

Exam Question 2

4 Example Student Answers

-->Question -2-

#2

Personal Jurisdiction 12(b)(2)

The requirements of due process must be satisfied before a court can exercise personal jurisdiction over a defendant. Due process requires that a defendant receive proper notice and be statutorily and constitutionally amenable to trial. Notice is generally proper if performed according to Rule 4. Since there is no indication otherwise, we can assume that notice is proper. Statutory amenability examines whether a state has allowed its courts to exercise their power to the full extent of due process. Again, because there is no indication that Texas has done otherwise, we can assume that Preston and Elvis are statutorily amenable. Constitutional amenability, according to the modern method advanced in *International Shoe v. Washington*, requires that the defendant has such contacts with the forum state as to not offend traditional notions of fair play and substantial justice. The court examines whether the defendant has purposefully availed himself by his actions to the forum, looking at whether he enjoys the laws and protections of the state, if he directed his activities toward the state, and any profit he may be making. The court looks at whether the contacts gave rise to the claim, subjecting the defendant to specific jurisdiction for claims so related to his contact with the forum. Alternatively, a defendant whose contacts are so systematic and continuous with the forum may be subject to general

jurisdiction, allowing him to be sued on any claim in that forum. The court considers the forum state's interest in adjudicating the case, the burden on the defendant in litigating the case, convenience and fairness to the plaintiff, and the concern the efficient use of judicial economy.

Here, if Preston files a 12(b)(2), the court will likely find that he does not have minimum contacts with Texas to subject him to either general or specific jurisdiction. The case is concerning whether Disaster was negligent regarding an accident that occurred in Indiana. There is no indication that Preston has ever been to Texas, conducted business with a Texas resident, or that his actions in Indiana could be said to have been purposefully directed toward Texas. Preston can argue that it is his contacts with Indiana that gave rise to the action commenced by Disaster. Therefore, the court will likely find that Preston has no contacts with Texas such that the maintenance of suit against him would violate Due Process.

Disaster can argue that Preston has sufficient contacts with Texas because he was involved in an accident with a Texas resident. However, this contact did not occur in Texas and Preston cannot be said to have purposefully directed his activities toward Texas by getting into an accident in Indiana with no knowledge that the other party was from Texas. Had the accident occurred in Texas, Preston would most likely be subject to personal jurisdiction in Texas. However, the court is unlikely to find that Preston established sufficient contact with Texas by virtue of his involvement with a Texas resident in Indiana.

Assuming the court did find that Preston had minimum contacts with

Texas, the court would still likely find that these contacts are not sufficient to maintain a suit against him. First, Texas does not have a high interest in adjudicating this suit because the event did not occur within Texas borders. While the plaintiff is a Texas Resident, he is attempting to obtain a judgment stating that he was not negligent, as opposed to seeking damages for another party's negligence. Thus, he has suffered no injury and Texas would not have as much interest in protecting its residents from suits arising from their own negligence as it would if the suit was to compensate the Texas resident for her injuries. Indiana has a higher interest in regulating conduct that occurs within its borders. Second, obtaining judgment in Indiana would probably be more efficient and convenient for the plaintiff considering that most of the witnesses and evidence are located in Indiana. Finally, interstate comity is preserved by allowing an Indiana court the opportunity to apply its law to an event occurring within its borders giving rise to a future claim. The burden to the defendant is greater in appearing in Texas, but this is generally not a valid excuse unless the burden of appearing is so great as to impose significant financial hardship or the presence of physical disability. Thus, the court should find that maintenance of a suit in Texas would offend notions of substantial justice and fair play.

Elvis is unlikely to achieve the same result as Preston. Elvis, as a Texas resident, would be subject to personal jurisdiction both under the traditional power theory advanced in *Pennoyer v. Neff* and under a theory of general jurisdiction. Under the Power theory, a state has the power to exercise jurisdiction to those within their borders. Elvis, as a resident,

obviously meets that criteria. Further, most state long arm statutes confer jurisdiction over those domiciled within the state. General Jurisdiction is also appropriate because Elvis, as a resident, does have systematic and continuous contacts with Texas. He enjoys the laws and protection of Texas and is able to file suit in Texas. Therefore, the court should find that a 12(b)(2) motion by Elvis is inappropriate.

Removal, Transfer, and FNC

Since this action is filed in state court (and states cannot transfer a case to a different state), transfer under 1404(a) is only possible if Preston and Elvis can first remove this action to federal court. However they are unlikely to succeed because removal requires that the federal court have original jurisdiction under either 1331 or 1332. Here, there is no diversity of citizenship, no minimum amount in controversy, and no question of federal law. Furthermore, the action, if diversity jurisdiction is appropriate, is not removable because Elvis is a Texas resident. Removal is prohibited under 1441(b) if the action is filed in a state where any defendant is a resident.

However, Preston and Elvis may move for a dismissal for Forum Non Conveniens (FNC), assuming Texas has a FNC statute. They are likely to succeed in this motion. FNC is appropriate under the Gilbert Test when there is an adequate, available, alternative forum in which the action could have originally been brought and a balancing of Public and Private interest factors show that fairness to the parties and the interest of justice are better served by adjudication in the alternate forum.

Preston and Elvis can argue that Indiana is an adequate Alternative forum because, Personal Jurisdiction, Subject matter jurisdiction and venue are all proper in Indiana state court. As defendants, Preston and Elvis are likely to consent to personal jurisdiction in Indiana. Disaster will also be subject to PJ in Indiana based on his purposeful availment toward the forum in the use of their roads which lead to the accident. Subject matter jurisdiction is proper in any Indiana state court of general jurisdiction. Venue is also proper under 1391(a)(2) because a substantial portion of the events giving rise to the claim occurred in Indiana.

Private Interests to be considered are, access to sources of Proof, cost of obtaining witnesses and means to compel attendance for the unwilling, ability to view the premises, and whether judgement can be enforced. All the witnesses are located in Indiana, as is the airport where the accident took place. Because this is a state-to-state FNC motion, concerns over ability to enforce the judgement are considerably less than when dismissing in favor of a foreign court. It would also be easier to compel witnesses to appear in Indiana, considering most of them are located there to begin with.

Public interest factors include Court congestion, burden of impaneling a jury, the forum interest, and conflict of law problems. The main public interest factor considered here is the forum interest. Indiana has a much higher interest in resolving this dispute by virtue that it occurred within its borders. While Texas may have an interest in protecting its citizens by issuing a declaratory judgment, this interest is superseded by the interest of justice in allowing Indiana to try this case. Burdens of Jury duty and choice

of law problems are minor are likely non-existent because the case, if dismissed, will still be filed within the U.S.

Rule 56 Motion for Summary judgment.

Preston and Elvis can also attempt to move for summary judgment. Summary judgment is appropriate when there is no issue of material fact for the jury to decide. Since Preston and Elvis do not have the burden of proof at trial (Disaster still must prove that it was not negligent in obtaining their declaratory judgment), all they need to do, according to the standard set forth in Celotex, is point out to the court that Disaster does not have sufficient evidence to raise an issue of material fact as to any part of his claim. Although a common practice, Preston and Elvis do not have to support their motion with any type of affidavit or other supporting evidence. Affidavits can, however, be used if they are made with personal knowledge and in a form that would be admissible as evidence by an individual who is competent to testify at trial. If Preston and Elvis do so support their motion, Disaster would then be required to show with specific facts that create an issue of material fact. In this case, since Disaster is moving for a declaratory judgment in its favor, it would probably have to establish with reasonable certainty facts showing a lack of negligence.

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-->Question -2-

Exam

Preston v. Disaster

The first piece of advice is for Preston. Preston, who is an Ohio resident, does not even need to show up in Texas courts as long as he never visits Texas or does any business there. The reason is because a default judgment in Texas against Preston could not have authority over Preston in Ohio because Texas does not have personal jurisdiction over him. Preston could make a collateral attack against jurisdiction in Ohio courts to prevent the Texas judgment from having power over him. There is also the option for Preston to specially appear in Texas state court in order to object to personal jurisdiction. The most important part of this special appearance is to make sure Preston does not attempt to argue the case on the merits, otherwise, the Texas court will have jurisdiction over him. During Preston's special appearance, Preston can motion using Rule 12(b)(2) and argue there is no personal jurisdiction over him because the defendant hasn't established that Preston has minimum contacts in Texas such that traditional notions of fair play and substantial justice are not offended (Shoe). First, argue there is no specific jurisdiction because the claim of negligence must arise out of Preston's contact or conduct in Texas and Disaster's claim arises out of Indiana. There is also no general jurisdiction because Preston doesn't have continuous and systematic contacts in Texas. And looking at the Helicopteros

case, even if Preston has made several trips to Texas for vacation, these contacts are not sufficient to establish minimum contacts. Preston could not reasonably foresee being hailed into Texas court, and he does not purposefully avail himself of Texas's laws and protection on a regular basis. It would also be unreasonable for Preston to make such a trip out to Texas because traditional notions of fair play and substantial justice would be offended. The inconvenience of forcing an Ohio resident to travel to Texas is one factor. The forum also has no interest because the accident did not arise in Texas, and its ruling would do nothing to deter accidents in Texas for the future. Disaster could make an argument that the plaintiffs have an interest in adjudicating the dispute in Texas, but that is not enough to make personal jurisdiction in Texas reasonable.

In the case Preston accidentally argues on the merits, he may also make argue using the common law doctrine of forum non conveniens (FNC), which basically allows for discretionary dismissal of a case because of a better venue option. In order to invoke FNC, there is a two part balancing test used in Piper where the court considers whether there is an adequate and alternative forum and whether there is a balance of private and public interests which would suggest dismissal is proper. The first part, adequate and alternative forum, has a very low threshold. The case is subject to suit in many other forums such as Indiana, where the claim arises, or Delaware, where Disaster is incorporated. These alternative forums offer adequate remedies to this situation because negligence is a common law claim available in every state. Some private interests to consider are ease of access to

sources of proof, witness costs and availability, and practicality for parties. There is not an easy access to proof or the site of the cause of action because all of that occurred in Indiana. The cost of witnesses and their availability would also put a strain on the parties because all the witnesses probably reside in Indiana, and arrangements for their travel would need to be made. It would be impractical for Preston because he lives in Ohio. Public interest factors to consider are forum interest, avoidance of unnecessary problems in conflict of laws, court congestion, and burden for jury duty. The forum has little interest in settling the dispute because the accident happened outside of Texas, but Disaster could attempt to argue Texas has an interest in protecting companies which have its principal place of business here. There might also be a problem in conflict of laws because Texas's declaratory judgment would be decided using Texas common laws of negligence, which would not be applied in Ohio or Indiana courts. The accident happened in Indiana, and so Indiana state courts or Federal courts ought to be applying Indiana common laws of negligence instead. Having this case in Texas would congest the courts even more, and it would be a burden for Texas citizens to sit through jury duty in a case not even relating to an accident in their state. Using these arguments, the Texas court will likely dismiss the case under forum non conveniens.

Preston could also have the case removed to Texas federal court because there is original jurisdiction due to diversity. Preston is an Ohio resident whereas Disaster is a Delaware and Texas resident, assuming the amount in controversy is met, the Texas federal court has original

jurisdiction over the claim. After removal, he may be able to get a change of venue using § 1404. The venue isn't improper, but the court might see it fit in the interest of justice to settle the dispute in a court where the evidence is easily obtainable and where it is closer to the origin of the claim. It would also be more convenient for Preston to have it transferred to an Indiana or Ohio federal court. Preston should not argue for dismissal under § 1406 because venue is proper in Texas when the defendant resides in Texas.

The best recommendation for Preston to stay in Ohio and let a default judgment be entered in Texas because the Texas courts don't have any personal jurisdiction over him anyways.

Elvis v. Disaster

Elvis should not take the same course of action as Preston. Having a default judgment entered against Elvis would be disadvantageous because Elvis is a resident of Texas, and all Texas courts have personal jurisdiction over him and his property. Therefore, he should voluntarily go into Texas state court to argue the merits of his case.

Elvis can also make an argument for forum non conveniens, but because he is a Texas citizen and Disaster is considered a Texas citizen, the forum has more interest in settling this dispute. It would not inconvenience either of the parties to appear in Texas state court. The court is likely to reject the forum non conveniens argument.

Elvis may be able to remove the case to Texas federal court by arguing

that Texas federal courts have original jurisdiction over the case because it arises under 1331 for federal question. Disaster may attempt to argue for remand because there the declaratory argument is for negligence, which does not involve a federal question, but Elvis should argue that Disaster is trying to artfully plead around the federal question over FAA regulations. The reason why Elvis should attempt to remove the case to Texas federal court is because he may be able to have the case transferred to a different venue. Under 28 USC § 1404, for the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district where it might have been brought. For the convenience of witnesses, it would be better to transfer the case either to Ohio or Indiana federal court because that is closer to where the alleged accident happened. Elvis could also argue the interest of justice would like to see the case settled in the district court where the claim arose.

Another tool Elvis may be able to utilize is Rule 56. Rule 56 allows for summary judgment before the trial when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. If Elvis has enough proof to show that a reasonable jury could find for him, Elvis is entitled to judgment as a matter of law. It is especially useful because it could result in dismissing the case instead of litigating it later. It is also possible to receive a judgment on the pleadings under Rule 12(c) before using Rule 56 summary judgment.

The best procedural option is for Elvis to use *forum non conveniens* where there might be a chance that the Texas state court sees the

inconvenience of litigating over a suit that didn't arise in Texas and all the witnesses and evidence are on the other side of the country.

-->Question -2-

There are multiple options to Preston and Elvis (hereafter, the defedants) both separately and if they want to press on together. I will address the options for each defendant separately and then their options as a "team." I will present last an argument against offensive issue preclusion (offensive collateral estoppel) as an unfavored approach.

Preston: Lack of Personal Jurisdiction. The issue with Preston is whether the state court in Texas has personal jurisdiction over him. If a state court lacks personal jurisdiction, the defendant can accept a default judgment and appeal the jurisdictional issue in an other forum. This is a collateral attack of jurisdiction. Another option available would be a special appearance to argue lack of personal jurisdiction, but this requires him to go before the court in Texas. If Preston were to accept this route, I would advise him to argue nothing of the merits of the case other than that which applies to personal jurisdiction and to make no other motions than the dismissal for lack of personal jurisdiction (Rule 12(b)(2)). If another motion is made during a special appearance, objection to personal jurisdiction is waived as is the possibility of the default judgment/collateral attack.

For Preston, the approach is quite simple. I would suggest to ignore the action. While his case appears solid and probably presents a jury question, even in Texas, if he truly does not want to litigate this action he shouldn't. The Texas state court does not have personal jurisdiction over

Preston, assuming the fact pattern is not leaving out relevant information about Preston's contact with the Texas forum. The state court will have subject matter jurisdiction (it is a court of general jurisdiction, and thus not as limited as federal courts). Furthermore, the Texas Long Arm Statute goes as far as the U.S. Constitution allows thereby providing the statutory amenability necessary for personal jurisdiction, and I assume Texas has some way of giving notice to out of state parties. Thus, two of the three elements necessary for personal jurisdiction are satisfied, but Preston does not meet the constitutional due process requirement of minimum contacts and fair play to be under the personal jurisdiction of the state court. Assuming there has been no purposeful availment by Preston on Texas, he cannot reasonably be expected to be hailed into court there.

By ignoring the action, Preston loses his ability to fight the case on the merits, but he has a powerful option - collateral attack on jurisdiction. He cannot appeal the merits of his case in a different forum, but he will be able to attack the jurisdictional impropriety of the Texas action. Thus he would prevail in Ohio on the collateral attack so long as there is no personal jurisdiction.

Elvis: His Situation is Harder. Can Elvis defeat the motion for default judgment through evidentiary means? A movant typically only has to make a motion to meet his/her burden. The non-movant, or responding party, cannot rely on the merits for the denial of the motion but should, if possible,

produce affidavits supporting their position.

Elvis is not a diverse party in this action although the events arose outside the jurisdiction. Assuming Elvis is a resident of Texas, the collateral attack on personal jurisdiction is not available to him. A defendant's home state is a plaintiff's last resort for a forum (if they are seeking other forums which is not the case here). The theory is that in a defendant's home state he is not as susceptible to local bias as a foreign plaintiff might be. This is the same reason why in a diversity action a defendant in a court of his home state cannot remove the case to federal court. Any judgment will be held against him because he is completely amenable to being brought into court in TX. Elvis on his own is pretty vulnerable here, but he does have options. I would suggest that he argue his case in the state court especially if he is able to support his position with affidavits. Assuming a declaratory judgment is treated procedurally the same as a summary judgment, if the plaintiff makes a motion he/she has met her burden - no affidavits or evidence is necessary. The burden is on the non-movant to offer evidence or affidavits controverting the claim of the moving party. If the driver was negligent, Elvis can probably defeat the motion. Even if he does not, he has not lost the ability to appeal on the merits of the case.

Preston and Elvis: If the two must remain together in the suit, I would suggest looking for a way to remove this to federal court. Most likely, based

on Elvis's citizenship, diversity will not create the subject matter needed for removal. ¶1441 stipulates that the defendant may remove to district court provided that the receiving court has original jurisdiction over the case. Consent of both the defendants would be necessary for removal, and I assume from their unwillingness to participate in Texas state court, consent is definite. Unfortunately, from the question presented in state court, a federal court may not have original jurisdiction over the matter making removal inappropriate.

Forum Non Conveniens

If we can get this to federal court, we should try to have it removed to a federal court in TX which will apply TX law and have a TX jury. We can move for a change of venue by showing that a venue in Indiana would be appropriate, thus getting the issue closer to home, but we would still be operating under Texas state law. A better approach would be to argue first that a forum non conveniens dismissal is warranted. To support this argument we would have to show that an adequate alternative forum that is not unfavorable (there would be no complete bar to relief) exists and that this forum is appropriate when balancing private and public interest factors. The public interest factors include determining whether the dispute involves local people or events and whether the dispute is likely to be decided under local law. Private interest factors include the location giving rise the the case, availability of

compulsory process of attendance of unwilling ,ability to implead other parties, the ability to view the premises involved in the dispute, the ease and cost of access to proof, and enforceability of judgment if one is obtained.

In the present case, the private interest factors outweigh the public interest factors. No in Texas is particularly concerned with the outcome of the case, and while it does involve locals (Elvis and the company), the local law that would apply in the courthouse is not the law that was at the scene of the accident. Applying state A's laws that may controvert state B's laws in a case in which the injury occurred in state B is unjust and means that state A's laws reach beyond the state's borders, thus in violation of the Constitution. Other private interest factors with great weight are the fact that the evidence and witnesses are in Indiana, there are compulsory techniques for getting unwilling participates to attend, and the judgment would be enforceable as the court would be have personal jurisdiction, subject matter jurisdiction, and be a proper venue.

We can also argue that the state court should dismiss the action if the state law has a provision for indispensable parties. If we can prove that Preston is not subject to personal jurisdiction in the state court and that he is an indispensable party (akin to that described in FRCP Rule 19a) we may be able to get the motion for declaratory judgment thrown out.

Issue Preclusion

Can we defeat issue preclusion if we act in a timely manner? Issue preclusion can be used to preclude an issue that has already been conclusively resolved between the parties in a prior action.

I would suggest they hurry up and file their action. If their has been no ruling by the time we file, we may be able to argue that issue preclusion will not be available to the defendant. Although the same issue would be litigated and determined in two separate actions, between the same parties, and could be outcome determinative, the fact that there was no binding decision prior to the initiation of the suit may bar the defendant from exercising issue preclusion. In fact, we could argue that his "pre-emptive strike" is a form of offensive issue preclusion that is typically frowned on by courts.

In conclusion, there are several options open to Preston and Elvis. I believe poking a hole in the authority of the court to hear the case revolves around Preston's lack of personal jurisdiction. The motion is an offensive one which may very well deny Constitutional rights to my clients.

-->Question -2-

Essay II

Preston and Elvis have several options to try in their effort to avoid litigating this case in state court in Texas.

Remove to Federal Court

One option that many defendants turn to first is a removal to federal court, under 1441 and 1446. (Those defendants then often move for a transfer to a more convenient federal court under 1404, which is probably the easiest way to resolve an issue like Preston and Elvis'.) However, as discussed in the prior essay, 1441 requires that the federal court also have original jurisdiction over the case, in order for a defendant to be able to remove it. Preston and Elvis definitely should not try to remove, as they fail the 1441 requirement in that respect.

Federal original jurisdiction is conferred under 1331 (federal question) and 1332 (diversity). 1331 federal question jurisdiction is almost certainly not present as Disaster is seeking a declaratory judgment that it was not negligent -- a state-law determination -- and does not appear to have alleged any type of federal question or issue that would be necessary to the

determination of that state-law claim. As discussed in the prior essay, the federal issue must appear in the plaintiff's well pleaded complaint and must be substantial, necessary to the disposition of the case, and actually in dispute.

Preston and Elvis also can't remove under 1332 diversity original jurisdiction, for a myriad of reasons. First, the parties are not completely diverse -- Elvis is a Texas resident/citizen, and Disaster is a Texas citizen by way of 1332c (corporations are citizens of the state where they are incorporated and have their principal place of business). Further, even if complete diversity WERE present, 1441c says that defendants cannot remove if one of the defendants is a citizen of the state in which the action is brought. Elvis, as a Texas citizen, defeats this option.

Ignore the case; allow default judgment for Disaster

Preston and Elvis could simply fail to show up in the Texas court, which would result in a default judgment being entered for Disaster.

Defendants sometimes do this when a plaintiff sues in a distant forum to recover damages; the defendant ignores the first suit, then collaterally attacks the judgment (usually on personal jurisdiction) when the plaintiff comes to defendant's home state to enforce. Usually, states have to honor each other's court judgments because of the Full Faith and Credit clause, if

the judgment is valid. However, this is a risky option as defendants forever lose the ability (via claim preclusion) to litigate the merits by allowing a default judgment to occur. They can only dispute validity in a collateral attack.

This isn't a great option for Preston/Elvis. It raises a serious problem of preclusion. The issue itself (Disaster's negligence) might not be precluded, as issue preclusion requires that it be the same issue, actually litigated and determined in the prior case, and necessary to the prior judgment. If Preston and Elvis default, then the issue of Disaster's negligence has not been "litigated," and therefore issue preclusion doesn't apply.

However, Preston/Elvis would face a serious claim preclusion problem, based on (the Texas equivalent of) Rule 13a compulsory counterclaims. Under Rule 13a, a pleading must include any counterclaims which at the time of serving the pleader has against the opposing party, if it arises out of the transaction/occurrence that is the subject matter of the opposing party's claim. Preston and Elvis' claims for damages from this incident certainly do arise from the same transaction as Disaster's action, so they would probably be obligated to assert it NOW -- and forever lose the opportunity if they didn't.

Therefore, I wouldn't recommend this option.

File Special Appearance to Dispute Personal Jurisdiction

Assuming Texas' laws are similar to the FRCP, Preston could file a special appearance (or make a 12b2 equivalent preanswer motion) to dispute the Texas court's personal jurisdiction over him. (Elvis would not have a good argument for lack of PJ, as he is a Texas resident and this is his home state. Elvis could easily be served with process in-state, and is likely subject to general jurisdiction in TX as he is a TX citizen.)

Personal jurisdiction over a person requires notice, statutory amenability to suit, and Constitutionality. In respect to Preston, the Texas court probably fails on both statutory amenability and Constitutionality, if not notice as well. Personal jurisdiction over an out-of-state individual can be conferred by "tag service" (per Burnham) while he is in the state. (Preston can avoid that simply by not entering Texas!) Therefore, unless Texas has some sort of special long-arm statute for declaratory judgment actions, allowing out-of-state service for out-of-state citizens (unlikely, as Preston/Elvis have not committed any torts/wrongs here) it is highly unlikely that the Texas state court can properly serve Ohio citizen Preston to compel him to appear. As for Constitutionality, PJ "minimum contacts" analysis (per *Int'l Shoe and Worldwide Volkswagen*) considers whether the noncitizen has enough contacts with the state to justify general or specific jurisdiction over him. General jurisdiction usually requires "systematic and continuous" contacts with the forum state, which is almost certainly not satisfied here. Specific

jurisdiction requires at least one contact with the state, purposefully directed at the state, from which the current cause of action arises. While Preston may have a "connection" with Texas via his friendship with Elvis, he certainly has not purposefully directed any claim-related contact at Texas -- the accident happened in Indiana as he drove Elvis to the airport. Nor has Preston done anything else that might be construed as effective consent to suit in Texas.

The court is likely to find in Preston's favor on this motion and dismiss him from the case, but that still leaves problems for Elvis, who IS subject to PJ in the Texas court. If Elvis defaults alone, then he'll run into the problem just discussed (claim preclusion via compulsory counterclaim), although Preston probably won't. If Elvis litigates the issue of negligence and loses, that will put a powerful tool in Disaster's arsenal for when Preston later brings suit elsewhere, although it may not preclude it entirely as Preston won't have been a party. However, if Elvis litigates the question of negligence and wins, then Preston might be able to use offensive issue preclusion against Disaster (on the issue of Disaster's negligence) in a later suit.

Hence....

After PJ dismissal of Preston, have Elvis argue he's a necessary/indispensable party

If Preston gets himself dismissed for lack of PJ, Elvis could try to argue that Preston is a (TX equivalent) Rule 19 necessary/indispensable party to the case -- that the case can't be fairly adjudicated without Preston, so the court should dismiss it. Rule 19a defines such a party: [without him], complete relief cannot be accorded among those already parties, OR the person claims an interest relating to the subject of the action and is so situated that the disposition of the action [without him] may impair or impede the person's ability to protect that interest. Rule 19b says that if a person described in 19a "cannot be made a party," the court should determine whether it is fair to litigate the case without them, and if not, should dismiss the case.

Elvis could certainly argue that Preston is such a party; Preston does have an interest relating to the subject of the action (recovery of damages for his injuries), and if it's decided without him, it may impair/impede his ability to protect it. If Elvis can convince the court of this, he may be able to get Disaster's whole suit dismissed on that ground.

Move for Dismissal due to Improper Venue

If the Texas venue rules are anything like FRCP 1391a and 1391b, then venue may properly lie in these places: 1) in a district where any defendant

resides, IF both reside in same state, 2) in a district where a substantial part of the events or omissions giving rise to the claim occurred, or 3) a district where any defendant is subject to PJ [a3] or "may be found" [b3], if there is no district in which the action may otherwise be brought.

Following those rules, the only place where venue would properly lie in this case is in Indiana, the place where a "substantial part" of the events occurred. Elvis and Preston (defendants here) reside in different states, so neither of their home states are proper for venue. (And the third provision would not apply, as there already is a place where venue properly lies -- Indiana.) Disaster won't have much luck arguing that a "substantial part" of anything occurred in Texas, as Preston hasn't even been there. Also, the plaintiff's residence is not considered for venue purposes.

Also, if venue truly is improper in Texas, the Texas state court would be FORCED to dismiss, as state courts can only transfer cases within the state. State courts' sovereignty ends at the state line; no state court can force another state court to take the case.

This option could work out wonderfully for Preston and Elvis as their troubles in Texas would be over, and no preclusion issues would be raised (as no claim or issue was actually yet litigated). They simply need to evaluate carefully between raising this defense, a lack of PJ defense, or both -- they can't raise ONE and leave the other out (if the TX rules are like the FRCP), as both

improper venue and lack of PJ must be consolidated in a motion per 12g, and are least-favored defenses under 12h1.

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