QUESTION 3: SELECTED ANSWER A

Applicable law

Under the Erie doctrine, a federal court sitting in diversity jurisdiction must apply the substantive laws of the state where it sits and the procedural laws of the federal system, generally the Federal Rules of Civil Procedure and in most cases the Federal Rules of Evidence. Whether or not a rule is substantive or procedural is a balancing test that depends on whether 1) the rule is outcome determinative, 2) the federal court's interest in applying their own rules, and 3) whether or not application of the federal rule will result in forum shopping.

Whether or not a party may obtain an order for a physical or mental examination is a rule of discovery that is procedural and governed by the Federal Rules of Civil Procedure which will apply in this case.

a) Diana's motion for a physical examination of Phil

Under the Federal Rules of Civil Procedure, a party may obtain a mental or physical examination of the other party if 1) that party's physical or mental condition is in controversy, and 2) good cause exists for ordering the examination. Good cause will generally be found to exist if the examination in question is not overly intrusive and it is relevant, measured in terms of its logical and legal relevance as well as how relevance is defined under the Federal Rules of Civil Procedure with regard to its discoverability. Evidence is logically relevant if it tends to make the existence of a fact of consequence more or less likely. Evidence is legally relevant if its probative value is not substantially outweighed by its prejudicial effect. And evidence is relevant and discoverable if it is reasonably likely to lead to the discovery of admissible evidence.

Phil's suit against Diana is one for personal injury stemming from her alleged negligence. In a negligence suit, the plaintiff must prove duty, breach, cause, and

damages. Because damages are a required element, the injury and the extent of the injury suffered by a party will always be in controversy in a personal injury suit. Additionally, good cause exists for ordering the physical examination here. It is not overly intrusive as Phil has already likely sought out and received medical treatment for his injuries of a similar nature in this case. Additionally, it is logically and legally relevant and relevant under the Rules' definition for discovery because it is reasonably likely to lead to the discovery of admissible evidence. The examining physician may have a different opinion as to the nature and extent of injuries suffered by Phil.

For these reasons, the court did not err in granting Diana's request for a physical examination of Phil.

b) Diana's motion for a mental examination of Phil

With regard to Diana's motion for a mental examination of Phil, the rules are the same as for a physical examination. Under the Federal Rules of Civil Procedure, a party may obtain a mental or physical examination of the other party if 1) that party's physical or mental condition is in controversy, and 2) good cause exists for ordering the examination. However, the calculus here for a mental examination is much different.

Phil's suit against Diana is for personal injury. His physical condition is relevant because it is a fact in controversy as damages are an element of negligence. Phil's mental condition, however, does not appear to be in controversy. Phil's suit is not for infliction of emotional distress or any other cause of action where his mental condition would be a fact in controversy. If Phil suffered from some sort of mental disease or defect that made him comparatively or contributorily negligent or that affected his abilities to perceive or recall, such that Diana could impeach his credibility, then Phil's mental condition could theoretically be in issue. However, that does not appear to be the case here. There is nothing to indicate that Phil's mental condition is in controversy. Additionally, a mental examination is an intrusive procedure that should not be granted unless necessary to establish a claim or defense, neither which requirement is met in

this case. Good cause for granting Diana's request for a mental examination thus cannot be said to exist.
For these reasons, the court erred in granting Diana's request for a mental examination of Phil.

2)

Whether the physician-patient privilege applies

Under the Federal Rules of Evidence, there is no physician-patient privilege. There are only privileges for spousal communications, spousal immunity in criminal cases, penitent-clergy, and patient-social worker.

However, as discussed above, under the Erie doctrine, a federal court sitting in diversity jurisdiction must apply the substantive laws of the state where it sits and the procedural laws of the federal system. Generally the Federal Rules of Civil Procedure and in most cases the Federal Rules of Evidence are procedural. However, whether or not a testimonial privilege applies is a rule of substantive law and a federal court sitting in diversity must apply the law of the state in which it sits regarding testimonial privileges.

The federal court sitting in this case must apply the state law regarding the doctor-patient privilege. Generally the doctor-patient privilege covers confidential communications between a doctor and a patient for the purposes of obtaining medical treatment. If the state in which this federal court sits acknowledged the doctor-patient privilege then Phil's communications to his doctor would generally be privileged.

However, there is generally an exception to the privilege when the patient-plaintiff's physical condition is in controversy. As stated above, this is a personal injury suit and damages are a necessary element of the negligence claim so Phil's physical condition is in actual controversy.

For that reason, even if the doctor-patient privilege applies, Phil's communications to Laura would likely be outside the privilege and would not prevent Diana from deposing Laura.

Whether Laura cannot be deposed because she is not a party

As with the standard for granting a physical or mental examination of a party, whether a party can be deposed is a discovery rule and is thus procedural and governed by the Federal Rules of Civil Procedure.

The Federal Rules of Civil Procedure allow a party up to 10 depositions in a case. Each deposition must be no longer than 1 day of 7 hours. A party may depose another party at any time simply by providing reasonable notice. A party may depose a non-party, but it must be done on subpoena to the non-party and must provide reasonable notice and accommodations.

Under the Federal Rules of Evidence, Laura may be deposed even though she is not a party to the litigation. So Phil's objection is not correct.

However, there is no indication in the fact pattern that Diana obtained a subpoena or served it on Laura prior to deposing her. Diana cannot simply serve Phil with a notice of subpoena in order to depose a non-party.

Nonetheless, a party's objection to discovery must be stated accurately and with particularity. Phil may have waived his valid procedural objection to Diana's deposition of Laura by not correctly stating the grounds for his objection.

In sum, Diana may depose Laura under the Federal Rules of Civil Procedure, even though she is a non-party. However, Diana must do so on subpoena and notice to Laura, which Diana failed to do in this case. However, Phil incorrectly stated the basis for his objection to Diana deposing Laura and in so doing likely waived his otherwise valid procedural objection to the deposition.

Thus, the court did not err in permitting Diana to depose Laura.

3)

Under the 7th Amendment to the Constitution, a party is entitled to a jury trial in all suits for damages at law. Phil's suit against Diana is a personal injury suit for damages at law and not for some form of equitable relief like an injunction so Phil is entitled to a jury trial in his suit against Diana (as is Diana). However, under the Federal Rules of Civil Procedure, a party must file a demand for a jury trial within 14 days of the filing of the answer to the complaint. A party may file a motion to strike all or a portion of the other party's pleading within 30 days of receiving that party's pleading.

In this case, Diana filed an answer to Phil's complaint denying negligence back in May. Phil did not file his demand for a jury trial until September and only a few weeks before trial. For this reason, Phil's demand is untimely and absent good cause for the delay in this case, which does not seem likely, Phil has waived his right to demand a jury trial. Since Diana immediately filed her motion to strike in response to Phil's demand, it was timely and should be considered and granted by the court.

For this reason, the court did not err in granting Diana's motion to strike Phil's demand for a jury trial.

QUESTION 3: SELECTED ANSWER B

Preliminary matters

Applicable Law

After having been injured by Diana (D), Phil (P), filed a complaint in April against D in federal district court properly alleging diversity jurisdiction and seeking damages for negligence for physical injury. As such, because the complaint was filed in federal court, the Federal Rule of Civil Procedure (FRCP) govern the rules applicable to the proceedings and the actions of the courts and the parties in the suit.

(1) The Court Properly Granted Diana's Motion to Order (a) the physical Examination if she properly established good cause, but erred in granting (b) the mental examination

(a) The Physical Examination

Scope of Discovery

Discovery is the process by which parties obtain information from the other party. The FRCP provides for a broad scope of discovery, and the information needs only to be relevant to the cause of action. In fact, any information that would reasonably lead to the discovery of admissible evidence is discoverable. In other words, the information does not have to be admissible evidence to be produced, but only to reasonably lead t such information. Here, the dispute between P and D involves a car accident where D struck and injured P. As a result, P filed an action against D for negligence for physical injuries. Therefore, any information that would relate to the accident, the physical condition of P, which is at issue here, will be admissible. Here, D has filed a motion, seeking a court order directing the court to order a physical examination of P. Such examination is relevant because here, the physical condition of P is at issue since the lawsuit involves damages for personal injury. As such, this information is discoverable and within the scope of discovery.

Physical Examination Requirements

Physical Condition at Issue

In order for a party to obtain an order for a physical examination, the FRCP requires, first, that the physical condition be at issue. Here, P's condition is at issue because, as explained above, the lawsuit between P and D is about a car accident where D stuck and injured P. P is seeking damages. A physical examination will be useful to determine the extent of the injury cause by the accident to P, and will therefore be useful to determine the extent of damages, if any. Also, such physical examination will also determine if the physical injuries suffered by P were the result of the accident.

Court order and Showing of Good Cause

The FRCP requires that a court grant a motion to order a physical examination only when the moving party establish good cause to do so. Here, the facts are not clear on whether D established such good cause. A showing of good cause will require D to show that there is no other means to obtain the information that the physical examination would provide and establish the reasons to do so. Here, as explained above, a physical examination will be useful to determine the extent of the injury caused by the accident to P, and will therefore be useful to determine the extent of damages, if any, especially if there is no other information available. Also, such physical examination will also determine if the physical injuries suffered by P were the result of the accident. However, if the deposition of D is ordered (see below), then the showing of good cause for a physical examination will harder to establish because there would already be available information related to the physical condition of P after the accident. If ordering the deposition fails, however, this might constitute a good cause to order the examination because no information related to P's physical condition would therefore be available.

(b) The Mental Examination

Scope of Discovery

Discovery is the process by which parties obtain information from the other party. The FRCP provides for a broad scope of discovery, and the information needs only to be relevant to the cause of action. In fact, any information that would reasonably lead to the discovery of admissible evidence is discoverable. In other words, the information does not have to be admissible evidence to be produced, but only to reasonably lead t such information. Here, the dispute between P and D involves a car accident where D struck and injured P. As a result, P filed an action against D for negligence for physical injuries. Therefore, any information that would relate to the accident, the physical condition of P, which is at issue here, will be admissible. Here, a request for a mental examination is not likely to lead to any relevant admissible information. In fact, here, the mental condition of P is not at issue, only his physical condition because he is seeking damages for personal injury as a result of the accident. As such, this demand does not fall within the scope of discovery.

Mental Examination Requirements

Again, a court will issue an order for mental examination, only when this condition is at issue and when the moving party has established good cause to do so. Here, as explained above, the mental condition of P is not at issue and there is no reason why the court would order such examination. Not only does it fails to show good cause but would also be highly prejudicial to P.

(2) <u>The Court Erred in Permitting to Depose Diana only if a Subpoena was not Issued, and P's argument that the Deposition would lead to the discovery of Privileged information fails</u>

Scope of Discovery

Discovery is the process by which parties obtain information from the other party. The FRCP provides for a broad scope of discovery, and the information needs only to be relevant to the cause of action. In fact, any information that would reasonably lead to the discovery of admissible evidence is discoverable. In other words, the information does not have to be admissible evidence to be produced, but only to reasonably lead t

such information. Here, the dispute between P and D involves a car accident where D struck and injured P. As a result, P filed an action against D for negligence for physical injuries. Therefore, any information that would relate to the accident, the physical condition of P, which is at issue here, will be admissible. Here Diana (D) is a physician who treated P right after the accident. Her deposition will be useful because it will lead and explain what was the physical condition of P right after the accident and will help in determining the extent of the injury as well as damages, if any.

Deposition of Third Party - Subpoena To The Third Party

The FRCP allows deposition of non-party to the case and provides for a maximum of 10 depositions, no longer than 7 hours each. There can also be only one deposition per person. When the deposition involves a non-party, i.e. someone not named in the lawsuit, then the requesting party must request the court to issue a subpoena in order to depose the third party. Here, D served P with a notice to depose Laura (L), the physician who treated him after the accident. The FRCP allows "notice" only when the discovery tools are used by party against another party. When a third party is involved, a subpoena is required, which D shall have done to properly depose her. In fact, not only did she fail to notice Laura personally, but she also failed by the means she used. As such, P is wrong when he says that a third party cannot be deposed. A third party can be deposed but here the court erred in granting the discovery request because the third party, Laura, was not properly notified.

Limit of The Scope of Discovery = Privileged Communication

The broad scope of discovery is limited by privileged information. In fact the FRCP provides that discovery means: discovery of any "non privileged" information. As such, whenever a privileged communication is involved, the scope of discovery may be limited. Here, P is asserting the Physician-Patient Privilege. As explained in the preliminary considerations, the FRCP apply here. The FRCP, and the Federal Rules of Evidence, do not recognize a Physican-Patient Privilege. As such, whether this argument will fail or prevail depends on which law the Federal District Court will apply.

Diversity Cases - Erie Doctrine - Application of State Law Privilege

The lawsuit filed by P against D was filed in federal district court, and properly alleged diversity jurisdiction. Under the Erie Doctrine, Courts sitting in diversity jurisdiction will apply the federal procedural law, and the substantive law of the state. Whether a law is substantive or procedural depends on whether it is outcome determinative or not. State Law regarding privileges have been held to be outcome determinative and therefore, substantive law for purposes of Erie Doctrine. Here, assuming that the state law of the seat of the federal action recognizes the physician-patient privilege, the federal court will have to apply it and such privilege might limit the scope of discovery.

Physician-Patient Privilege

Privilege

The physician-patient privilege is a privilege usually applied by states specifically recognizing such privilege. Under the physician-patient privilege any communication between a physician and his patient, made for the purpose of diagnosis or treatment, is privileged. The patient is the holder of the privilege and can oppose to the revelation of such information. Here, deposing L will likely lead to revealing privileged information: P saw L for purposes of diagnosis and treatment after the car accident and therefore, such communications are likely privileged.

Exceptions

The Physician-Patient privilege does not apply in several circumstances, and especially when the physical condition of the patient is at issue. Here, as explained, P's physical condition of D is at issue: the lawsuit involves a car accident where D struck and injured P and P is seeking damages for physical injury. As such, the privilege does not apply and P will fail in his argument that the deposition of L will lead to violate the physician-patient privilege because here, the privilege does not apply.

(3) The Court Properly granted Diana's Motion to Strike Phil's demand for a jury trial

In September, a few weeks before trial, P decided to file a demand for jury trial. D immediately filed a motion to strike the demand. The court was absolutely right in granting the motion.

7th Amendment Right to a Jury Trial

The 7th Amendment of the U.S. Constitution provides a right for a jury trial in federal civil case (does not apply to the states through the 14th Amendment) when the damages at law involved exceed $20. Here, P is seeking damages for personal injury under a negligence action. Negligence is an action recognized in common law and the damages required are legal damages and likely to involve more than $20, since they stem from the personal injury suffered after the car accident. Therefore P was entitled to a jury trial, but only as long as the demand was timely filed.

Notice to Opposing Party and Timely Demand

P made his demand for a jury trial about 3 weeks before trial. A demand for jury trial must be noticed to other party and promptly filed. The FRCP requires that a demand for a jury trial be filed by the Plaintiff 14 days after the complaint is filed, at the very latest and be properly notified to the opposing party. Here, P made his demand only 3 weeks before trial, after all the pleadings were closed. As such, this was not a timely demand and the Court was absolutely right to grant D's motion to strike P's demand for a jury trial.