

VIRGINIA BOARD OF BAR EXAMINERS  
Norfolk, Virginia – February 24, 2015

***GREEN BOOKLET - Write your answer to Question 6 in the GREEN Answer Booklet 6***

6. On a clear afternoon, Julie was attempting to cross a four-lane highway near Smithfield in Isle of Wight County, Virginia, when she was struck and severely injured by a silver Corvette driven by Ted at slightly above the posted speed limit. Ted's wife, Geneva, was a passenger in the car. They had just left a local tavern where they had consumed several alcoholic drinks during a discussion in which Geneva had told Ted that she would be filing for divorce the next day.

Julie filed and properly served a negligence action against Ted in the appropriate Virginia Circuit Court. Ted filed an answer denying the allegations of the complaint and asserting the affirmative defense that Julie was contributorily negligent.

The following facts were revealed during pretrial depositions at which the lawyers for both Julie and Ted were present:

- Julie admitted that, at the time she was struck, she was not crossing at an intersection, in a marked pedestrian crosswalk, or at a traffic light.
- Julie suffered a head injury and has no memory of whether she saw any vehicles coming toward her as she began to cross the road.
- Ted denied that he had been speeding and that he had been drinking before the incident. He said he saw Julie suddenly dart out in front of his car and that he could not avoid hitting her.
- Two eyewitnesses, Georgia residents who happened to be driving along the highway, testified that Julie ran out onto the highway without first looking either way.

After the depositions were taken, Ted's lawyer served the following written request for admission on Julie: "Admit that, just before you were struck by Ted's car, you ran out onto the highway without looking either way." It wasn't until 60 days later that Julie's lawyer served a written response denying this request.

A jury trial ensued. At trial, Julie's lawyer asked Geneva if she knew how fast Ted was traveling and how much he had been drinking prior to hitting Julie. Ted's counsel objected, asserting the marital privilege as to testimony of a spouse. By this time, Ted and Geneva were finally divorced.

Over Julie's timely hearsay objection, the trial court allowed Ted to introduce into evidence those parts of the discovery depositions containing the testimony of the two Georgia residents stating that Julie ran out onto the highway without first looking either way. Ted had given Julie timely notice of his intention to use the deposition testimony at trial.

Ted also introduced in evidence the request for admission he had served on Julie. In opposition, and over Ted's objection, Julie sought to introduce her response denying the request.

At the conclusion of the evidence, Ted, asserting that the request for admission was a conclusive admission by Julie that she had run onto the highway without looking, moved the Court for a partial summary judgment on that issue. Julie opposed the motion on the ground that the request for admission was based upon the impermissible use of discovery depositions.

- (a) How should the Court have ruled on Ted’s assertion of the marital privilege as to the questions Julie’s lawyer asked Geneva? Explain fully.**
- (b) How should the Court have ruled on Julie’s objection to admitting into evidence the deposition testimony of the two eyewitnesses? Explain fully.**
- (c) How should the Court have ruled on Ted’s objection to Julie’s introduction of the response to the request for admission? Explain fully.**
- (d) Does the ground asserted by Julie in opposition to Ted’s motion for partial summary judgment preclude the Court from granting the motion? Explain fully.**

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***PURPLE BOOKLET - Write your answer to Question 7 in the PURPLE Answer Booklet 7***

7. In 2008, Willie Cabell (“Willie”) inherited New Kent Farm, located in New Kent County, Virginia, from his mother. Since then, he has lived at New Kent Farm with his wife, Mary Scott, and their children. Soon after his inheritance, Willie leased from Bob Lee (“Lee”) the surrounding acreage known as Riverland, on which Willie has continuously grown tobacco, peanuts, and corn. Lee has never recorded as a public record any document relating to the lease.

In 2009, when Willie’s farming business was thriving, he conveyed New Kent Farm to “Willie Cabell and his wife, Mary Scott Cabell, in consideration of love and affection, as tenants by the entirety.”

Commencing in 2012, and continuing intermittently, a drought devastated Willie’s crops, and over time he fell in arrears of his rent payments to Lee. He now owes Lee back rent of \$15,000.

In late 2013, Willie borrowed \$15,000 from Farm Bank (“Bank”). Willie granted Bank a security interest in “all crops growing on Riverland” as collateral for the loan. Bank properly filed all documents necessary to perfect its security interest in the crops as granted by Willie.

Willie used the money as a down payment on a new pickup truck. He financed the balance with Credit Union which retained legal title to the truck to secure the payment of the balance.

Although he continues to farm Riverland, Willie’s debts at the beginning of 2015 exceed his assets. He owes Lee \$15,000 in back rent, he has defaulted on the loan from Bank, and he has missed several months’ payments to Credit Union on the pickup truck.

Credit Union lawfully repossessed the pickup truck. Willie went to Credit Union’s office, tendered in cash the entire amount of the delinquent payments plus repossession expenses incurred by

Credit Union, promised he would thereafter keep the payments current, and requested that Credit Union return the truck to him. Credit Union refused and handed Willie a letter informing him that it plans to sell the truck at an auction in five days and sue Willie for any deficiency.

Lee, knowing that Willie is unable to pay the arrears in rent, asserted an interest in crops growing on Riverland and sought to have them sold to satisfy the debt. Bank learned of Lee's claim and intervened to foreclose its interest.

- a) **What is the nature of the respective interests asserted by Lee and Bank, and, as between them, whose interest is superior? Explain fully.**
- b) **Did Credit Union violate Willie's rights by refusing to accept his cash tender and giving him notice of its intention to sell the truck at auction in five days? Explain fully.**
- c) **May the creditors force the sale of New Kent Farm to satisfy any judgment they might ultimately obtain against Willie? Explain fully.**

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***GOLD BOOKLET - Write your answer to Question 8 in the GOLD Answer Booklet 8***

8. On April 6, 2014, Susan filed a complaint in the United States District Court for the Western District of Virginia, Roanoke Division, against her former employer AAB Corporation ("AAB"). Her complaint names AAB and its President, John, as defendants. Susan alleges in general terms that until April 30, 2013, she was employed by AAB as its sole sales representative in Virginia and that, on that date, she was terminated by the "fraudulent, discriminatory, and physically threatening actions of John." She prays for \$100,000 in "damages."

Paragraphs 1 through 5 of the complaint allege the following:

1. This action is brought to redress rights secured to plaintiff by the United States Constitution and applicable federal laws and statutes.
2. This Court has jurisdiction based on diversity of citizenship, in that plaintiff and defendants were at the time of the acts complained of in this complaint domiciled in different states and the amount in controversy exceeds the minimum required.
3. Plaintiff was at all times a resident of the Western District of Virginia.
4. Defendant AAB, by filing statutorily required documents with the Tennessee Secretary of State in 2012, became and remains a domesticated corporation in Tennessee, and has its principal place of business in Nashville, Tennessee.
5. On April 30, 2013, John was a Tennessee resident.

Service was properly effected on the defendants, and on May 1, 2014, they timely filed a joint motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1), asserting that the Court lacks

subject matter jurisdiction on either of the bases alleged in paragraphs 1 and 2 of the complaint. John attached to the joint motion to dismiss an unsworn declaration which states truthfully that 1) he is and has been a citizen of the Commonwealth of Virginia since January 2, 2014, when he moved his family to Richmond, Virginia, registered to vote in Virginia, and purchased a home there, which he occupies as his principal residence; 2) AAB, which he incorporated in Virginia in 2011, is and continues to be a Virginia corporation; and 3) although he owns a condominium in Nashville, Tennessee, he occupies it only during intermittent visits to AAB's headquarters. The declaration included the following language: "I declare under penalty of perjury that the foregoing is true and correct." The declaration was dated April 30, 2014, and signed by John.

In addition to filing a brief in opposition to the defendants' motion to dismiss, Susan filed a motion to strike the declaration of John and asks the District Court to disregard it.

- a) **How should the Court rule on Susan's motion to strike John's declaration? Explain fully.**
- b) **How should the Court rule on defendants' motion to dismiss on each of the following grounds:**
  - (i) **There is no federal question jurisdiction? Explain fully.**
  - (ii) **There is no diversity jurisdiction? Explain fully.**

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***ORANGE BOOKLET - Write your answer to Question 9 in the ORANGE Answer Booklet 9***

9. Sammy Cotton was 18 years old when, along with thousands of other U.S. Marines, he served multiple combat tours in the jungles of Vietnam in 1968 and 1969. The trauma of the experience left him disabled, and he was honorably discharged with a diagnosis of dementia incident to Post Traumatic Stress Disorder (then known as "shellshock"). For the rest of his life Sammy received a military disability pension.

Sammy returned to his hometown, Hampton, Virginia, where his five brothers also lived: Alton, Bobby, Charles, Dan, and Ed. Sammy moved in with Alton and Alton's three children and lived a reclusive life for several years. Alton's three children adored Sammy and the four of them grew very close. Because Sammy seemed incapable of handling his financial affairs, Alton was appointed his guardian. After Alton died suddenly, Sammy left Alton's home and moved in with his brother Bobby, where he lived for the next 30 years until his death.

Because of Sammy's continued apparent inability to handle his financial affairs, Bobby was appointed his guardian. While Bobby was at work, Sammy spent his time at home absentmindedly drawing pictures, hanging out with Alton's children, or in Bobby's woodshop making furniture for family members.

Sammy was frequently heard to say that, because Bobby was his closest living relative since Alton's death, he was going to leave all his property to Bobby. Although Sammy did not know how much money he had, he knew that Bobby regularly deposited his monthly military disability checks into a savings account and made only small periodic withdrawals to pay for food and clothing.

In 2010, after discussing the need for a will and to save some money, Bobby asked a neighbor, a retired attorney, to draft a will for Sammy. At Sammy's request, the neighbor drafted the will so that it left Sammy's entire estate equally to all the brothers who survive him. Sammy signed the will in Bobby's presence.

Later that day, Bobby deposited Sammy's will with their long-time family attorney. The attorney noticed that Sammy's will was not signed by any witnesses and, knowing that there were concerns about Sammy's competence, took Sammy into his office and asked his paralegal to join them. With the paralegal in the room, the family's attorney asked Sammy whether he knew what property he had, who his family members were, whether he intended to leave his estate to Bobby and his other brothers, and whether the signature on the will was his. Sammy responded, "I know Bobby puts my disability pension in a savings account. I don't know how much is in the account. I sure love Alton's three kids, but I think Bobby and maybe my other brothers should get my money when I die. Yeah, I signed that paper when Bobby handed it to me this morning." Satisfied with Sammy's answers, the attorney and his paralegal each signed their names below Sammy's while Sammy was sitting across the table from them.

Sammy died in September 2014. He was survived only by his brothers, Bobby, Charles, Dan, and Ed, and Alton's three children. In Sammy's estate was \$150,000 in the savings account in which Bobby had deposited the military pension checks over the years. Charles qualified as Sammy's executor and submitted Sammy's will to the Circuit Court for probate.

Alton's three children are considering challenging the validity of the will on the grounds that it was improperly executed and that Sammy lacked testamentary capacity. They hire you as their attorney, relate to you the foregoing facts surrounding the making of the will, and ask for your advice on the following questions:

- (a) How would the Court be likely to rule on whether Sammy's will was properly executed?**
- (b) On the question whether Sammy had testamentary capacity, what must be proved to establish that he did have such capacity, whose burden is it to prove it, and how would the Court be likely to rule on the issue?**
- (c) To whom and in what proportions would the \$150,000 in the savings account be distributed if (i) they were to lose the will contest or (ii) if they were to prevail?**

**Please advise Alton's children on each of their questions and explain your answers fully.**

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***Proceed to the short answer questions in Booklet SA - the BLUE Booklet.***