

**Federal Civil Procedure Two
Final Examination**

**Prof. Slomanson
Spring 2009**

Exam# _____

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Memorandum

Dewey, Cheatem, Bilkem & Howe
110 Laurel Avenue
San Diego, CA 92101

May 10, 2009

To: Job Applicant

Fm: Managing Partner

Re: Instructions

We are among the growing number of law firms using this type of exercise. We assess the ability of our job applicants to bridge the gap between law school and the bar exam by doing what lawyers do: read instructions; process documents; and produce a reasoned analysis of a case.

After reading this instructional Memo, examine the FILE. It contains the facts and issues for this exercise. The enclosed LIBRARY contains sources that may bear upon your analysis. They are not the only legal rules applicable to this exercise. Do not assume that every scrap of information in the FILE and LIBRARY is relevant to some issue. Please advise me on Issues #1 through #10 as they appear in the enclosed FILE.

We do not expect you to respond as if you are an advocate for only our firm. If there are two sides to an issue, you should address the relative arguments, but do give me your reasoned conclusion on each issue. Use whatever format you wish to provide your response.

I have decided that there is supplemental jurisdiction over the claim against the San Diego Police Department (S.D.P.D.). So do not address subject matter jurisdiction regarding the plaintiff's claim against the S.D.P.D. (Having nothing to do with any issue in this exam, but lots to do with ethics, Nancy Grace apparently believes that she can properly represent all the defendants in this case—including both the S.D.P.D. and the "hood" who shot the S.D.P.D.'s former employee.)

Good luck,

Jumpin' Jack Flash

Hiring Partner

FILE

Charles Orion Peace v. Dennis DeHood [D ¹], Dan Devine [D ²], Delta Gunco, Inc. [D ³], and San Diego Police Department [D ⁴].	United States District Court Southern District of California Civil Action No. 654321-SOB COMPLAINT Personal Injury, Product Liability, and Wrongful Termination/Negligence
<p style="text-align: center;">Count One: Personal Injury</p> <p>1. This is a case arising under 28 USC §1332. Plaintiff Charles Orion Peace, aka “COP,” is an individual domiciled in California. Dennis DeHood is an individual domiciled in Nevada. Dan’s Dive is an unincorporated business in San Diego, California, owned and operated by Dan Devine. He is an individual domiciled in Nevada. Delta Gunco is a Nevada corporation, with its principal place of business in Nevada.</p> <p>2. Plaintiff COP is a San Diego police officer. He entered Dan’s Dive because of a reported disturbance. Upon entering Dan’s Dive, COP observed defendant DeHood aiming a pistol at the bartender, who was shouting at DeHood. COP drew his weapon—a handgun manufactured and sold by defendant Delta. COP’s weapon misfired. As a result, DeHood panicked. He then shot COP and killed the bartender.</p> <p>3. COP was seriously injured. COP thus alleges damages for personal injury against defendants DeHood and Devine. Devine’s liability is derived from his failure to properly train and supervise his bartender to deal with disorderly patrons in a high-risk location.</p> <p style="text-align: center;">Count Two: Product Liability</p> <p>4. Plaintiff COP herein re-alleges all prior allegations, as if fully set forth herein. COP further alleges a product liability claim against defendant Delta. Its weapon failed to function as designed.</p> <p>5. Due to the malfeasance and/or misfeasance of defendants D¹, D², and D³ in this action, plaintiff COP was emotionally distressed for a six-month period. During that time, he often dreamed that he was reliving the referenced shooting incident at Dan’s Dive.</p> <p style="text-align: center;">Count Three: Wrongful Termination/Negligence</p> <p>6. On the basis of plaintiff COP’s disability, he was terminated from his job by San Diego Police Department (S.D.P.D.). The reason given was that he could no longer perform the duties required of a police officer. He thus seeks reinstatement in the S.D.P.D., in a job suitable for his current condition. Plaintiff further seeks back pay, for his resulting two-year period of unemployment, during which he should have remained employed by the S.D.P.D.</p> <p>7. Plaintiff’s resulting condition was proximately caused by the defendant S.D.P.D.’s issuance of a handgun that was not properly designed or maintained.</p> <p>WHEREFORE, plaintiff COP seeks:</p> <p>(a) \$1,000,000.00 in damages each, from defendants D¹, D² and D³, for a total of \$3,000,000.00; (b) \$48,000.00 from D⁴—consisting of \$2000.00 per month, for each month of the above twenty-four-month period of unemployment, when he could have been suitably employed in an administrative capacity; and (c) further damages, in accordance with proof at the trial of this action.</p> <p style="text-align: right;">Signed: <i>Jumpin’ Jack Flash</i> Dewey, Cheatem, Bilkem & Howe Attorneys for Plaintiff</p>	

<p>Charles Orion Peace v. Dennis DeHood [D¹], Dan Devine [D²], Delta Gunco, Inc. [D³], and San Diego Police Department [D⁴].</p>	<p>United States District Court Southern District of California Civil Action No. 654321-SOB ANSWER By Defendants D¹- D⁴</p>
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ANSWER

1. The defendants, and each of them, hereby respond to the Complaint of plaintiff Charles Orion Peace (aka “COP”). They each generally deny all liability allegations in COP’s Complaint.

AFFIRMATIVE DEFENSES

2. Lack of Subject Matter Jurisdiction—Defendant Dennis DeHood is now serving a life sentence at the state prison in San Quentin, California. In addition to his conviction for shooting the plaintiff, DeHood was convicted of second degree murder of the bartender at Dan’s Dive, during the incident described in paragraph two of the Complaint in this action. Like plaintiff COP, DeHood is domiciled in California. This case must therefore be dismissed as to this answering defendant.

3. Lack of Personal Jurisdiction—Defendant Delta Gunco has never sold a gun or any ammunition in California. Delta has sold its products only to wholesale sellers, none of whom are located in California. As such, Delta has not subjected itself to the jurisdiction of the California courts.

4. Preclusion by Prior Suit—There was a prior California lawsuit against defendant DeHood involving the identical facts. He was therein found guilty of shooting a police officer, and second degree murder for killing the bartender. DeHood is once again a defendant in this subsequent action. Plaintiff COP is thus barred from re-litigating this action against DeHood.

WHEREFORE, the defendants, and each of them, pray that plaintiff COP take nothing by reason of the Complaint filed in this action.

Signed: *Nancy Grace*
Last, Hope & Chance
Attorneys for Defendants

Issue #1: Does the trial court have subject matter jurisdiction (SMJ) to hear the claim against defendant DeHood?

Issue #2: Does the trial court have personal jurisdiction over defendant Delta?

Issue #3: Does the prior suit against DeHood bar this second suit against DeHood?

Assume a “yes” answer to Issues #1 and #2, and a “no” answer to #3: The case continues.

Issue #4: Could defendant DeHood obtain immediate appellate review of the SMJ order?

Issue #5: Is COP entitled to a jury trial for his claim against the San Diego Police Dep’t?

Issue #6: Could the defense obtain a mental examination of plaintiff COP?

More Facts: Dan's Dive is a popular hangout for off-duty police officers. Wendy was in Dan's at the time of the shooting. Wendy is the San Diego Police Department (S.D.P.D.) forensics weapons expert. When she returned to work the next day, Wendy conducted standard forensic tests on COP's gun (that had misfired at Dan's the day before).

Wendy has just retired. Wendy is one of a handful of qualified forensic handgun experts in California. She is generally regarded as the most qualified of all such experts in the state. Assume that there is no statute or case that prevents Wendy from being a hired consultant in this case.

With the permission of her former employer, Wendy has been employed by defendant Delta Gunco. She is now Delta's forensics handgun expert. She will advise Delta regarding its potential liability for COP's alleged claim against Delta. She has conducted additional testing on COP's gun.

Issue #7: Can plaintiff COP take Wendy's deposition to determine the relevant issues in this action?

<p>Charles Orion Peace v. Dennis DeHood [D¹], Dan Devine [D²], Delta Gunco, Inc. [D³], and San Diego Police Department [D⁴].</p>	<p>United States District Court Southern District of California Civil Action No. 654321-SOB DEFENDANT DAN DEVINE'S MOTION FOR SUMMARY JUDGMENT Trial Date: June 15, 2009</p>
<p>1. Defendant Dan Devine hereby moves the court for summary judgment on the issue of Devine's derivative tavern owner liability, as alleged in ¶3 of plaintiff's Complaint. 2. The relevant deposition testimony of Wally Witness is set forth below, in support of defendant Devine's motion for summary judgment. 3. Under all applicable legal principles, this case is a "sick chicken." It should be euthanized before trial. Defendant Dan Devine has no liability to the plaintiff—for the acts of plaintiff and the other defendants.</p> <p style="text-align: right;">Signed: <i>Nancy Grace</i> Last, Hope & Chance Attorneys for Defendants</p>	
<p style="text-align: center;">Defendant's Affidavit in <i>Support</i> of Summary Judgment Motion <u>Deposition Testimony of Wally Witness: Action #654321-SOB:</u></p> <p>*** Q: What did you see the bar patron DeHood do with his handgun? A: Well, first the police officer said "Go ahead—make my day." The cop tried to fire his weapon at DeHood, who was pointing his gun at the bartender. Before the cop could fire, however, DeHood turned and shot the policeman and the bartender. ***</p>	

<p>Charles Orion Peace v. Dennis DeHood [D¹], Dan Devine [D²], Delta Gunco, Inc. [D³], and San Diego Police Department [D⁴].</p>	<p>United States District Court Southern District of California Civil Action No. 654321-SOB PLAINTIFF'S OPPOSITION TO DEVINE'S SUMMARY JUDGMENT MOTION Trial Date: June 15, 2009</p>
<p>1. Plaintiff COP here by hereby opposes the Devine's motion for summary judgment. 2. The relevant deposition testimony of Wally Witness is set forth below in the affidavit in support of the defendants' motion for summary judgment. 3. Under all applicable legal principles, the shooting in this case clearly presents facts which trigger the right of the plaintiff to proceed to trial.</p> <p style="text-align: right;">Signed: <i>Jumpin' Jack Flash</i> Dewey, Cheatem, Bilkem & Howe Attorneys for Plaintiff</p>	
<p style="text-align: center;">Plaintiff's Affidavit in <i>Opposition</i> to Summary Judgment Motion <u>Deposition Testimony of Wally Witness: Action #654321-SOB:</u></p> <p>*** Q: What did you see the bar patron DeHood do with his handgun? A: Well, first the police officer said "Go ahead—make my day." The cop tried to fire his weapon at DeHood, who was pointing his gun at the bartender. Before the cop could fire, however, DeHood turned and shot the policeman and the bartender. ***</p>	

Issue #8: How should the court rule on Dan Devine's summary judgment motion?

More Facts: Assume that the defendant San Diego Police Department settles with plaintiff COP. This case ultimately goes to trial against the three remaining defendants. The jury renders the following verdict:

VERDICT FORM: Charles Orion Peace v. Dennis DeHood, et al., Action No. 654321-SOB			
No:	Question to be answered by jury:	Answer:	Amount / %:
1.	What was the amount of the plaintiff's total damages proven at trial?		\$100,000.00
2.	Was Defendant Dennis DeHood negligent?	Yes	
3.	Was Defendant Dan Devine negligent?	Yes	
4.	Was Defendant Delta Gunco liable?	Yes	
5.	Was Plaintiff Charles Orion Peace negligent?	Yes	
6.	If your answer to #5 was "Yes," was the plaintiff's COP's negligence a proximate cause of his injuries?	No	
7.	What was the percentage of negligence for each liable party?		
	(a) Defendant One (D ¹ shot COP)		70%
	(b) Defendant Two (D ² owns tavern)		10%
	(c) Defendant Three (D ³ made gun)		10%
	(d) Plaintiff		10%
8.	What is your general verdict?	We hold for Plaintiff "COP"	\$90,000.00. We further hold that D ² should pay a total of \$1.00 in damages.

Issue #9: Is the verdict defective? If so, how?

Issue #10: Assume that: (a) the jury has been released; and (b) their verdict is erroneous. What motion should be made to correct the defect(s); by whom; and how should the court rule?

[END OF FILE]

LIBRARY

FEDERAL RULES OF CIVIL PROCEDURE

RULE 8 *General Rules of Pleading.*

(a) Claim for Relief. A pleading that states a claim for relief must contain:

(1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support;

(2) a short and plain statement of the claim showing that the pleader is entitled to relief; and

(3) a demand for the relief sought, which may include relief in the alternative or different types of relief.

(b) Defenses; Admissions and Denials.

(1) In General. In responding to a pleading, a party must:

(A) state in short and plain terms its defenses to each claim asserted against it; and

(B) admit or deny the allegations asserted against it by an opposing party.

RULE 12(b) *How to Present Defenses.* Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:

(1) lack of subject-matter jurisdiction;

(2) lack of personal jurisdiction;

(3) improper venue;

(4) insufficient process;

(5) insufficient service of process;

(6) failure to state a claim upon which relief can be granted; and

(7) failure to join a party under Rule 19.

A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed. If a pleading sets out a claim for relief that does not require a responsive pleading, an opposing party may assert at trial any defense to that claim. No defense or objection is waived by joining it with one or more other defenses or objections in a responsive pleading or in a motion.

RULE 26(b)(3) *Trial Preparation Materials.*

(A) Documents and Tangible Things. Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:

(i) they are otherwise discoverable under Rule 26(b)(1); and

(ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

* * *

RULE 35(a) Order for an Examination.

(1) In General. The court where the action is pending may order a party whose mental or physical condition—including blood group—is in controversy to submit to a physical or mental examination by a suitably licensed or certified examiner. The court has the same authority to order a party to produce for examination a person who is in its custody or under its legal control.

RULE 38 Right to a Jury Trial.

(a) Right Preserved. The right of trial by jury as declared by the Seventh Amendment to the Constitution--or as provided by a federal statute—is preserved to the parties inviolate.

(b) Demand. On any issue triable of right by a jury, a party may demand a jury trial by:

(1) serving the other parties with a written demand—which may be included in a pleading—no later than 10 days after the last pleading directed to the issue is served; and

* * *

(c) Specifying Issues. In its demand, a party may specify the issues that it wishes to have tried by a jury; otherwise, it is considered to have demanded a jury trial on all the issues so triable. If the party has demanded a jury trial on only some issues, any other party may—within 10 days after being served with the demand or within a shorter time ordered by the court—serve a demand for a jury trial on any other or all factual issues triable by jury.

(d) Waiver; Withdrawal. A party waives a jury trial unless its demand is properly served and filed. A proper demand may be withdrawn only if the parties consent.

RULE 50(b) Renewing the Motion After Trial; Alternative Motion for a New Trial. If the court does not grant a motion for judgment as a matter of law made under Rule 50(a), the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. No later than 10 days after the entry of judgment—or if the motion addresses a jury issue not decided by a verdict, no later than 10 days after the jury was discharged—the movant may file a renewed motion for judgment as a matter of law and may include an alternative or joint request for a new trial under Rule 59. * * *

RULE 56(c) Serving the Motion; Proceedings. * * * The judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.

RULE 59 New Trial.

(a) In General.

(1) Grounds for New Trial. The court may, on motion, grant a new trial on all or some of the issues—and to any party—as follows:

(A) after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court * * * .

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UNITED STATES CONSTITUTION

Amendment VII. Civil Trials. In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

UNITED STATES JUDICIAL CODE

28 USC §1331 Federal Question. The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 USC §1332 Diversity of Citizenship.

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and is between—

- (1) citizens of different States;
- (2) citizens of a State and citizens or subjects of a foreign state;

* * *

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of \$75,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title—

(1) a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business.

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[END OF LIBRARY]

<p><u>Issue #1: SMJ DeHood</u></p> <ul style="list-style-type: none"> * “case arising” under 1332 ± FQ * Diversity = dom + amt <li style="padding-left: 20px;">* amt clearly > 75k <li style="padding-left: 20px;">* shot + presumably hosp * Dom = pres & intent <li style="padding-left: 20px;">* resides SQuentin <li style="padding-left: 20px;">* rule stud/mil/prison <li style="padding-left: 20px;">* DH life sentence ± nec intent CA * Amt = D ± atk * ± legal certainty <75k * claim may excessive, but whether >75k⁺ <p><u>Issue #2: IPJ Delta</u></p> <ul style="list-style-type: none"> * Min Cont * D = no sale CA <li style="padding-left: 20px;">* no wholesaler = CA <li style="padding-left: 20px;">* stream comm ± enough * P = can’t disavow resale <li style="padding-left: 20px;">* gun used adjacent state CA <li style="padding-left: 20px;">* SDPD issued > 1 product stream comm <p><u>Issue #3: Prior Suit</u></p> <ul style="list-style-type: none"> * RJ = split claim <li style="padding-left: 20px;">* D’s wrong ± P’s rights <li style="padding-left: 20px;">* People & COP = diff claims (OJ hypo) * CE = id issue, actual litig <li style="padding-left: 20px;">* offensive CE ok (crim liab v. DH) <li style="padding-left: 20px;">* ± diff incidents <p><u>Issue #4: Appellate Review SMJ</u></p> <ul style="list-style-type: none"> * pre-jmt review policy * C.O. <li style="padding-left: 20px;">* SCt stingy * 1292b = <li style="padding-left: 20px;">* joint discretion <li style="padding-left: 20px;">* elements (common all bases) <li style="padding-left: 20px;">* elements applied * writ (“Narly”) <li style="padding-left: 20px;">* if every SMJ order writable <p><u>Issue #5: Jury Trial SDPD?</u></p> <ul style="list-style-type: none"> * judge/jury division <li style="padding-left: 20px;">* claim seeks \$ damages <li style="padding-left: 20px;">* overlap argument (Beacon) <li style="padding-left: 20px;">* fed ± ILR (DQ) * if right reinstatement, amt not at issue * Waiver: not plead @ <li style="padding-left: 20px;">* judge can waive waiver <p>@” = Complaint. “±” = not</p>	<p><u>Issue #6: Mental Examination</u></p> <ul style="list-style-type: none"> * Rule 35 elements * facts silent type exam * Q = in contro if relevant claim * mental higher bar if doubt (privacy) * ¶5 = “emotionally distressed six mo” <li style="padding-left: 20px;">* “dreamed reliving shooting” * mental exam = higher threshold * probably not enough plead (± IIED) <p><u>Issue #7: Wendy’s Depo?</u></p> <ul style="list-style-type: none"> * <i>Purpose</i>: depo scope not stated <li style="padding-left: 20px;">* scope issue <li style="padding-left: 20px;">* cond’al WP * <i>Percipient witness</i>: 5 senses <li style="padding-left: 20px;">* at scene shooting <li style="padding-left: 20px;">* standard lab tests ± WP * <i>WP</i>: rule anti raiding Delta cond’al WP <li style="padding-left: 20px;">* exception: ± subst equiva <li style="padding-left: 20px;">* add’al testing post-retained * facts: handful qualified experts <li style="padding-left: 20px;">* most qualified in state <li style="padding-left: 20px;">* next closest? <li style="padding-left: 20px;">* share costs <p><u>Issue #8: Summary Judgment</u></p> <ul style="list-style-type: none"> * <i>gist</i>: no gen iss mat’l fact <li style="padding-left: 20px;">* reas jury find favor non-movg <li style="padding-left: 20px;">* inferences favor non-resp <li style="padding-left: 20px;">* disc complete (abt month to trial) * <i>mat’l fact</i>: acts other parties/adeq training <li style="padding-left: 20px;">* COP: “Make Day”/panic <li style="padding-left: 20px;">* Delta: handgun misfire * <i>affidavits</i>: if conflict-> trial <li style="padding-left: 20px;">* admissible (Wally depo) * <i>concl</i>: ± enough void DD liab <li style="padding-left: 20px;">* tougher tort cases <p><u>Issue #9: Defective Verdict</u></p> <ul style="list-style-type: none"> * answers must internally consistent * <i>Contrib</i>: COP neg (#5) ± prox cause (#6) <li style="padding-left: 20px;">* P = 10% fault <li style="padding-left: 20px;">* P only 90k NWS #6 * <i>Tavern owner</i>: 10% <li style="padding-left: 20px;">* \$1 dollar NWS #7(b) <p><u>Issue #10: Motion</u></p> <ul style="list-style-type: none"> * jury discharge ± reassemble * ± Mo Jmt: ± substantial evidence issue * motion new trial * jud discretion/weigh facts * prej error -> <i>Contrib</i>: ± prox cause <li style="padding-left: 20px;">* -> Tavern Owner: \$1 v. 10% * when grant, dam only?
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ID: 6917 (Exam Number)
Exam Name: Civil_Procedure_II_Slomanson_Sp09_Final
Instructor: Professor Slomanson
Exam Date: May 10, 2009
File Name: 6917-Civil_Procedure_II_Slomanson_Sp09_Final-090510.xmd
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Grade: _____

Total Number of Words in this Exam = 4,710
Total Number of Characters in this Exam = 27,142
Total Number of Characters in this Exam (No Spaces, No Returns) = 21,970

1)

#1: Does the trial court have subject matter jurisdiction (SMJ) to hear the claim against DeHood (D1)?

Subject matter jurisdiction is the power of the court to hear the case. There are two ways of establishing SMJ: Federal Question and Diversity Jurisdiction.

Federal Question

Federal question jurisdiction is established when the plaintiff alleges that the claim arises under a federal treaty, statute or Constitution and that the D's conduct fits within that statute. Here, Peace (COP) does not claim that this case arose under federal statute so this form of jurisdiction does not apply.

Diversity Jurisdiction

Diversity Jurisdiction is established when no plaintiff and no defendant are domiciled in the same state and the plaintiff's prayer meets the minimum amount in controversy which needs to exceed \$75,000.

Domicile

Domicile of an individual is established through the individuals presence in the

forum and his/her intent to remain in the forum state indefinitely. Here, the facts state that COP is domiciled in CA. However, the facts also state that D1 is domiciled in Nevada. D1 is arguing that because D1 is currently incarcerated in prison for a life sentence at a state prison in California. Therefore, D is present in the state of California and has no intentions of leaving because he will never leave as he will be serving the rest of his life in a CA prison. The P will argue that even though one may be incarcerated for a period of time that doesn't that one loses their original domicile which in this case would be Nevada for D1 Forcing someone to remain in a state is not by that person's choice and therefore does satisfy the necessary intent element. Most likely the court will hold for the P because even though D1 is incarcerated in CA does not mean that he no longer is domiciled at his former domiciliary where he most likely still has the requisite intent to return to. Therefore, this element is met.

Amount in Controversy

The minimum amount in controversy must exceed \$75,000. Before a court will dismiss on this element is must appear to a legal certainty that the P will not be able to recover this requisite amount. Here, COP is praying for \$100,000,000 from D1 for personal injury due to the shooting where he was later fired because he could no longer do his job and was emotionally distressed for six months. Because this shooting was an intentional tort COP could also be asking for punitive damages, pain and suffering, and most likely medical bills resulting from the injuries he has suffered. Therefore, even if \$100,000,000 seems like an exorbitant amount of damages it would appear to a legal certainty that COP could cover the requisite minimum amount in controversy against D1 alone.

Conclusion

Both element of Diversity SMJ are met. The court has SMJ to hear this case against D1.

#2: IPJ over Delta (D3)

IPJ is jurisdiction over the person. IPJ is determined through a two step process.

First, statutory construction of the forum state's Long Arm Statute. Second, the D's ties with the forum.

LAS

This action is taking place in CA. CA has a one step LAS which states the CA may have jurisdiction over anyone in anyway that is not inconsistent with the U.S. Constitution. Therefore, D3 ties must be satisfactory in order to satisfy CA's LAS.

D's ties with the forum

A D must have sufficient ties with the forum. This is established by balancing the factors of whether D has minimum contacts with the forum. Whether he/she purposefully availed him/herself to the forum state's benefits and its residents and whether the D could reasonably anticipate being hauled into the forum state to litigate. Here, COP is suing Delta for product liability which P is claiming that Delta's weapon failed to function as designed because COP's police department issued gun misfired during the middle of a shoot out and COP got injured. Delta will argue and has in the facts that it never sold any guns or ammunition to CA and only sold their products to wholesalers who distributed this guns to the San Diego Police Department who then gave it to the P. Therefore, Delta has no minimum contacts with the forum state of CA and furthermore did not purposefully avail themselves of the benefits of the forum state. Merely placing a product into the stream of commerce without more does not sustain minimum contacts. The P will argue that although D3 sold the guns to wholesalers that D3 was benefiting and profiting from where ever the wholesaler was distributing these guns. Although D3 is incorporated in NV and does its PPB there it was foreseeable to this company that its guns could be sold all over the U.S. and that problems with these gun could arise in any forum in the U.S. Therefore, D3 did purposefully avail themselves to the benefits of CA and its residents (since San Diego Police Department bought this gun to help protect CA residents). P will also argue that the cause of action arose in the forum since the gun misfired in a bar in San Diego giving D3 minimum contacts. The court will most likely find that D3 has minimum contacts with the forum because of its business practices and because the cause of action arose in the forum.

#3 Prior Suit of DeHood

Res Judicata

Res Judicata is claim preclusion meaning that a plaintiff (or a defendant with a compulsory counterclaim) can split its cause of action. A claim is determined by looking at the wrong of the defendant. If the P does not litigate all of its damages that come out of the one defendant's wrongs then all of those non-litigated claims are extinguished with the others that were litigated when the claim is finally adjudicated. Typically, RJ can only be asserted by parties who were parties in the original action.

Here, D cannot assert RJ against COP because COP was not a party to the first suit. The first suit against DeHood was his criminal trial where he was found guilty of shooting COP and the bartender. COP was not a party to the suit because the government prosecutes criminal cases and therefore the government was the other party along with DeHood in the first suit.

Therefore, RJ may not be applied in this case against COP.

Collateral Estoppel

CE is issue preclusion. CE requires three elements: #1) The identical issue in both suits 2) The issue was actually litigated in Suit 1 3) The suit was necessarily decided in Suit 1.

Identical Issue

Here, the personal injury of COP resulting from D1 shooting him is the identical issue in Suit 1 and suit 2. The facts and evidence would be the same for suit 1 and 2 because both center around whether D1 shot COP. The only difference is semantics. In suit 1 D1 would be found guilty if he shot COP. In suit 2 D1 would be found liable if he shot COP. Therefore, the issue is identical in both suits.

Actually Litigated

Because the jury in D1 criminal case convicted DeHood for shooting COP this

issue of whether or not D1 shot COP was actually litigated in Suit 1.

Necessarily Decided

As stated above, since the jury convicted D1 in his criminal trial with shooting COP this issue of D1's liability regarding his shooting COP was necessarily decided in Suit 1. If the jury in the prior suit did not think that D1 shot COP then he would not have been convicted for that crime as well during Suit 1. D3 would have only been convicted of the 2nd degree murder of the bartender.

CE Against a Stranger

CE cannot be asserted against a stranger to Suit 2. As stated under the RJ analysis, COP is a stranger to Suit 2 because he was not a party in suit 1. Because he was not a party in suit 1 he would not be bound by that guilty verdict against D1 because that would be against federal due process. Therefore, D may not defensively assert CE against COP in suit 2. However, P may offensively assert CE against D1 because D1 is bound by the guilty verdict in Suit 1 if P is not a wait and see plaintiffs. Wait and see plaintiffs are not tolerated and therefore can use CE if they wanted for prior litigation to occur to see what the verdict was in order to file its own case. However, suit 1 was a criminal trial and it is the right of all criminal defendant's to have a speedy trial. Although the facts are silent as to whether COP wanted until the criminal trial was over to file his own suit, it is more likely that the criminal case against D3 commenced before the civil case against D3 because criminal cases are pushed through the system while civil cases are scheduled around them.

Therefore, because it is the D who is trying to assert CE against COP who was a stranger to the first suit the court will not likely hold that CE can be asserted successfully in this case.

#4: Appellate Review of SMJ order

There are several avenue in which one could obtain appellate SMJ. In general, an appellate review prior to final judgment can only typically occur when this issue is too

important to deny it immediate review and the policy against piecemeal litigation in different courts is overcome.

Multiple Claims

A deposition on less than all claims that is on the merits is appealable at the discretion of the trial court. SMJ however does not involve the merits of this case because SMJ has nothing fundamentally to do with the elements of personal injury, products liability, or wrongful termination. Therefore, a multiple claims appeal is not applicable here.

Collateral Orders

A collateral order is an order that is not on the merits of the case. It is automatically appealable. The Supreme court, however, has limited what qualifies as an appealable collateral order in its decision in *Cohen*. Subject matter jurisdiction is likely not the type of order that the Supreme Court had in mind under *Cohen* because the Court sought to extremely limit what was automatically appealable under this approach. If not there would be a lot of cases that could be automatically appealed with SMJ. Therefore, the basis for appeal with SMJ does not likely trigger appellate SMJ.

Interlocutory Appeal

An interlocutory appeal is one that requires the discretion of both the trial and appellate court to appeal. Interlocutory appeal requires that the issue in question be a controlling question of law, one that has grounds for a substantial difference of opinion, and one that if there was immediate appellate review would materially determine the ultimate disposition of the case.

Controlling question of law.

For an issue to be deemed a controlling question of law it must get to the heart of the case or be a "big deal". SMJ does not get to the heart of the case because it is a procedural process. This leans towards this issue being likely not appealable.

Substantial Difference of Opinion.

For an issue to have substantial grounds for difference of opinion there must be different federal courts who have taken different action with this issue in the past. It is not likely that other federal courts would have a difference of opinion on SMJ. The Federal Judicial Codes regarding SMJ are very specific and are not likely to lead to radically different results when applied in different courts. This leans towards this issue not likely being appealable.

Determine the Ultimate Disposition

Here, an appellate court's review of the SMJ issue in this case is not likely to lead to the ultimate disposition of this litigation because if the appellate court grants SMJ that just allows the trial to go ahead and does not help determine the ultimate termination of the case. On the other hand, if the appellate court does not grant SMJ in this case, the P can refile this action in state court and the trial would still go ahead.

Joint Discretion

For interlocutory appeal both the trial court and the appellate court must certify this issue as final before the issue can be appealed prior to final judgement. The facts are silent as to whether either the trial judge or the appellate court would object.

Therefore, assuming that both the trial judge and the appellate court certify this appeal SMJ will most likely not be appealable under interlocutory appeal because this issue did not meet the required elements to grant immediate appellate review.

Writ

Writ is the final way that this issue could obtain an immediate appeal. Writs are an equitable remedy and exists as an avenue for appellate review when there is no other adequate remedy at law. Writs require only the discretionary certification of the appellate court. Because this issue of SMJ did not seem to work with any of the other

appellate review basis, the appellate court will more than likely allow a review of this issue under writ.

#5 COP entitled to jury trial against SDPD

The Seventh Amendment of the United States Constitution states that the right to jury trial must be preserved. When a plaintiff is seeking legal relief (money damages) a jury will be the trier of fact unless the case is complex or it is an administrative adjudication. When the plaintiff is seeking equitable relief such as injunction or specific performance the judge will be the trier of fact. The plaintiff must demand a jury trial either in her pleadings or make a demand no less than 10 days after the complaint is filed.

In this case, the P's complaint does not demand a jury trial. However, a judge at his discretion could order a jury trial at his discretion even if the parties do not demand one. Here assuming that P made a later timely demand after this pleading was filed or the judge ordered one, one must next look to what the prayer of the complaint is asking in order to determine whether the plaintiff has a right to jury trial.

In this case COP is seeking reinstatement in a job that was suitable for his current fragile condition plus \$48000 in back pay for the time he was not employed because he was wrongfully terminated. Here the plaintiff is seeking both equitable remedy to be reinstated and legal relief for back pay in the same action. This case is analogous to the another police offer case who was wrongfully terminated and was seeking reinstatement and back pay. In that case, the court decided that the main type of relief sought was injunctive and the legal remedy was mainly incidental to the main relief. However, the Supreme Court in *Dairy Queen* overturned the legal relief doctrine stating that even if the legal relief is incidental to the main equitable relief that a jury must be empanelled. There is would also be an overlapping of fact finding in this case because the judge would need to determine whether D was wrongfully terminated should be reinstated and the jury would determine whether D should receive back pay. According to the Supreme court in *Beacon* where there is an overlap in issues and fact finding the jury should typically render its verdict first, then the judge. However, this would be difficult in this case because the judge's finding of wrongful termination and whether to reinstate COP colors whether the jury will find any award any back pay damages. In any case, a jury should be empanelled to hear this case.

However, if this type of case for wrongful termination falls under the jurisdiction of an administrative adjudication this would be an exception to the right to jury. In that case, a judge would be the trier of fact and no jury would be empanelled. The main equitable relief would over shadow the legal relief and there would be not much to decided. Figuring out the back pay would be easy to calculate using the figure that he should have been paid \$2,000 a month for the 24 month period in which he was unemployed.

#6 Could the Defense obtain a mental exam of the P?

For a party to obtain an exam of the adversary party that parties condition (in this case) mental condition must be in controversy and there must be good cause. It is easier to obtain an exam of a P because he/she has chosen the purse over his/her privacy. Here, P's mental condition is in controversy because his mental state regarding his sixth month period of emotional distress is stated in the pleadings. The D must show good cause for the exam giving the time, place, scope, and doctor of who will be administering the exam. If the defense chooses an exam that is not painful, not inconvenient, and non-obtrusive it is more than likely that the D will be able to obtain a mental examination of the P.

#7 Can COP take Wendy's depo to determine the relevant issues in this action.

A party can obtain discoverable information that is not privileged, relevant to any party's claim or defense, and is admissible at trial or lead to admissible evidence. This question deals with privilege.

Work product is the mental impressions and materials gathered in preparation for the trial. There are two types of work product: Absolute and conditional. Absolute work product are the mental impressions of the attorney(s) working on the case. Absolute work product can never be exchanged with the other party. Conditional work product is the mental impressions of anyone else who has information regarding the case.

In this case Wendy has many roles. Each will be analyzed as to whether P can depo her.

Fact Witness

Wendy is a fact witness in this case as she was there at the bar at the time of the incident and witness the shooting. P may depose Wendy as a fact witness for only what she saw, heard, touching, tasted, etc. at the time of the incident and nothing else. P would have obtained W's contact information because as a fact witness her information was automatically exchanged as a part of this litigation's core discovery.

SDPD Forensics Expert

Wendy conducted standard forensic tests on COP's gun for the SDPD before she started to work for Delta as their forensic handgun expert. Therefore, because W's report was a relevant document which would be used to support any party's claim or defense P would be entitled to that report and also would probably be able to ask W deposition questions on her findings on the gun before she went to work with Delta. P would probably not be able to ask W about her subsequent testing on the gun after she began working for Delta. This will be discussed further below.

Expert consultant/witness

If a party uses an expert as a consultant in preparation of its case and that party does not designate that expert as a witness then that expert cannot be deposed by the other party and that expert's findings as a consultant would be deemed conditional work product. Conditional WP is privileged, but exceptions are made when the opposing party shows that it has a substantial need to depose this consultant as he/she is the only available consultant in the whole world and that the opposing party cannot obtain the substantially equivalent information without undue burden or to extreme cost in obtaining another expert or there is another expert but there are scheduling conflicts or they are otherwise unavailable.

Here, the facts are silent as to whether the D has designated W as an expert witness. If D has, then P may freely depose W as an expert witness. If Delta has not designated W as an expert witness it would be difficult to show that P could not obtain the same information from some other expert. The facts state that W is the most qualified of all such experts. However, it would be hard for P to show that he could not obtain a substantially equivalent because he has not made a showing that no other

qualified experts are available and could likely retain one to conduct testing on this gun to obtain the same information as W would provide. COP use to be a police officer. It would be more likely that he would personally know other weapons experts (may ones still on the force) who could be some independent testing on this gun.

Therefore, if W has not be designated as an expert witness to D, P will most likely not be able to depose her in the capacity of an expert.

#8: Summary Judgment

Motion for summary judgment (MSJ) is established when the moving party establishes that there is no genuine issue of material fact and no reasonable jury could find for the non-moving party. All affidavits must be based on personal knowledge and conform to the trial rules of evidence. Assuming that the affidavits conform to the trial rules of evidence because the fact do not state otherwise, the other issues will be discussed below.

No genuine issue

Here, the affidavits submitted by both parties on the same. When there are conflicting affidavits the judge must deny the SMJ. When the two affidavits are the same the judge must look deeper to see if the underlying inferences of the affidavits are conflicting. Here, D2 is submitting Wally's statement to prove that D2 was not liable because the shooting of P had nothing to do with D2 not training his bartender properly, but that COP provoked DeHood into shooting him by saying to "make his day". The P is using this affidavit to show that D was liable for the lack of training for his bartender despite of Wally's testimony because the bartender didn't defuse the situation. However, the inference that P is trying to make is lacking since Wally's statement does not show that D2 was liable. It shows that P was the cause of his own self being shot. Furthermore, the P cannot now rely on his pleading as evidence in opposition to motion for summary judgement. Therefore, because the affidavits submitted by both parties seem not to be conflicting either on its face or on its inferences, there is no genuine issue of material fact in this case.

No reasonable Jury

The moving party must show that no reasonable jury could find for the non-moving party with all inferences drawn in favor of the non-moving party. Here, all the inferences favor the defendant. If this were a high pressure situation provoking DeHood was most likely the cause of P's shooting injuries and not the lack of training of the bartender by D. The P would argue that his words did not provoke DeHood as he was already ready to shoot. However, the D would likely win because without P's words only the bartender probably would have got shot and not the P. Therefore, with all inferences favoring the non-moving party D would probably show with his affidavit that P was liable for the shooting and not him.

Based on Personal Knowledge

This might be an issue because part of Wally's testimony is hearsay on what the P said although it was based on his personal knowledge because he was at the scene.

Conclusion

The judge will most likely grant the D's motion for summary judgment and close this part of the P's case.

#9: Defective Verdict

The jury's verdict is defective depending on the jurisdiction. If this is a pure contributory negligence jurisdiction then the fact that the jury found P negligent in though it was only 10% would bar his claim and he would receive no money damages for any of his claims. If this is a comparative jurisdiction then P's negligence should be reduced in the amount in which he was negligent. This is shown in the jury's special verdict because they found the P 10% negligent and reduced his \$100,000 by 10% so it now totals \$90,000. However, D2 who owned the tavern was 10% negligent but was only ordered to pay one dollar. The verdict is further defective because it states that D1 was 70% negligent and D3 10% but the general verdict does not state specifically how much those defendants are ordered to pay. Also, how could P be negligent in this case if P's

negligence was not one of the proximate causes of his injury.

#10 What motion should be made to correct the erroneous jury verdict by whom and how should the court rule.

The motion that both the plaintiff or defendant should make is a motion for new trial. The motion for new trial must be timely filed within 10 days after the jury's verdict is entered into the court's docket. The moving party must establish that there has been prejudicial error at some point during the trial. In this case, the prejudicial error would be the jury's flawed verdict.

P's motion for new trial

The P would argue that the prejudicial error in this case the jury's verdict finding that he was not the proximate cause of his injuries and yet he was 10% negligent for his own injuries. The P would argue that his error was prejudicial because it awarded him less than he should have received since if he wasn't the proximate cause he couldn't have been negligent and therefore his award should not be reduced by 10%.

D1 & 3 motion for new trial

The D's will argue that the fact that D2 only had to pay \$1 is not fair since he was 10% neglect. This is a prejudicial error for them because they now have to pay more money due to the fact that D2 doesn't really have to contribute to the damages award. Also, D1 and D3 don't know how much money they need to pay since the percentage of negligence calculations seem to be erroneous and the judge cannot harmonize a verdict that D1 only has to \$70,000 because he was 70% negligent and D1 \$10,000 for his negligent 10%. Between the two of these Ds who should pay the other \$9,999 awarded to the P.

D2

D2 would probably not move for a new trial since he was only ordered to pay \$1. D2 will most likely (unless he is crazy) to be happy with that settlement since it is no

where near what he should have been ordered to pay.

Judge's Decision

In a motion for new trial the judge weighs the evidence as if he is the 13th juror. In regards to all of the parties motions for new trial, in federal court a judge may not order additur meaning that the judge cannot force a defendant to pay more in damages in order to for him/her not to grant a new trial. Therefore, because s/he cannot force D2 to pay more than \$1 in order for him to get out of having to litigate again the judge will most likely grant a new trial. Furthermore, since the judge will not be able to harmonize the damage awards for D1 and D3 based on their percentage of negligence calculated in the jury award this also leans towards the judge granting a new trial.

However, because the judge can weigh the evidence for this motion, s/he finds that the P was one of the proximate causes for his injury s/he will more than likely not grant the P's motion for new trial because although the verdict was defective in its proximate cause reasoning it was a harmless error since P still was awarded the proper amount of damages by subtracting his percentage of negligence from his total award. The P was awarded what he deserved. However, if the judge thought that P was more negligent, the judge can order remittur meaning that he could force the P to take less in damages and if the P does not agree the judge can order a new trial.

Therefore, because of the defect verdict the judge will most likely grant the D's motion for new trial.

Question #1 Final Word Count = 4710

Question #1 Final Character Count = 27142

Question #1 Final Character Count (No Spaces, No Returns) = 21970

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