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Memorandum of Law

May 4, 2005

To: Wannabe Associate

Fm: Managing Partner (M.P.)

Re: Instructions–Pam Tiff v. Dallas Delight

Like a growing number of law firms, our firm uses this method to assess your practical training for this job. It will be similar to the bar examination Performance Test you experienced before applying for this job.

It is now 2:00 PM. I need your analysis by 5:00 PM this afternoon. This hypothetical exercise includes various questions that I want you to analyze.

I do not expect any particular format for your answer. I do expect that you will provide both arguments and counter-arguments that you would expect the parties to use for the issues presented. For Question #6, however, you will advocate *only* for the defendant.

Our law firm represents the defendant, Dallas Delight (DD). A plaintiff named Pam Tiff sued DD. Other details are provided in the remainder of this exercise. Assume that no one is lying, and that all actions by the parties are timely.

You will be given one issue (Question #7), that you probably did not discuss in your law school civil procedure course—although it will arise in a familiar context.

Do not use any *subsequent* event in this case to analyze an *earlier* event. For example, that the case ultimately goes to trial should not be used to assess any jurisdictional issues. Do not assume that every scrap of information in this exercise will be relevant to some issue.

Good luck,

M.P.

Pam Tiff) v.) Dallas Delight)	United States District Court Southern District of California Civil Action No. 654321-SOB COMPLAINT (Personal Injury)
<p>1. This is a case arising under Title 28 United States Code §1332. Pam Tiff is a law student from Texas. She has lived in San Diego for four years, and has been working at a San Diego, California law firm since the year before she started law school in San Diego.</p> <p>2. Dallas Delight is a fast food service restaurant. Its sole place of business is in the Dallas/FortWorth Airport in Dallas, Texas.</p> <p>3. Pam purchased a sandwich at the defendant restaurant on January 2, 2005. She ate it before boarding her flight to San Diego. She became violently ill for several days thereafter, and was hospitalized for seven days.</p> <p>4. Pam thus seeks money damages for \$100,000.00, with the ultimate amount to be determined at the trial of this action.</p> <p style="text-align: right;">Signed: <i>Jumpin' Jack Flash</i> Dewey, Cheatem & Howe Attorneys for Plaintiff</p>	

Pam Tiff) v.) Dallas Delight)	United States District Court Southern District of California Civil Action No. 654321-SOB ANSWER
<p style="text-align: center;"><u>Answer</u></p> <p>Comes now the defendant in this action, who denies all of the plaintiff's allegations.</p> <p style="text-align: center;"><u>Affirmative Defenses</u></p> <ol style="list-style-type: none"> 1. The court lacks the power to hear Pam's case. 2. The court lacks jurisdiction over Dallas Delight. <p style="text-align: right;">Signed: <i>Jane Doedeft</i> DefenseMasters of Law Attorneys for Defendant</p>	

Pam Tiff) v.) Dallas Delight)	United States District Court Southern District of California Civil Action No. 654321-SOB MOTION TO DISMISS COMPLAINT
<p>Comes now defendant Dallas Delight, who moves the court for an order dismissing Pam Tiff's Complaint on the following grounds:</p> <ol style="list-style-type: none"> 1. Both parties are domiciled in the same state. 2. A plaintiff cannot unilaterally draw a defendant into the forum. <p style="text-align: right;">Signed: <i>Jane Doedeft</i> DefenseMasters of Law Attorneys for Defendant</p>	

Question #1: Does the court have the subject matter jurisdiction to hear this case?

Question #2: Does the court have the personal jurisdiction over the defendant?

Assume that the judge denies the defense Motion to Dismiss. In so doing, she comments that she has never seen a more frivolous personal jurisdiction motion.

Question #3: Is the judge's personal jurisdiction decision now appealable?

Question #4: Now that we have to proceed with this case, please prepare a very general discovery plan for us (Dallas Delight). Tell me what we should do, if anything. How should we obtain information regarding our defense?

Pam and Dan's Deli then exchange the following documents:

Pam Tiff) v.) Dallas Delight)	United States District Court Southern District of California Civil Action No. 654321-SOB PLAINTIFF's INTERROGATORIES TO DEFENDANT
<p>Please take notice that the plaintiff hereby submits the following discovery requests to Dallas Delight, pursuant to Rule 33 of the Federal Rules of Civil Procedure. Your responses must be submitted to plaintiff's lawyers within thirty days of your receipt:</p> <ol style="list-style-type: none"> 1. Has Dallas Delight ever been sued for food poisoning, or any like claim resulting in the sickness of a customer? 2. Has Dallas Delight ever been sued by any customer, for any reason, during its ten-years in operation? 3. What is the substance of the report of any expert who has been hired by Dallas Delight to assist in the defense of this action? <p style="text-align: right;">Signed: <i>Jumpin' Jack Flash</i> Dewey, Cheatem & Howe Attorneys for Plaintiff</p>	

Pam Tiff) v.) Dallas Delight)	United States District Court Southern District of California Civil Action No. 654321-SOB DEFENDANT's OBJECTIONS TO PLAINTIFF's INTERROGATORIES
<p>Dallas Delight hereby objects to all of plaintiff's Interrogatories, on the ground that they are both beyond the scope of discoverable information.</p> <p style="text-align: right;">Signed: <i>Jane Doedeft</i> DefenseMasters of Law Attorneys for Defendant</p>	

Question #5: How should the court rule on the Dallas objections to Pam's interrogatories?

Assume that the court requires Dallas Delight to answer only plaintiff's Interrogatory #1. DD therefore submits copies of the following documents to Pam's lawyer:

Pam Tiff) v.) Dallas Delight)	United States District Court Southern District of California Civil Action No. 654321-SOB DEFENDANT's RESPONSE TO COURT ORDERED DISCOVERY
<p style="text-align: center;">Certified Judgment United States District Court for the Western District of Texas</p> <p>A judgment was entered for the plaintiff on this date, for personal injury (food poisoning), in the case of Evert Goldmem v. Dallas Delight, Civil Action No. 172737-MSG. Entered by the Clerk of Court this fifteenth day of March 2004, against Dallas Delight in the amount of \$100,000.00 for compensatory damages, and \$50,000.00 for punitive damages.</p> <p style="text-align: right;">Signed: <i>Fred Basted</i> Clerk of Court Date: March 15, 2004</p>	
<p style="text-align: center;">Certified Judgment United States District Court for the Middle District of Alabama</p> <p>A judgment was entered for the plaintiff on this date, for personal injury (food poisoning), in the case of MoJo Powers v. Dallas Delight, Civil Action No. 526272-NPR. Entered by the Clerk of Court this first day of August, 2004, against Dallas Delight, in the amount of \$30,000.00 for compensatory damages.</p> <p style="text-align: right;">Signed: <i>Danger Midnam</i> Clerk of Court Date: August 1, 2004</p>	
<p style="text-align: center;">Certified Judgment Maricopa County Superior Court of Arizona</p> <p>A judgment was entered for the plaintiff on this date, for personal injury (food poisoning), in the case of Mack Nife v. Dallas Delight, Civil Action No. 5279-2005. Entered by the Clerk of Court this twenty-third day of January, 2005, against Dallas Delight, in the amount of \$1,700.00 for compensatory damages.</p> <p style="text-align: right;">Signed: <i>Zwien Sabe</i> Clerk of Court Date: Nov. 25, 2004</p>	

Pam's lawyer then sends a Request for Admissions to Dallas Delight's lawyer, requesting that DD admit the genuineness of these documents. DD has no choice but to do so. Pam then files:

Pam Tiff) v.) Dallas Delight)	United States District Court Southern District of California Civil Action No. 654321-SOB PLAINTIFF’S MOTION FOR SUMMARY AJUDICATION
<p>Plaintiff Pam Tiff hereby moves the court for an order granting summary adjudication, pursuant to FRCP 56.</p> <p style="text-align: center;">Points & Authorities</p> <p>1. A plaintiff may move for summary adjudication of the issue of liability. FRCP 56(a). That there is liability is demonstrated by the three affidavits filed in support of this motion. Defendant Dallas Delight has had three judgments against it for food poisoning within the last year.</p> <p>2. A prior suit can bar a subsequent suit which is based on the same facts, and/or bar the relitigation of the same issue. Here, Dallas Delight may not relitigate its liability for food poisoning, given the three recent case judgments against it.</p> <p>Wherefore, plaintiff prays for an order of the court granting summary adjudication to the plaintiff for both of the reasons stated above.</p> <p style="text-align: center;">Affidavits</p> <p>[Here, Pam’s lawyer inserts the admissible certified judgments from the three other courts against Dallas Delight. Pam properly demonstrates that the defendant has admitted their genuineness. We do not have, nor do we tender, any counter-affidavits.]</p> <p style="text-align: right;">Signed: <i>Jumpin’ Jack Flash</i> Dewey, Cheatem & Howe Attorneys for Plaintiff</p>	

Question 6: Please identify any arguments that we would have, in your opposition to the plaintiff’s motion on the respective Points 1 and 2. Do not argue for the plaintiff. Argue only for the defendant.

Assume that the judge denies the plaintiff's Motion for Summary Adjudication. The case goes to trial. The plaintiff wins. The defendant then timely files:

Pam Tiff) v.) Dallas Delight)	Ninth Circuit Court of Appeals San Francisco, California Civil Action No. 654321-SOB DEFENDANT'S NOTICE OF APPEAL
<p>A defendant may appeal on the ground of insufficiency of the trial evidence. [Jane then tenders an argument which would normally convince any appellate court to rule in her favor.]</p> <p>Signed: <i>Jane Doedeft</i> DefenseMasters of Law Attorneys for Defendant</p>	

Question #7: What impact does the Library case of *Umpty v. Scrunch* have upon Jane's ability to appeal?

LIBRARY

STATUTES

28 United States Code § 1331

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 United States Code § 1332(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;
- (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and
- (4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

* * *

RULES

FEDERAL RULES OF CIVIL PROCEDURE

FRCP 26 (b) Discovery Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) In General. Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(i), (ii), and (iii).

* * *

(3) **Trial Preparation: Materials.** Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

FRCP 50 Judgment as a Matter of Law in Jury Trials

(a) Judgment as a Matter of Law.

(1) If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

(2) Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment.

(b) Renewing Motion for Judgment After Trial; Alternative Motion for New Trial.

If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, 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. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment—and may alternatively request a new trial or join a motion for a new trial under Rule 59. * * *

FRCP 56

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

* * *

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

FRCP 59 New Trials.

(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

CASE

Umpty v. Scrunch

United States Court of Appeals
for the District of Columbia Circuit
999 F.4th 999 (May 1, 2005)

BOOGALOO, ASSOCIATE JUSTICE, writing for the majority:

The question in this case is whether a court of appeals may review the sufficiency of the evidence, tendered in support of a civil jury verdict, where the party requesting review made a Motion for Judgment as a Matter of Law (JMOL) *before* the verdict under FRCP 50(a)—but did not make either a *post*-verdict motion under FRCP 50(b), nor a Motion for New Trial.

Parties cannot, of course, move for a Renewed Motion for JMOL under FRCP 50(b), unless they have made a pre-verdict Rule 50(a) JMOL. Neither the FRCPS, nor relevant caselaw in this first impression case, nor the Federal Rules of Appellate Procedure expressly bar a party from appealing on the ground of insufficiency of the evidence in this situation. Thus, it would be both unfair and unsound to now require such a result. This would be judicial legislation in its worst form.

SCALIWAG, ASSOCIATE JUSTICE, dissenting.

Justice Boogaloo has lost it. He exalts form over substance. His supposed “unsound/unfair” characterization, purports to exempt the defendant in this case from doing what any trial lawyer would logically do before appealing. Counsel should have sought what is effectively the same relief as sought on appeal in the trial court—before attempting to appeal on the ground of insufficiency of the evidence, commonly referred to as lack of substantial evidence to support the verdict. Contemporary mushrooming litigation costs demand that our courts not rescue a miscue.

Issue Outline

<p><u>Q#1 Subject Matter</u></p> <ul style="list-style-type: none"> • no P no same state • presence & intent • student status not nec change • SD year b4 start school • DD “sole” bus DFW airport • 75K+ legal cert • violently ill several days • hosp 7 days • may not able work post grad <p><u>Q#2 Personal Jurisd</u></p> <ul style="list-style-type: none"> • MC • P went to Dallas (unilateral draw?) • D only tie sandwich sale • P ate in TX, not CA • small D RA CA fora? • last act necessary liab • major airport/hub • (inject prod stream) <p><u>Q#3 Appealability</u></p> <ul style="list-style-type: none"> • pre-jmt (advance ultimate v. two fronts) • C.O. • SCt cut back auto (~ FSC SCt case) • 1292b elements • jt dicretion • tc “never more friv motion” • writ route • loose jurisd to TX Cir v. TC “friv” deny <p><u>Q#4 Discovery Plan</u></p> <ul style="list-style-type: none"> • we must provide core • wits + rel docs • D IRs to P (background) • D Prod Docs (non-party med records?) • D obtain Pam’s depo • Depo treat Dr/hosp • Family/work/passengers • Physical exam • unable cont side effects/work post grad/ 	<p><u>Q#5 Discovery Objex</u></p> <ul style="list-style-type: none"> • D objection specific enough? • #1 10 years “any coa” relevant? • overbroad/oppressive? • policy: broad pre-trial inquiry • #2 narrower • lead admissable? • protective order • #3 conditional W.P • subst equiv elsewhere? • food poisoning not uncommon <p><u>Q#6 Summ Adjudication</u></p> <p><i>Point 1:</i></p> <ul style="list-style-type: none"> • gist summ jmt (issue D’s liab <i>this</i> P) • 3 recent jmts “food poison” • D admission only genuine docs/not liab • <i>earlier</i> jmts not estab P’s claim • all prior to Pam (Jan 2, 2005) • no counter-affidavit (burden not shift) • jury could hold for D (no evid caus) <p><i>Point 2:</i></p> <ul style="list-style-type: none"> • RJ = can’t split a claim • not RJ: ¾ distinct claims & Ps • CE element(s): identical issue? • P attempting offensive CE • “issue:” liab <u>prior</u> 3 not relitigated • diff dates (all 2004) <p><u>Q#7: Umpty Task</u></p> <ul style="list-style-type: none"> • “may” RMFJ 50(b) • neither 50b nor 59 <i>required</i> for appeal • Justice B: no rule rewrite (plain mng) • Justice S: practical time saver • : missed oppo avoid delay • : reverse merits anyway
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ID: 61188 (5-Digit Exam Number)
Exam Name: Civ_Pro_II_Final_Sp05_Slomanson
Instructor: Slomanson
Exam Date: May 4, 2005
File Name: 050504Civ_Pro_II_Final_Sp05_Slomanson61188.xmd
Exam Length: 168 minutes (Started @ 5/04 2:13 PM; Ended @ 5/04 5:01 PM)
Downloaded: Apr 11, 2005 12:07 PM (Eastern Time)
Uploaded: May 04, 2005 08:03 PM

1. Does the court have SMJ over the case?

SMJ is the power of the court to hear that particular case.

There are 2 ways a federal court can have SMJ over the case: Federal Question and Diversity Jurisdiction.

FQ SMJ

Does the D's conduct fit within a federal statute?

Here, the P's complaint alleges personal injuries caused by the food poisoning in the D's restaurant. There is no federal statute given to us in teh Library, so there is not FQ SMJ.

Diversity Jurisdiction

In oder for the court to have Diversity SMJ there must be complete diversity of citizenship and the minimum amount in controversy should exceed \$75,000.

Diversity of Citizenship

In order for there to be diversity of citizenship no P and no d must be domiciled in teh same state. Domicile of an individual is his presence in a state simultaneous with his intent to remain in that state indefinitely. A domicile of a corportation is where it is incorporated and where its Principle Palce of Business (PPB) is located.

Here, the P is a law student from Texas who is in San Diego going to law school. She is present in CA, however, there is a question as to whether she intends to remain there indefinitely. Going to school, just like being in jail doesn't change the person's original domicile, which is in this case for P is Texas, unless the person can demonstrate that he or she is going to stay there permanently when they get out of school. P can argue that she intends to work in the law firm that she is working in now, since in the complaint she says that her injuries may make her impaired and unable to work in that law firm after she graduates, which infers intent to remain in

CA after graduation. Also, even if she may not be able to work in that law firm, she may be able to work somewhere else in CA, so she may remain in CA after she graduates. However, the D can argue that since she will be impaired and unable to work in the firm, she may have to return to Texas to be cared for, so she doesn't intend to remain in CA indefinitely, so she is still domiciled in TX.

As to the domicile of the D, it is not clear where it is incorporated from the facts, however, its PPB is in TX, since its only place of business is in the TX Airport. So, if P is domiciled in TX there would be a problem with domicile and the court would not have SMJ over this case. However, if the P is domiciled in CA, then unless the D is incorporated in CA, there will be diversity of citizenship.

Minimum Amount in Controversy

The burden of proof is on the D to prove to a legal certainty that the minimum amount in controversy doesn't exceed \$75,000.

Here, the complaint of the P states that she is asking for \$100,000 with the final amount to be determined at trial, which is over the minimum amount. Also, the P was violently ill after consuming the food purchased from the D, and she was ill for several days after that, and she was hospitalized for 7 days, and has continued side effects, all of which are probably enough to add up to \$100,000 or more. The D can argue that the minimum amount in controversy may not be met by the D, since there were other judgments against it for food poisoning that did not amount to the same amount of money, one was for \$30,000 (in AL) and another was for \$1,700 (in AZ), which are both well below the \$75,000 minimum amount in controversy, so the P's amount may be too large.

2. IPJ

In order for the non-resident D to have to litigate in the forum chosen by the P the D has to have minimum contacts with the forum state. The D's contacts should be such that he purposefully availed himself of the forum state as to reasonably anticipate to be haled into the court of that jurisdiction to litigate.

P will argue in this case that D's only place of business is in the airport, so D should expect his customers to be from different states, and he should expect them to eat his food and go home to

another state and if they get sick, he should expect them to sue him in their home states. Also, CA would have an interest in litigating this suit, since one of its residents got sick from food poisoning, so CA courts would want to adjudicate this case to bestow justice upon the P who is a resident of the state. Also, it would be too costly for the P to have to go and litigate this case in TX, since P is a poor student and the D is a big corporation. Also, the P has continuous side effects, so she keeps having her injury that is in the forum, so the D should be compelled to come and litigate in the forum where the P keeps having her injury.

The D on the other hand will argue that P unilaterally dragged him into the forum of CA because its SOLE place of business is in Texas. Also, merely putting their products in the stream of commerce should not subject the D to litigation all over the world or in all the 50 states of the US. Also, first act that led to her injury (her buying the sandwich) and the last act to have caused the injury to the P, which was her eating the sandwich, did not happen in the forum, but happened in TX before she got on the plane, which is another reason that the D should not have to be dragged to CA to litigate.

3. Is the order appealable?

Rule 54(b)

A disposition on the merits of less than all claims is appealable with the discretion of the trial court. Here, the motion to dismiss was not one of the issues of the P's complaint nor was it a counterclaim, so it was not a decision on the merits in this case, so this is not a Rule 54(b) appeal.

Collateral Order?

A collateral order is an order that is not on the merits. It is automatically appealable.

Here, the order was not on the merits, as discussed under Rule 54(b). The D would argue that this was a final judgment on this motion and it is too important to be denied immediate appellate review, since now the case would have to go to trial, so this is a CO within the meaning of Cohen. However, the P will argue that the courts have been stingy in holding that certain COs fall within the meaning of Cohen in order to avoid piecemeal appeal so that one party would not be able to take advantage of the other party by waging a war on 2 fronts, and since this order is such that has not been reviewed by the SC yet, the court will hold that this order is not such that would fall within the Cohen COs.

Interlocutory Appeal (1292(b))

An order is appealable under 1292(b) with the discretion of the trial and the appeals court if it is a controlling question of law, there is a potential ground for difference of opinion and the resolution of this issue would lead to an immediate final resolution of the case.

Controlling question of law

Is this issue a big deal? It is a big deal, since the denial of this motion forces the parties to trial, however, the granting of the motion will force the case to be over, since it would be dismissed and the P would have to re-file in TX or just forget about it and not re-file at all.

Potential Grounds for difference of opinion.

Have different courts held differently on whether this type of appeal should be allowed? Here, we do not know whether there were any different rulings on this type of appeal, but if there were, then this would cut more in favor of this type of appeal to be granted (provided that there was joint discretion), since the judge doesn't have to worry about being right or wrong, since the case has gone both ways before.

Immediate Final Resolution

Would the case settle for millions or peanuts after this issue is finally resolved? Here, it is not clear, since if the motion to dismiss is granted then the case would be dismissed, however, if the motion to dismiss is denied, then this case will go to trial and would take longer to resolve.

Joint discretion

In order for the case to be appealable under 1292 (b) there has to be joint discretion of the trial and the appellate judges. Here, the trial judge said that this is the most frivolous IPJ motion that he has ever seen, so probably he would not grant his discretion for appeal, and we do not know whether the appellate judge has granted his discretion to appeal, so this issue is up in the air.

Writ

When all else fails go the writ route. The courts should grant all writs that are necessary or appropriate in aid of their respective jurisdictions. The courts usually grant writs in exceptional circumstances, for example if the judge abused his discretion or if the court would lose

jurisdiction over the case if the order is not immediately appealed. Here, the court may lose jurisdiction since the case is being dismissed due to lack of IPJ, so the P cannot re-file in this jurisdiction and would have to go to TX. Also, the trial judge said that this is the most frivolous IPJ motion he has ever seen, however, it looks like it is not frivolous, as discussed in question 2 above. Therefore, if the appellate judge determines that the motion is not frivolous and that the trial judge abused its discretion by saying that it is, then the appellate court will issue a writ and would be able to have jurisdiction to hear the appeal in this case.

4. Discovery Plan

Core Discovery

After the 120 days that the P has to name and serve all the Ds, the parties should exchange the following, as part of their core discovery:

1. Information about all the relevant witnesses that they know of;
2. All relevant documents that are relevant to their claim or defense;
3. P should provide her computation of damages;
4. D should provide his insurance coverage.

So, we should provide the P with all the information about the witnesses we will be using for our case, and with all the relevant documents that we plan to use, and we should also give the P our insurance information. The P in turn is supposed to provide us with the witness information, her relevant documents, and her computation of damages.

Also, we must remember that both parties have a duty to supplement this core discovery and all the information that has been provided that became outdated or misleading, since if a party fails to supplement he or she will not be allowed to use that information at trial to prove his or her case.

Next, we move on to the devices of discovery that we can use to obtain information.

PRIDE

We should first send interrogatories to the P to get some background information about the case. We have to draft our questions carefully, since each party is limited to 25 interrogs (not including the subparts). The P would have 30 days to answer each interrog separately in writing and under oath. The P will probably send us the same and we would have to answer her interrogs.

Next, we should depose the P, and any of her witnesses that would have relevant information.

Depositions are oral questions that are asked of the party deposed in person, where the party is sworn in under oath. A court reporter records the depo. Depo is the only device where a non-party can be asked questions. We would have to send notice to P to have her deposed. As to non-parties, we have to subpoena them. We should try to depose the P's treating physician, and the emergency room doctor, and any witnesses that the P has named. The P will probably depose our company's CEOs and managers, and our witnesses. We should keep in mind that depositions are expensive and should try to depose only those people who we think will provide relevant info.

Next, we can ask for production of documents that the P has that was not included in her documents that she has disclosed to us during her initial disclosure. We may want to ask for her medical report, and any other relevant documents or things that she has in her possession. The P in turn will probably ask us to provide some documents too, but if she will want some documents that are difficult or costly for us to find, we may tell her to come on down and find the docs herself as long as the burden on her and on us is the same. Also, she may ask us to be allowed to go into the restaurant and inspect the inside, so we have to be prepared for that.

Next, we should ask the P to submit to a physical exam. The party may be required to submit to an examination if asked by the other party if that party's medical condition is in controversy and there is good cause for each particular exam. Here, the P put her physical condition in controversy by suing us for personal injury, so we would be able to get a physical exam of her, however we should make sure to set out specifically time, place, manner, duration, of the exam and exactly by whom it will be performed.

Next, after both parties have gathered some information the P may want to send us a request for admission in order to get us to admit to some dirt. We do not have to admit to anything unless it is a slam dunk, in which case we should admit, since if we don't and there is later a judgment in our favor, we may be required to pay the costs of the P for the prolonged litigation because of the issues that we should have admitted to.

Scope

The scope of discovery is information that is not privileged, relevant to both parties' claims or defenses, and admissible at trial under the rules of evidence, or if not admissible reasonably calculated to lead to evidence admissible at trial. We should keep this in mind when both requesting information from the P and answering P's discovery.

Question 5

The scope of discovery is information that is not privileged, relevant to both parties claims or defenses, and admissible at trial under the rules of evidence, or if not admissible reasonably calculated to lead to evidence admissible at trial. We should keep this in mind when both requesting information from the P and answering P's discovery.

Interrog. 1

D in this case would argue that this is not relevant to any party's claim or defense, because it is asking about whether D has been ever sued before by anyone for any reason, even if it doesn't have to do with food poisoning, so he should not be compelled to answer this. However, the P would argue that during the discovery stage there is no jury present so this is like a fishing expedition where both parties are trying to find out information about the other party's claim or defense, so the scope of discovery is very broad, and relevancy objections are rarely sustained. Here, even if the information is not admissible at trial because of lack of relevancy, it is reasonably calculated to lead to evidence admissible at trial, so this question should be answered by D.

Interrog 2

This question is narrower than the first one, and this question is relevant to the P's claim since it is asking for the D to provide information about whether he has been liable in the past for food poisoning. However, this is the type of question that may be analogized to subsequent remedial repair privilege, which is that a party cannot use subsequent remedial repair to prove liability at trial. Here, if the P is allowed to get this information from the D, the P would probably not be able to use that info at trial to prove liability since if the jury sees that D has been sued in the past for food poisoning, the jury would be prejudiced to rule in favor of the P. However, since this is not trial and is discovery and the scope of discovery is very broad, the D would probably have to answer this interrogatory and the P would just be precluded from using the information obtained to prove D's liability at trial.

Interrog 3.

Here, this is a privilege objection.

Work Product (WP) includes materials prepared in anticipation of litigation. WP can be absolute, which are written mental notes and impressions of the attorney about the case. This type of WP

is not discoverable. Another type of WP is conditional WP, which includes reports of consultants.

A consultant is an expert that is retained by a party in anticipation of litigation and has not been designated as a trial testifying expert witness. A consultant's report is conditional WP. Conditional WP is discoverable only upon showing substantial need and that the requesting party is unable without undue hardship to obtain a substantial equivalent.

Here, the P is asking for the substance of the report of any expert who has been hired by the D to assist in the defense. It is not clear as to whether the P wants the reports of the testifying experts or of consultants. If she wants the reports of testifying experts and we already have one (or more) designated, then their reports are discoverable and we should hand them over. However, if she is asking for our consultant reports, we do not have to give them over unless the P can show that she has a substantial need, such as that we have the greatest expert in the world and possibly even the only one; and she also has to show that she cannot obtain a substantial equivalent without undue hardship, which can be that it would be too expensive for her to get her own expert or there is no other expert. If we are required to share our expert(s), then the P would have to reimburse us for 1/2 of what it cost us to obtain that expert's report.

Question 6

Count one

Motion for Summary Judgment (MSJ)

The pitch of the moving party on a motion for summary judgment is that based on the affidavits presented there is no genuine issue of material fact, and that no reasonable jury could hold for the non-moving party. All affidavits and counter-affidavits must be based on personal knowledge and must be admissible under the trial rules of evidence. All reasonable inferences are made in favor of the non-moving party. The judge must determine whether the affidavits and the counter affidavits conflict. If they do, then the MSJ should not be granted, but if they do not the MSJ should be granted.

Here, the D is the non-moving party so all reasonable inference have to be made in his favor. The issue here in question is the liability of the D to P for food poisoning in this particular incident alleged in P's complaint. The D can argue that the evidence presented by the P in support of her MSJ is that the D was found liable for injuries to other Ps, however, these cases

are for other torts that happened to involve other people and not P and happened earlier. The tort that P is alleging is a **different tort**, and just because the D was found liable in those cases, doesn't mean that he should be found liable in this particular case, since this is a whole new tort during a whole new year, so a reasonable jury could very easily hold for the D, who is a non-moving party if there is evidence that the D is not liable for this specific tort. The prior rulings do not establish D's liability for THIS PARTICULAR TORT, so this case should go to the jury to decide and this MSJ should not be granted.

Count 2

Res Judicata

Res Judicata is claim preclusion. According to the principle of res judicata the P cannot split her claim. To determine whether the P split her claim, the focus is on the wrong that the D has done to the P. Here, the wrong in question is the food poisoning allegedly incurred by the P in the D's restaurant. The cases that are being presented by P in support of her motion involve different parties, since P is not a party to any of these suits, so since there are different parties, this is not a res judicata issue.

Collateral Estoppel

Collateral estoppel is issue preclusion. The elements of it are: Identical issue, actually litigated, necessarily decided.

Identical Issue

The issue in suit one has to be identical to the issue being alleged to be barred in suit 2. Here, the issue that was decided in all suit ones is liability of the D for food poisoning of the Ps, however these issue were all different torts. The case at bar is a whole new tort, so the issue in this suit is not identical to the other suits.

Actually litigated.

The issue that is being sought to be barred has to have been actually litigated in suit one to be barred in suit 2 by suit one judgment. Here, the issue of D's liability to this particular P for this particular tort has not been actually litigated in the previous cases, since those cases decided the D's liability to other Ps for other torts.

Necessarily Decided

The issue sought barred has to be such that was necessary to the decision in suit 1. Here, the issue of D's liability for this particular tort to this particular P was not even a part of the prior suits, and is not such that is necessary for their resolution, since it is a whole new tort, so this issue was not necessarily decided.

This suit will not be barred by the judgments in the prior suits.

Offensive CE

Here, the P is raising offensive collateral estoppel, which is allowed as long as the D is bound by the judgment in the prior suit and the P is not a wait and see P. Here, the P is not a wait and see P since her injury happened after the other cases were decided (the prior cases were decided in 2004, and her injury happened in 2005), so she did not wait to see the outcome of those suits, and the D was a party to all 3 prior suits, so he is bound by them. So, if D was collaterally estopped by those suits, which he is not, P would have been able to use CE against him since she is not a wait and see P.

Question 7.

Here, it is not clear whether the D made a post-judgment motion for judgment or a motion for a new trial, although we do have facts that the D made a pre-verdict motion for judgment. If the D actually made this post-verdict motion for judgment or motion for a new trial, then the D would be able to appeal this case, but according to Umpty, the D would be able to appeal even if there is no such motions were filed because the case decided that the post-verdict motion for judgment doesn't have to be filed in order for the D to be able to seek appellate review of the sufficiency of the evidence.

This essentially takes away the power of the trial judge to be able to correct any mistake that the trial judge made in his rulings during the trial, and would undermine the trial judge's ability to correct himself by granting a new trial and re-hearing the case. Also, the appellate court was not present at the time that the evidence was presented, so the appellate court is not in a better position to be able to evaluate the evidence, since the appellate court would only look at affidavits and not hear the actual testimony. The trial judge on the other hand is actually present during trial and is better able to evaluate the evidence to see whether the new trial should be granted or whether the evidence was sufficient.

END OF EXAM