal based on lack of SMJx should be granted.

Exclt

3. Paula moves for summary judgment, claiming Dan's suit [for slander and lost profits?] is barred.

Paula is moving for summary judgment (movant must show there is no genuine issue of triable fact, or the suit is barred on some procedure or jurisdiction basis). Paula must be moving on a res judicata theory that the suit was a compulsory counterclaim that should have been brought during the initial litigation and is now barred. This simply won't stand - she can't be invoking res judicata theories as the basis for summary judgment because these are not the same parties in the same configuration regarding the claims Paula already brought. In addition, we have no indication that Paula's claims made it to actual litigation but was settled and dismissed, which does not necessarily equal a final judgment, so there's no basis to claim collateral estoppel. Especially given that these are entirely separate events at issue. The events in the store are a separate occurrence from Paula's later actions on screen after returning home. Although she may not have ever said such things had the store incident not occurred, that is not a strong enough "but for" cause to link the two sets of facts. There is no basis for Dan's suit to be barred.

4. Dan's protest to Paula's jury selection methodology to exclude Asians because Dan is Asian.

Although each side is allowed three peremptory challenges for no reason at all and additional challenges for good reasons, Paula's reasons are a violation of the rules

governing jury selection. Dismissing jurors on the basis of race is disallowed. Race is a protected class against which the parties cannot specifically discriminate or target. Jury challenges on this basis are not appropriate and Dan's protest is valid.

=====
===== End of Answer #1 =====

2)

81

=====
===== Start of Answer #2 (1658 words) =====

1) Rule 12 motion to dismiss the non-title case of action, including Franks.

Subject matter jurisdiction (SMJ) in federal district courts is established by statute. Original jurisdiction must be established under either 1331 or 1332. Supplemental jurisdiction is contained in 1367. SMJ can be challenged under a rule 12 motion even before the defendant has answered the complaint, or at any point during the suit.

Jurisdiction under statute 1331 is called federal question. Original jurisdiction is established under 1331 when the claim arises out of the laws, Constitution, or treaties of the US. The facts state that Peter's claim on the property lines is based on a federal law. This is enough to establish federal question jurisdiction under 1331.

Under rule 18, a plaintiff has a right to join any claims it has against the defendant in a single suit, as Peter has done. However, he also needs the power to do so, meaning that each claim must independently meet SMJ.

The additional claims do not arise out of US laws, so they cannot come in under 1331. Under 1332, original SMJ can also be based on diversity of citizenship. This requires complete diversity, meaning that no plaintiff can be a citizen of the same state as any defendant. Citizenship is determined by domicile, the last state where a person resided with the intent to remain there indefinitely. Since the facts tell us that these parties are neighbors, we can assume that this test is failed. Additionally, diversity jurisdiction is only applied to claims where the amount in controversy exceeds \$75k. As a single plaintiff, Peter can aggregate his claims, but even then the facts suggest this element is not met. Peter's additional claims do not come under diversity jurisdiction.

Supplemental jurisdiction may be the answer to one of Peter's additional claims. Under 1367, claims can come in under supplemental jurisdiction when original SMJ has been established on another claim in the same suit. There are important limits to supplemental jurisdiction. The claims must all arise out of the of same subject matter, the same nucleus of operative fact (Gibbs). This might be true as to his claim about the crab grass. It could be that Paula has allowed it to grow there because she believes it is on her property. If this is the case, Peter may be able to establish supplemental SMJ.

As to his claim on the insult to his son, he cannot make this same argument. It has nothing to do with the subject of the federal question claim and cannot come in under supplemental SMJ. He would have to establish SMJ independently, and as discussed above, he cannot.

Frank appears to be trying to join the lawsuit as an intervenor under rule 24 or perhaps under as a permissive joinder under rule 20

Rule 24 only applies to parties who have an interest in the subject matter of the case. An intervenor by right is a person who either is given the right to intervene by statute or has an interest in the subject matter of the claim that may not be adequately protected in his absence. Frank may have raised this if his claim related to the begonias, but his claim is completely unrelated to the subject matter of Peter's claim.

Under rule 20, plaintiffs can join together in a single suit when they assert a claim jointly, severally, or in the alternative respecting or arising out of the same conduct, transaction, or occurrence and a common question of law or fact will be raised. Again, the claim Frank brought has nothing to do with the subject matter of Peter's claim. He should be dismissed from the suit.

2) Dismissing complaint on account of missing husband.

Danielle can make a rule 12 motion to dismiss the title-related claim on account of Peter failing to join a necessary party under rule 19(b).

Rule 19 deals with parties who must be joined if feasible. A party is necessary under this rule when the court cannot accord complete relief amongst the existing parties, when a person has an interest in the subject matter of the litigation and a judgment in their absence will as a practical matter impair their ability to protect it, or when a judgment in their absence may expose the existing parties to multiple liability.

Assuming that Danielle and her husband Mike own this property together, he is likely a necessary party under the second category. He would have an interest in the determination of the property boundary and a judgment in his absence will preclude him from making his claim of ownership.

Part B or rule 19 sets out what a court must do if it is not feasible to join a necessary party. The facts suggest that it is not feasible to join Mike. He is out of the country and out of contact. He cannot be brought in to the lawsuit if he cannot be found. The judge

must now decide if in equity and good conscience the suit should be maintained or dismissed. The judge can consider various factors. What result to the existing parties if judgment is rendered in Mike's absence? Is it possible to shape the relief to avoid prejudice? How would it affect Mike if the boundary line is established in his absence? Would the plaintiff have another remedy if the suit were dismissed? This claim is about a property boundary. One of the co-owners is a party to the suit and is the spouse of the missing necessary party. If the suit is dismissed, it is not as if Mike has another court he can look to- Mike's absence makes it impossible to get him into any court. Based on these factors, the court should allow case to continue. Mike is adequately represented by his wife, who is sufficiently motivated to defend their common claim, and Peter has no other recourse to settle the dispute.

3) Demand for investigator's notes.

Under rule 26, the scope of discovery is any nonprivileged matter that is relevant to any party's claim or defense- including the existence, description, condition, location and custody of any document or other tangible thing and the identity of a person who may lead to other discoverable matter.

Rule 26 also establishes what items are privileged. Any documents that are prepared in anticipation of litigation are privileged. These notes fit that description. However, the privilege is broken into two categories, absolute and qualified. Items protected by a qualified privilege can be discovered if the seeking party shows a substantial need for them and that they cannot, without undue hardship, obtain their substantial equivalent. Items that are absolutely privileged cannot be discovered. This includes the mental impressions, opinions, conclusions or legal theories of the attorney working on the case on their representatives.

Peter will try to make a showing to defeat the qualified privilege. He will assert that he needs this information to prepare to meet Danielle's defense. He will assert undue hardship in obtaining their substantial equivalent since the person interviewed have

either moved to Europe or are dead.

However, Danielle will assert that this information is absolutely privileged. Peter is not seeking copies of witness interviews, he is seeking the notes the investigator made about the interviews, his "mental impressions, opinions" etc. This is not the type of material that can be discovered under any circumstance and Danille will be able to keep them from Peter.

4) Motion for summary judgment.

Summary judgment is brought under rule 56 and the movant seeks to establish that there is no legitimate dispute as to a material fact and that the movant is entitled to judgment as a matter of law. Res judicata and collateral estoppel are two doctrines that can be raised under a summary judgment motion. They are based on the concept that a judgement in a prior claim preclude a second claim in whole or in part.

Res judicata only applies where the parties, or the real parties in interest under rule 17, are the same in both suits. This is not the case here.

Collateral estoppel no longer requires mutuality of parties (Parklane). This will be the doctrine that Thomas argues.

Collateral estoppel has four initial elements: there must be a common issue between both suits; the issue must have been fully litigated in the first suit; the issue must have actually been decided; and the decision on that issue must have been necessary to the judgment.

Peter's boundary lines is an issue that is raised in both suits. By all appearances, the issue would have been fully litigated in the first suit. The facts state that issue was decided. There may be some question as to whether or not the issue was necessary as to the first judgment. The only dispute in the first suit was the property line between

Peter and Danielle's properties. The determination of Peter's boundary with Thomas was not necessary there. But, it can also be argued that the boundary in its entirety was at issue and necessary to decide the case. Thomas has a good chance to prevail on this point.

However, Thomas was not a party to the first suit and is a plaintiff in this suit. This means he is using nonmutual offensive collateral estoppel and must meet further elements. He has to show that Peter had sufficient motive and incentive to fully litigate the issue the first time, that the procedural opportunity was as broad, and that there is not element of unfairness in binding him to the prior decision. He should prevail on these points. Peter brought the prior suit and was the one who was demanding a decision. He brought his suit in federal district court, which provides procedural opportunities as broad as are available in any court. There is no unfairness in holding him to the prior decision and he should be estopped from raising this defense to Thomas' suit.

==== End of Answer #2 =====

3)

81

==== **Start of Answer #3 (1412 words)** =====

1. How should the court rule on the motion to dismiss for failure to file the expert report?

This is an action properly in Federal Court under 28 USC 1332, with subject matter jurisdiction due to the diversity of the parties. Patty is a California resident who is suing Dr. Smith a Reno Nevada resident (presumably). A resident is based on the domicile of the person, for Patty California, and if Dr. Smith does indeed reside in Dr. Smith, Nevada is his domicile. When there is subject matter jurisdiction due to diversity of parties, but the law there is no federal law on malpractice so there is a question of what law to use. This is an Erie question. ✓

We now have state law claims being adjudicated in Federal court. This has now become an Erie question. Under *Erie*, if a law is substantive the State law should be applied and if it is procedural the Federal law should be applied. The courts have struggled over what laws are substantive and what laws are procedural. The outcome-determinative test where the court looks at whether or not the law would determine the outcome of the litigation (York). If it does, then that law is substantive. *Byrd* held that the court should examine whether the law absolutely determines the outcome, and if so it is substantive. The court also held that the interests of the State and Federal courts in applying a law should be weighed. Finally the court decided in *Hanna*, that if there was a federal law on point in a grey area it should be applied. If not, the court should look at the twin aims of Erie which are 1) to discourage forum shopping and 2) to maintain equitable administration of justice. ✓

Here, the Nevada law provides an expert report supporting the malpractice claim be given to Dr. Smith before the lawsuit can be filed. If this isn't done before the complaint is filed, the suit must be dismissed. We need to establish if the law is substantive or procedural. If it is procedural, Federal law will be applied and the claim will not be dismissed. Under York, we look to see if the law would determine the outcome of the litigation and if it does, the law is substantive and the state law will be applied. The first question will be whether or not there is a federal rule on point, and the facts tell us there is not. Under York, the outcome of the law will determine the outcome of the litigation - if state law is applied the case will be dismissed. Under Byrd, the outcome will ✓

2 of 10

absolutely be determined by law, and when weighing the interest of the state courts in applying the law, it appears that this will keep a lot of cases out of court by requiring the expert report be given before the suit is filed. Under *Hannah 2*, when looking at the twin aims of Erie, this law will likely cause forum shopping because it appears that it will be easier to pursue a malpractice claim in federal court. To maintain equitable administration of justice would not still be available, the party would just have to follow the rule before filing the complaint. Therefore based upon the Erie analysis, it is likely that the state law will be applied.

2. How should the court rule on the motion to dismiss the third party complaint against Nancy?

Nancy will file a 12b1 motion to dismiss the complaint for lack of subject matter jurisdiction. While it is true that Dr. Smith and Nancy do not have diversity and the question is not a federal one, the claim against Nancy was properly asserted by Dr. Smith. Under Rule 14, a defending party can bring a third party into the action if the claim arises out of the same transaction or occurrence as the underlying main claim, and the defending party is seeking indemnification or contribution. Here Dr. Smith is a defending party and the reason he files an action against Nancy is because she was involved in the surgery and completed the wrong form. Nancy's actions were part of the same transaction and occurrence that underlies the main claim by Patty against Dr. Smith. Therefore, under Rule 14 the claim has been properly asserted against Nancy. Because the requirement that the claim come from the same transaction or occurrence, under *Gibbs* a common nucleus of operative facts, the claim will be held to have proper subject matter jurisdiction. Nancy's motion to miss the complaint on lack of subject matter jurisdiction will be denied.

3. How should the court rule on the motion by Patty to amend her complaint and sue the right doctor?

Patty would like to amend her complaint to bring in the right doctor, but the statute of limitations has run. Under Rule 15, a party has the right to amend their pleading once as a matter of course within 21 days of service, or within 21 days of service of a responsive pleading. The amending party can add claims or parties in their amendment. Under Rule 15c, it is possible that the amendment to bring in a party can be related back to the date of the filing of the complaint which will be necessary so that they are not barred by the expiration of the statute of limitations. With claims there is no problem relating back to the time of the original filing because the parties are the same and there is no due process violation due to lack of notice. When it comes to relating back the addition of a party after the statute of limitations has run this creates a due process problem. The correct doctor can still be added if three criteria are met: 1) the party is part of the same transaction and occurrence of the events that created the claim, 2) the party was given notice when the original complaint was filed, and 3) the new party would have been added in the original complaint but for the mistake made on the part of the plaintiff, and that the added party should have known they were the party that should've been part of the original complaint.

Here the correct doctor is part of the same transaction that created the claim, and it is likely that they were aware of the lawsuit shortly after it was served on the wrong doctor. It appears that Dr. Smith and the correct doctor, Dr. Smyth, know each other well. They said that this type of thing "happens all the time." It is also likely that because a nurse was impleaded into the complaint, there was talk about the lawsuit in the OR community. It seems likely that the incorrect Dr. Smith would have done a little research to find out that the other Dr. Smyth was the correct defendant. If that happened and Patty can show that Dr. Smyth knew about the lawsuit against Dr. Smith, shortly after it was served, and that Dr. Smyth should have known she was the proper defendant, it is likely that Patty will be allowed to relate the amendment back to the original filing date, avoid the violation of the statute of limitations and amend her complaint to add Dr. Smyth.

