

## Question 2

Doctor performed surgery on Perry's spine to insert a metal rod designed by Bolton, Inc. (Bolton). Shortly after the surgery, Perry developed severe back pain at the location where the rod was inserted. Within the applicable statute of limitations for a tort action for negligence, Perry sued Doctor in federal district court, alleging that she was negligent in using Bolton's rod for the kind of back condition from which he suffered. Personal jurisdiction, subject matter jurisdiction, and venue were proper.

During a deposition, Perry's attorney asked Doctor to state whether she had performed any other spine surgeries using Bolton's rods and, if so, whether any of those surgeries had resulted in complications. Doctor's attorney objected to the questions on the ground that the information requested had nothing to do with whether Doctor was negligent as to Perry, and Doctor refused to answer. After the attorneys properly met and conferred concerning Doctor's refusal, Perry's attorney filed a motion to compel Doctor to answer the questions.

Shortly after the statute of limitations had run, Perry learned through a newspaper article that Bolton had been sued by several patients who alleged that they suffered severe back pain after Bolton's rod was inserted into their spines during surgery. Perry immediately sought and obtained leave to amend his federal complaint to join and include a claim against Bolton, alleging that it had negligently designed the rod. Bolton immediately filed a motion to dismiss Perry's claim against it on the ground that the statute of limitations had already run.

Perry also learned that Doctor had lost a lawsuit brought by another patient with a back condition like his who had also alleged negligence by Doctor for inserting Bolton's rod into his spine. Perry filed a motion for summary judgment against Doctor on the basis of preclusion.

1. How should the court rule on Perry's motion to compel Doctor to answer? Discuss.
2. How should the court rule on Bolton's motion to dismiss Perry's claim on the ground that the statute of limitations had run? Discuss.
3. How should the court rule on Perry's motion for summary judgment? Discuss.

## **Answer A to Question 2**

### **Perry v. Doctor**

#### **1. Perry's Motion to Compel Doctor to Answer**

Discovery provides fact-gathering tools for parties to obtain relevant evidence to the case. The scope of discovery is broad but not limitless. A party may only discover relevant evidence/information or facts reasonably calculated to lead to relevant evidence/information. However, a party may not discover privileged information. Therefore, the scope is broader than evidence admissibility as not only relevant evidence is discoverable, but also those that provide a good lead to relevant information. Deposition is one of these fact-gathering tools.

During a deposition, typically there is not judge present, but attorneys should still make proper objections for the future purpose of excluding any answers at trial. If an attorney does not make an objection during deposition to a question or an answer, it is considered waived and the same question cannot be objected to in the future. If the opposing attorney later wishes to admit the objected question and/or answer at trial, the judge will determine whether the attorney's objections at the deposition should be sustained or overruled. At the deposition, because there is no judge present to determine the objection, the witness must still answer because, as stated above, all relevant evidence or facts reasonable calculated to lead to relevant evidence/information is discoverable. One deposed does not have to answer a question unless the answer would reveal privileged information.

Here, Perry's attorney asked Doctor to state whether she had performed any other spine surgeries using Bolton's rods, and if so, whether any of those surgeries had resulted in complications. Doctor's attorney objected on the basis of relevance - asserting that the information requested had nothing to do with whether Doctor was negligent as to Perry, so Doctor refused to answer. The question asked is a relevant question because Perry is suing Doctor for negligence. In this case, Doctor performed surgery on Perry's spine to insert a metal rod designed by Bolton. Shortly after the surgery, Perry developed severe back pain where the rod was inserted. If Doctor has

performed similar surgeries with the same Bolton's rods in the past and those have also resulted in complications, that would be relevant to the question of Doctor's duty and breach of duty. For example, if Doctor had performed similar surgeries and had resulted in complications, then a reasonable doctor with similar skill, knowledge and experience as another doctor in the same field of profession may decide to no longer use Bolton's rods or to improve or change his technique so as to avoid future surgical complications. The answer to this question could reasonably lead to Perry's attorney finding other patients for relevant information and may also discover the techniques used during those surgeries. Thus, the information is relevant and reasonably calculated to lead to relevant information. Thus, this information is discoverable, and the Doctor must answer. Because the attorneys properly met and conferred concerning Doctor's refusal to answer and could not come to an agreement, the motion to compel was properly filed. The court should grant Perry's motion to compel Doctor to answer.

Doctor may argue that revealing such information would violate doctor-patient confidentiality, thus privileged information. However, the question simply asked whether Doctor had performed other spine surgeries using Bolton's rods, and whether any of those surgeries had resulted in complications. The answer only requires a yes or no answer. The answer would not require Doctor to reveal any patient's names or medical conditions. Thus, Doctor's argument would fail.

The court should grant Perry's motion to compel.

## 2. Motion to Dismiss Perry's Claim on the ground that Statute of Limitations had run

Assuming that this is a diversity of citizenship case in federal court (because negligence is typically not a federal question), the Federal court must apply the Erie doctrine where Federal Rules of Civil Procedure (FRCP) for procedure and apply state law for substantive law. Courts have established that in a diversity case, the state statute of limitations must be used as that is considered substantive law. Under FRCP, a party has 14 days to amend a complaint after original filing.

To amend a complaint after the statute of limitations had run, the complaint must relate back to the original complaint that was filed before the statute of limitations had

run. To relate back to the original complaint while adding a defendant on the amended complaint, 3 elements must be satisfied: 1) the claim arises out of the same transaction or occurrence as the original complaint, 2) the new party knew of the original action within 120 days of filing, and 3) the new party, but for the mistake, knew that they should have been named as the original party.

Here, the original complaint was filed in federal district court within the applicable statute of limitations for a tort action for negligence. Perry alleges that Doctor was negligent in using Bolton's rod for the kind of back condition from which he suffered.

Same transaction or occurrence

The amended complaint includes a claim that alleged that Bolton negligently designed the rod. Because Perry was suing Doctor for negligence for using Bolton's rod during surgery for Perry's kind of back condition, the new claim against Bolton arises out of the same occurrence because they both arose out of Doctor's surgery and inserting Bolton's rod. Thus, this element is satisfied.

New party knew of original action

It is unclear whether Bolton knew of the original action where Perry sued Doctor for negligence. If doctors are sued based on products they used on patients, it is not unusual that doctors would seek indemnification or contribution from the manufacturers of those products. Thus, if Doctor informed Bolton of Perry's lawsuit (or if Bolton somehow was aware of it) within 120 days of filing, then this element is satisfied. Otherwise, this element is not satisfied.

But for the mistake, Bolton knew they should have been named

There is no indication that Perry had originally wanted to file a claim against Bolton. Perry's original claim was that Doctor negligently used Bolton's rods for his type of injury, thus alleging that Bolton's rods were wrongly used. Perry did not allege that anything was actually wrong with the rod itself. Therefore, there appears to be no mistake regarding the identity of the defendant. In fact, there is no facts to suggest that Perry had even considered suing Bolton for negligence until Perry learned through a

newspaper article that Bolton had been sued by several patients who alleged that they suffered severe back pain after Bolton's rod was inserted into their spines during surgery. Clearly, Perry did not make a mistake as to the defendant when he filed the original claim prior to reading this newspaper. Only after reading the newspaper did he "immediately sought" to amend his complaint. The evidence shows that there is no mistake as to the identity of the defendant in Perry's suit.

Even if Bolton was aware of the suit, no indications on the claim would lead Bolton to believe that Doctor had originally meant to sue Bolton instead of Doctor. Therefore, this element is not satisfied.

The court should grant Bolton's motion to dismiss because the applicable statute of limitations had run and the amended complaint does not relate back.

### 3. Perry's Motion for Summary Judgment

Motion for summary judgment will be granted if the court determines there is no dispute of fact in the case. The court may look at evidence when making such a determination.

#### Claim Preclusion (res judicata)

To assert claim preclusion, 3 elements must be satisfied: 1) same claimant vs. same defendant in both case #1 and #2, 2) case #1 ended in a valid final judgment on the merit (which means it did not end based on jurisdiction, venue or indispensable party), and 3) the claimant is asserting the same claim as case #1 (same claim usually means arises out of the same transaction or occurrence).

The first lawsuit was brought by another patient, not Perry. Thus, the first element requiring the same claimant and defendant fails because Perry was not the plaintiff in the first case, as he is in the second case. Although it appears that case #1 ended in valid final judgment on the merits, case #1 did not assert the same claim because it is not the same transaction or occurrence. The previous patient's claim arises under his individual surgery, and Perry's claim arises out of his own separate surgery. Thus, claim preclusion should not be asserted.

## Issue preclusion (collateral estoppel)

To assert collateral estoppel, 5 elements must be satisfied: 1) case #1 ended in a valid final judgment on the merits, 2) the issue was actually litigated in case #1, 3) the issue was essential to the judgment (if the issue was decided differently, the case would have ended differently), 4) collateral estoppel is being used against one who was a party in case #1, and 5) collateral estoppel is being used by one who was a party in case #1 (satisfies mutuality requirement in those jurisdictions who require it), one who was not a party in case #1 but is a defendant in case #2 if plaintiff actually litigated the issue in case #1, and one who was not a party in case #1 but is a plaintiff in case #2 if it is fair. Collateral estoppel may be used by nonparties in case #1 because many jurisdictions have found that not complying the mutuality requirement does not violate due process.

### Valid Final Judgment

No facts suggest that the first case did not end in final valid judgment on the merit. No facts state that case #1 ended based on jurisdiction, venue or indispensable party. Thus, if it did not end in one of these bases, then it ended in valid final judgment, and this element is satisfied.

### Issue actually litigated

The facts state that "Doctor had lost a lawsuit brought by another patient... who also alleged negligence for inserting Bolton's rod into his spine." Therefore, it appears that the issue of negligence was actually litigated. If it was, this element is satisfied.

### Issue essential to judgment

Because the previous patient brought an action based on negligence, the issue of negligence was likely essential, and if the court or jury in case #1 had found Doctor not to be negligent, then the outcome of case #1 would have been different. Thus, this element is satisfied.

### Used against party in case #1

Perry is asserting issue preclusion against Doctor, who was the defendant in case #1 because in the previous case, Doctor was sued by another patient. Doctor is a current defendant in Perry's case and was a defendant in case #1. Thus, this element is satisfied.

Used by nonparty in case #1 but plaintiff in case #2

For Perry to assert issue preclusion, the use of issue preclusion must be fair. Here, Perry would argue that it is fair because the previous plaintiff/patient's injuries had a back condition like Perry's and Doctor inserted the same Bolton's rod into his spine, just like Doctor did with Perry. However, this argument would likely fail. Doctor would argue that although the previous patient in case #1 had a "back condition like" Perry's, medical conditions/injuries, especially back injuries, are almost never exactly the same. Its causes may be different and its symptoms may be different, which would call for different treatment. Thus, even if Perry and the previous patient had similar injuries, its causes, symptoms and other factors may require Doctor to use different technique or treatment. Or even if the same technique was used, each patient may react different based on the patient's physiology even without any negligence on the part of Doctor. Therefore, it would not be fair to preclude Doctor from litigating the issue of negligence in Perry's case based on Perry's injuries/condition, causes of Perry's injuries/medical condition, and techniques used during Perry's surgery. Because it would be unfair to preclude Doctor from litigating the issue of negligence in Perry's lawsuit, this element is not satisfied.

Thus, the court should deny Perry's motion for summary judgment.

## **Answer B to Question 2**

### 1-Motion to compel Doctor (D) to answer

#### Scope of discovery- relevance

During discovery, both parties to a lawsuit may engage in discovery through depositions, interrogatories, requests for production, requests for admissions, and other discovery devices any evidence that is relevant to the lawsuit. Relevance is a low standard and it just requires that the evidence sought to be discovered be likely to lead to the discovery of any admissible evidence relevant to a claim or defense in the subject case. Here, Perry (P) is bringing a lawsuit against D for negligence. Negligence is a tort action that requires the plaintiff to establish 1) duty, 2) breach, 3) actual causation, 4) proximate causation, and 5) damages.

Here, P is seeking discovery of whether D had performed any other spine surgeries using Bolton's rods, and if so, whether any of these surgeries resulted in complications. Although D is arguing that this information has nothing to do with whether D was negligent as to Perry, this evidence is relevant to the issues of duty and breach- which P will have to establish as part of his prima facie negligence lawsuit.

Although this information does not involve P, it is relevant to duty because it helps determine what standard of care D should be held to. A physician is typically held to the standard of care of an average member of his profession in good standing. Thus, D will be held to the standard of care of an average back surgeon in good standing. Here, if D in fact used Bolton's rods before and these surgery's resulted in complications, this would indicate that D should have warned P about these complications. An average back surgeon in good standing would warn his patients of complications that occurred when the doctor performed similar surgeries on other patients.

This information is also relevant to breach. In order to establish breach, a plaintiff has to establish that the defendant fell below the applicable standard of care. Here, if other spine surgeries using the same rod had led to complications, this would be relevant to whether D fell below his standard of care because either he did not inform P of these



complications (which he should of done) or because he in fact used this rod for the spine surgery knowing that it had a potential to lead to complications.

Thus, the evidence that P is seeking is relevant to his negligence theory and should have been discoverable.

#### Privilege/ work product

Relevant evidence is discoverable unless there the party against whom the discovery is sought can claim a privilege such as doctor-patient confidentiality or work product privilege. Here, D will have to answer P's request unless he can claim either of these privileges.

Although many jurisdictions, including CA, recognize the doctor-patient privilege, the federal courts do not. Here, P is suing D in federal district court thus the doctor-patient privilege does not apply and D will not be able to assert it to avoid his discovery obligations to P.

Work product privilege protects the work of the attorney and parties that is done in anticipation of litigation. Here, there is no indication that D's attorney compiled a list of other spine surgeries in anticipation of this litigation, thus D will not be able to claim the work product privilege.

#### Conclusion

Because the evidence as to other spine surgery complications is relevant to P's negligence claim against D and not subject to any privilege, the court should grant P's motion to compel D to answer his deposition question.

#### 2-Motion to dismiss on ground that statute of limitations (SOL) had run

Generally, a plaintiff must file his complaint with all claims and all defendants within the applicable SOL. There are 2 limited exceptions, outlined below, where there plaintiff may 1) add a new claim and 2) add a new defendant after the SOL has run. In these situations, the new claim/ new defendant will "relate back" to the original complaint and the date that this original complaint was filed. This way, if the original complaint was

filed within the applicable SOL, the plaintiff will be able to avoid the SOL problem with his new claim/ defendant.

Here, P filed a suit against doctor within the applicable SOL, thus whether P can add the claim against Bolton depends on whether it "relates back."

#### Relation back- Amendment of pleadings to add a claim

A plaintiff may amend his complaint to add a new claim after the SOL has run if the claim arises out of the same transaction or occurrence as his original claim against the original defendant. Here, P wants to add a claim against Bolton based on negligent design of the rod. P's original claim is against the doctor for negligence in using this rod. Thus, P's claim against Bolton arises out of the same transaction or occurrence as his original complaint- both the new claim against Bolton and the original claim against D arise out of the back surgery/ rod insertion that led to P's severe back pain. Thus, P will be able to amend his complaint to add this claim.

#### Relation back- Amendment of pleadings to add a defendant

A plaintiff may amend his complaint to add a new defendant after the SOL has run only in very limited circumstances. The plaintiff must establish 1) that his claim against this new defendant arises from the same transaction or occurrence as the original complaint, 2) that the new defendant knew about the original action within 120 days of its filing, and 3) that the defendant knew that, but for a mistake, he would have been originally named in the plaintiff's original complaint.

Here, P wants to include a claim against Bolton, alleging that it had negligently designed the rod that D placed in his back during the spin surgery. P's original claim is against the doctor for negligence in using this rod. Thus, P's claim against Bolton arises out of the same transaction or occurrence as his original complaint- both the new claim against Bolton and the original claim against D arise out of the back surgery/ rod insertion that led to P's severe back pain. Thus, this first element is satisfied.

Here, P will also have to establish that Bolton knew about his claim against D within 120 days of its filing. Here, there is no indication that Bolton received a copy of P's complaint

against D or had any notice that P brought a claim against D as a result of his surgery. Thus, unless P can establish that Bolton knew about the lawsuit, he will not be able to establish this element.

Here, P will also have to establish that Bolton knew that he made a mistake and that he would have originally named Bolton but for the mistake. Here, P will try to argue that Bolton had been sued by several other patients who alleged that they suffered severe back pain after Bolton's rod was inserted during spine surgery. Thus, P will argue that Bolton knew that P should have filed the lawsuit against it. However, P will not be able to establish this element. P did not make a mistake and negligently name the wrong defendant- rather, he named Doctor who is likely a proper defendant and then subsequently named Bolton after he learned more information. He did not even learn this information through discovery/ deposition of Doctor- he learned it by reading a newspaper article. This is not a situation where the plaintiff completely puts the wrong name in the applicable line of his complaint. P did not make a mistake at the time of his complaint and rather learned about a potential claim against Bolton too late. He will be barred by the SOL.

### Conclusion

Here, P's new claim will relate back to his original complaint. However, his addition of Bolton as a new defendant will not relate back to the original complaint and P will not be able to add his claim against Bolton. Thus, the court should grant Bolton's motion to dismiss P's claim on the ground that the SOL had run.

### 3-Motion for summary judgment based on preclusion

A motion for summary judgment requires the moving party to establish 1) there is no genuine dispute of material fact and 2) he is entitled to judgment as a matter of law. Preclusion is a common ground for a motion for summary judgment because it involves the judgments of prior lawsuits so there is genuinely no dispute as to material fact (the outcome of these lawsuits).

### Res judicata/ claim preclusion

Res judicata (RJ) bars a subsequent lawsuit (lets call it case 2) when there is a prior lawsuit (call it case 1) and 1) case 1 and case 2 involve the exact same parties (the exact same plaintiff and the exact same defendant), 2) case 1 ended in a final judgment on the merits, and 3) case 2 involves the same transaction or occurrence as case 1.

Here, P will not be able to assert RJ against Doctor. Here, case 1 is the lawsuit brought by another patient against Doctor. Case 1 involved a negligence action for inserting a Bolton rod into his back. Although P's lawsuit (case 2) is very similar, RJ will not apply because P was not a party to the prior case 1. RJ requires the exact same persons to be parties to both the first case and the second case. Although D was a party to the first case, P was not, thus he will not be able to assert RJ against D.

#### Collateral estoppel/ issue preclusion

Collateral estoppel (CE) bars a subsequent lawsuit (case 2) when 1) case 1 and case 2 involve the same issue, 2) this issue was actually litigated and decided in case 1, 3) this issue was essential to the judgment in case 1, 4) issue preclusion is being asserted in case 2 against a party who was a party in case 1, and 5) traditionally, is being asserted by a party who was a party in case 1 (mutual collateral estoppel) but modernly, does not to be asserted by a party who was a party in case 1 (non mutual collateral estoppel).

Here, case 1 (the lawsuit by the other patient) and case 2 (P's negligence suit against D) will likely involve similar issues. They are both negligence suits so they will both have issues such as 1) what was the defendant doctor's standard of care? 2) did the defendant breach this standard of care by installing a Bolton rod in his patient's spine, 3) did the insertation of the Bolton rod cause the patient to suffer subsequent back pain, etc. Thus, case 1 and case 2 will involve many of the same issues, and this first element will be satisfied.

Because Doctor lost the first negligence lawsuit, many of these issues will also have been litigated and decided, thus there are a number of issues which will have been actually litigated and decided in case 1, thus P will likely be able to satisfy the second element of CE.

Similarly, many of these issues would have been essential to the judgment in case 1. A plaintiff has the burden of establishing all of his prima facie negligence elements so each of these issues would have been essential to the first patient prevailing in his negligence suit against Doctor, thus this third element will likely be satisfied.

P is also asserting issue preclusion in case 2 against Doctor, who was a party in case 1. Thus, issue preclusion is being asserted against a party who was a party in case 1 and the fourth element is satisfied.

For the fifth element, traditionally, mutual collateral estoppel was required and CE could only be asserted by a party who was also a party to case 1. However, unlike the fourth element (which is required by due process), due process does not require the party who is asserting CE to be a party to case 1. Thus many jurisdictions allow nonmutual use of collateral estoppel. The standard that must be met depends on whether the party is asserting CE as a plaintiff or as a defendant. If the party is asserting it as a defendant (defensive collateral estoppel) the court will apply CE to bar further litigation of this issue as long as the plaintiff had a full and fair opportunity to litigate the issue in case 1. However, if the party is asserting it as a plaintiff (offensive collateral estoppel) the court will be more reluctant to apply CE and will look at a number of factors- 1) did the defendant have a full and fair opportunity to litigate the issue in case 1, 2) could this new plaintiff have joined case 1, 3) could the defendant have foreseen multiple lawsuits, and 4) are there any inconsistent judgments so that assertion of CE could be unfair to the defendant.

Here, P was not a party to case 1 however he still may be able to use nonmutual collateral estoppel since most courts have got rid of the mutuality requirement. P is a plaintiff and he is the one asserting CE against D. Thus, P is trying to make offensive use of CE. The court will look at a number of factors- whether Doctor had a full and fair opportunity to litigate the first lawsuit against the other patient. Whether Perry could have joined the first negligence lawsuit involving the Bolton rod- did P know of this claim at the time it was brought? Whether the doctor could have foreseen that there would be multiple lawsuits like this- here multiple patients had sued Bolton from back pain they suffered so D likely could have foreseen that plaintiffs would bring lawsuits against him

as well for use of the rod. And finally, whether there are inconsistent judgments against Doctor. Here, this appears to be the only other lawsuit against this particular doctor involving negligent use of the rod thus unless there are other lawsuits where the Doctor prevailed on this issues, there are unlikely to be inconsistent judgments.

### Conclusion

The court should dismiss Perry's motion for summary judgment as to his claims of res judicata but likely should grant his motion as to his claims of collateral estoppel for a number of negligence issue (outlined above) depending on the factors (outlined above).