

VIRGINIA BOARD OF BAR EXAMINERS

Norfolk, Virginia – February 26, 2013

You MUST write your answers to Questions 6 and 7 in BLUE Answer Booklet D

6. Riles Plumlee (“RP”) filed a complaint in the Circuit Court of Loudoun County against Loudoun County, alleging that he suffered physical injuries as a result of the County’s gross negligence in maintaining a public park and seeking \$1,000,000 in compensatory damages for his injuries. RP admittedly made no attempt to contact the County prior to filing the complaint.

Loudoun County filed a demurrer to the gross negligence allegations and a special plea of sovereign immunity. The Circuit Court heard argument on the County’s defensive pleadings and sustained the demurrer as to gross negligence on the ground that the facts as alleged in the complaint did not as a matter of law constitute gross negligence. The Circuit Court declined to rule on the County’s special plea of sovereign immunity.

Plaintiff appealed, arguing that the Circuit Court erred in sustaining the County’s demurrer as to gross negligence. The County did not cross appeal and did not assign any cross error. Nor had the County previously noted any objection on the final order of the Circuit Court, which sustained the demurrer.

In its appellate brief, the County argued for the first time that, because it has sovereign immunity from tort claims, the Circuit Court lacked jurisdiction to hear RP’s lawsuit.

RP countered that his complaint is allowed by the Virginia Tort Claims Act as well as by Virginia Code section 15.2-1809, which states:

No city or town which operates any park, recreational facility or playground shall be liable in any civil action or proceeding for damages resulting from any injury to the person or from a loss of or damage to the property of any person caused by any act or omission constituting ordinary negligence on the part of any officer or agent of such city or town in the maintenance or operation of any such park, recreational facility or playground. Every such city or town shall, however, be liable in damages for the gross negligence of any of its officers or agents in the maintenance or operation of any such park, recreational facility or playground.

The immunity created by this section is hereby conferred upon counties in addition to, and not limiting on, other immunity existing at common law or by statute.

The appellate court judge, for whom you work as a law clerk, asks you to analyze and answer the following questions:

- (a) Is the County’s argument on sovereign immunity one that the appellate court can now consider? Explain fully.**

(Continued on next page)

- (b) **What is the Virginia Tort Claims Act, and what effect does the Act have on RP's claim against Loudoun County? Explain fully.**
- (c) **Is RP correct that section 15.2-1809 allows his claim against Loudoun County to proceed? Explain fully.**

Reminder: You MUST answer Question #6 above in the Blue Booklet D

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7. Dan Davis, a resident of Virginia Beach, Virginia, is a real estate developer who is experiencing severe financial difficulties. He has interests in the following assets:

- Dan Davis, LLC: Dan is the sole member of this Virginia limited liability company (LLC). The only asset of this LLC is a beach house in Virginia Beach which is primarily rented to vacationers, but Dan occasionally uses it for his own pleasure. The beach house is valued at \$950,000 and is encumbered by a deed of trust of \$850,000. It generates rental income of approximately \$30,000 a year net of all expenses.
- Family farm in Northampton County: This farm consists of several hundred acres of waterfront property on the eastern shore of Virginia, which Dan and his two brothers had inherited at his father's death. His father, a widower, died intestate last year, and at the time of his death this farm was valued at \$150,000 and is subject to no deeds of trust or other liens.
- Dan's Delight, Inc.: Dan's Delight, Inc. is a Virginia corporation, which owns a hall that is rented out for social events. This property is valued at \$300,000 and is subject to a deed of trust for \$150,000. Dan is the sole officer, director, and shareholder of this corporation. Although he regularly held corporate meetings, maintained minutes and kept separate financial books, Dan has not filed the necessary annual reports with the State Corporation Commission or had a registered agent for the past two years. Recently, the State Corporation Commission notified Dan that the corporation had been terminated.
- Home in Virginia Beach: Record title to this home shows that it is jointly owned by Dan and his ex-wife, Winona, as tenants by the entirety. Dan and Winona have been divorced for three years, but Winona continues to live in the house which is valued at \$400,000. The mortgage was paid-off at the time of the divorce.
- A late model Porsche: Dan refers to this car, previously owned by Tom Cruise, as "the love of my life," and it bears the license plate "CRUISER." Last week, Dan transferred title to the Porsche to his daughter, but he continues to drive it and keep it in his garage. CRUISER is valued at \$45,000 and title to it is free and clear of liens.

A month ago, Virginia Bank obtained a judgment against Dan, individually, in the Virginia Beach Circuit Court in the amount of \$1,000,000 as a result of his default on an unsecured line of credit from the Bank.

(Continued on next page)

What remedies, if any, might Virginia Bank employ to reach each of the foregoing assets, and what amount would be available from each to be applied to the Bank's judgment? Explain fully.

Reminder: You MUST answer Question #7 above in the Blue Booklet D

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→→ Now MOVE to PURPLE Answer Booklet E ←←

You MUST write your answer to Questions 8 and 9 in PURPLE Answer Booklet E

8. Roger Dodger was arrested in New York City by federal Drug Enforcement Agency (DEA) officers and charged with transporting and selling illegal drugs. The DEA seized and declared forfeited property worth \$500,000 belonging to Roger. All proceedings against Roger were brought in the U. S. District Court for the Southern District of New York.

Roger retained Jane Solicitor, an attorney residing in and practicing criminal defense law in New York City (which is within the Southern District of New York), to defend him on the criminal drug charges and in the related civil forfeiture proceeding to recover the seized property. Roger entered into a written contingency fee arrangement by which he agreed to pay Solicitor 40% of the value of any property recovered from forfeiture.

Solicitor, recognizing that her experience in forfeiture proceedings was limited, searched online Internet sources and found Bob Buzzer, a lawyer residing and practicing in Richmond, Virginia, who appeared to be highly qualified in defending civil forfeiture proceedings in the U. S. District Courts. With Roger's consent, Solicitor associated Buzzer as co-counsel and entered into a written agreement reciting that Solicitor would keep the first one-fourth of any fee earned in the civil forfeiture proceeding and Solicitor and Buzzer would share the remaining three-fourths in proportion to the amount of time each spent working on the forfeiture matter.

Although they never met face-to-face, Solicitor and Buzzer exchanged from their respective offices in New York and Virginia several telephone calls, letters, and e-mails related to Roger's defense. Before the trial, through negotiations conducted between Solicitor and the U.S. Attorney representing the DEA, they reached a plea bargain in which Roger pleaded guilty to a lesser offense, and the U.S. Attorney agreed to release \$500,000 worth of property from forfeiture. Roger then paid Solicitor \$200,000 as the agreed 40% contingency fee.

Asserting that Buzzer had not performed any meaningful work on the case, Solicitor declined to pay Buzzer any part of the contingent fee. Buzzer, claiming that he had spent just as much time on the forfeiture matter as Solicitor, filed suit for breach of contract against Solicitor in the U. S. District Court for the Eastern District of Virginia, claiming \$87,500 as his share of the contingent fee. Solicitor, through Virginia counsel, filed the following three-part motion: (a) to dismiss for lack of subject matter jurisdiction; (b) to dismiss for lack of personal jurisdiction over Solicitor; and (c) for transfer of venue to the U.S. District Court for the Southern District of New York. Solicitor's supporting affidavit asserted that Buzzer's efforts had not contributed to

the settlement with the DEA and that, in any event, the time spent by Buzzer on the forfeiture matter and therefore his share of the fee, if any, would be minimal.

In opposition to the motion, Buzzer filed an affidavit describing the communications exchanged in the course of his association with Solicitor.

How should the U.S. District Court for the Eastern District of Virginia rule on each of the three parts of Solicitor's motion? Explain fully.

Reminder: You MUST answer Question #8 above in PURPLE Answer Booklet E

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9. Mr. Wilson, a resident of Dinwiddie County, Virginia, died on December 26, 2011. Four children, John, Rob, Sally and Mary, survived him. Following Mr. Wilson's death, his safe deposit box at Dinwiddie Bank was opened and inventoried. It contained Mr. Wilson's Last Will and Testament, three sealed envelopes, and one savings account passbook evidencing an account with Dinwiddie Bank to which was attached a photocopy of the bank's signature card.

The envelopes were individually addressed to Rob, Sally and Mary respectively. Each envelope contained a United States Government Bond payable to Bearer. Rob's envelope contained a bond in the principal amount of \$150,000, the bond in Sally's envelope was for \$90,000, and the bond in Mary's envelope was for \$75,000. Additionally, each envelope contained a letter from Mr. Wilson to the appropriate child, each dated November 1, 2011, stating: "The enclosed Bond is a gift for Christmas."

Mr. Wilson's savings account had a balance of \$50,000. Mr. Wilson had established it in January 2011 in the names of "Mr. Wilson and John Wilson, joint tenants with right of survivorship." The copy of the signature card had both Mr. Wilson's and John's signatures in two places, once to establish their signatures for account purposes and once next to a statement reading: "JOINT ACCOUNT WITH SURVIVORSHIP."

Mr. Wilson's will dated December 1, 2011 contained a specific provision stating that John was to receive nothing from the estate and further stating that the \$50,000 joint savings account in the name of Mr. Wilson and John was not to pass to John, but be divided equally among Rob, Sally and Mary. There were a number of specific bequests variously to Rob, Sally, and Mary but no specific bequests of the bonds contained in the sealed envelopes. The residue of Mr. Wilson's estate was also to be divided in equal shares among those three children.

At a hearing on the probate of Mr. Wilson's will, Rob, Sally and Mary each testified that Mr. Wilson had informed them that he intended to make gifts to each of them of certain bonds that he had instructed Sally to put in his safe deposit box. Sally testified that she had always been an authorized user to enter Mr. Wilson's safe deposit box and that on November 1, 2011, at Mr. Wilson's request, she entered that box and delivered all of the subject bonds to Mr. Wilson. According to Sally, Mr. Wilson dictated to Sally the letters later found in the envelopes. She typed them, addressed the envelopes, and gave them to Mr. Wilson who placed the letters and bonds in the envelopes and sealed them. Mr. Wilson then said to Sally, "Since you have access

to my safe deposit box, put these envelopes back in there,” which she did. She testified he later said to her, “Don’t forget those envelopes I told you to put back in my safe deposit box. Come Christmas, I want you, Rob, and Mary to have them.” She further testified that, because Mr. Wilson became terminally ill just before Christmas, the family delayed their Christmas celebration to be with him during his final illness and that, as a consequence, she never got around to handing out the envelopes before he died on the day after Christmas.

John testified concerning the joint account. He stated that he executed the signature card at his father’s request and acknowledged that all of the money placed in the account had belonged to Mr. Wilson. None of the other children had any knowledge of the account, although Sally had seen the passbook in the safe deposit box. No other testimony was received.

- (a) **What are the arguments pro and con that the Government Bonds are either the property of Rob, Sally and Mary, or that they are assets of Mr. Wilson’s residuary estate, and what is the most likely outcome? Explain fully.**
- (b) **Should the savings account be divided equally among Rob, Sally and Mary as specified in Mr. Wilson’s will? Explain fully.**

Reminder: You MUST answer Question #9 above in PURPLE Answer Booklet E

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Proceed to the short answer questions in Booklet F - (the GRAY Booklet).