

VIRGINIA BOARD OF BAR EXAMINERS

Norfolk, Virginia - February 26, 2008

You MUST write your answer to Questions 1 and 2 in WHITE Answer Booklet A

1. On January 15, 2008, following an earlier bench trial, Judge A.J. Wisdom, the newest judge of the Circuit Court of Fairfax County, Virginia issued a letter opinion explaining his rationale for ruling in favor of Plaintiff and directing that Plaintiff's counsel prepare an order to reflect the trial court's holding as set forth in his letter. On January 16, 2008, Defendant's counsel filed a motion for reconsideration of the letter opinion. The hearing on Defendant's motion was set for February 1, 2008.

At the outset of the hearing on February 1, and before the commencement of the argument on Defendant's motion, Plaintiff's counsel submitted a typed order reflecting the Court's January 15, 2008 letter opinion. The pertinent text of the order read:

And it appearing to the Court for the reasons stated in the Court's letter opinion, dated January 15, 2008, a copy of which is attached hereto and incorporated herein, that judgment should be entered in favor of Plaintiff in the amount of \$275,000;

Now, therefore, it is SO ORDERED.

And, nothing further remaining to be done in this action, it also is ORDERED that this action be placed among the closed files of this Court.

Counsel for both parties endorsed the above Order, with Defendant's counsel noting his objection. Judge Wisdom initialed each page and signed the Order, and the Clerk's office of the Circuit Court entered the Order on the Court's docket on that same day, February 1.

The oral arguments on Defendant's motion for reconsideration then proceeded, and at the conclusion thereof, on that same morning, Judge Wisdom stated orally from the bench, and without taking any further action at that time, that he was granting Defendant's motion for reconsideration and would issue a letter opinion in the near future.

On February 25, 2008, Judge Wisdom issued a second letter opinion, articulating his reasons for changing his mind and deciding the entire case in favor of Defendant and against Plaintiff -- a result that was directly opposite to that set forth in the first letter opinion. Judge Wisdom asked that Defendant's counsel prepare, circulate, and submit an order reflecting the February 25, 2008 letter opinion.

In a telephone discussion between counsel on February 26, Plaintiff's attorney told Defendant's attorney that Plaintiff would take action to preserve the earlier result in her favor. Defendant's attorney opined that Judge Wisdom's February 25 letter opinion was entirely proper and cited Code of Virginia § 8.01-428 in support of his position. That Code section states:

Clerical mistakes in all judgments or other parts of the record and errors therein arising from oversight or an inadvertent omission may be corrected by the court at any time on its own initiative or upon the motion of any party and, after such notice, as the court may order.

- (a) **What authority can Plaintiff bring to bear to preserve the earlier result in her favor, and what is the likely outcome? Explain fully.**
- (b) **Is Defendant's reliance on Code of Virginia § 8.01-428, recited above, likely to prevail against Plaintiff's effort to preserve the earlier result in her favor? Explain fully.**
- (c) **If Defendant is concerned that the Court might restore its February 1 Order in Plaintiff's favor, what steps should Defendant take to preserve his right to challenge it, and what are the immediate requirements for taking such steps? Explain fully.**

Reminder: You MUST answer Question #1 above in the WHITE Booklet A

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2. Mary and George, residents of Suffolk, Virginia, had been married for 20 years. They had no children by their marriage. George had a son, Wilbur, by a previous marriage, and, although Wilbur and George had a close relationship, Mary and Wilbur never got along. In 2000, George and Mary executed valid wills, each leaving their substantial estates to the other. To please George, Mary provided in her will that, if George predeceased her, upon her death her entire estate would go to Wilbur.

George died in 2005. From then until Mary's death in January 2008, Mary and Wilbur had no communication, and Mary lived alone with her cats. In December 2007, upon finding a copy of her 2000 will, which she had long forgotten, Mary mailed the following letter to the attorney who had prepared the 2000 will and retained the original in his office. The letter was entirely in her own handwriting and signed by Mary.

Dear Counselor:

I want to meet with you as soon as possible. I am now canceling the will you wrote for me in 2000, and I am writing a new one. I do not want George's son, whose name I have forgotten, to have any of my property when I die. I have a very large estate, and I know George wanted to see that his son was taken care of, but I have never gotten along with him, and he has paid no attention to me at all. Since I have no living relatives, I want to leave my entire estate to the Stray Cats Society (SCS). As you may

recall, I am a cat-lover, and I served on the SCS Board of Directors until recently and, before that, on the Board of Directors of The Kat Doktor (TKD). Both are wonderful nonprofit organizations that take care of homeless cats, but I believe SCS has a better program.

I am somewhat feeble, so I find it hard to get out of the house. Please call me so we can set up time when you can come to my home and write up a formal document.

/s/ Mary

December 30, 2007

Mary died on January 5, 2008, before her attorney was able to meet with her. Her 2000 will and the December 30, 2007 letter were presented for probate. In the meantime, SCS had suffered financial setbacks and had gone out of business. Another nonprofit organization named Critter Care (CC), which cares for a variety of derelict animals, not just cats, took over the care of about half of the cats SCS had been caring for, and TKD took over the care of the remaining cats.

In the probate proceedings, Wilbur asserts the following claims: (1) that the December 30 letter is ineffective to dispose of Mary's estate; (2) that the December 30 letter does not revoke Mary's 2000 will; and (3) that he has the right to Mary's entire estate either under the terms of her 2000 will or by intestacy.

TDK and CC each petition the court to be substituted in place of the defunct SCS and claim the right to receive all or part of Mary's estate under the terms of the December 30, 2007 letter.

What arguments should Wilbur, TKD and CC make in support of the claims they each assert, and how should the court resolve each claim? Explain fully.

Reminder: You MUST answer Question #2 above in the WHITE Booklet A

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→→ Now MOVE to the YELLOW Answer Booklet B ←←

You MUST write your answer to Questions 3 and 4 in YELLOW Answer Booklet B

3. Gordon, a 13-year-old resident of Phoebus, Virginia, and his parents went on a family hiking trip along Skyline Drive in Virginia. Before leaving, they had made reservations for an overnight stay at a motel called the Waynesboro Mountain Inn ("WMI"). They had never heard of WMI before.

Shortly after checking in to WMI, Gordon slipped on the sidewalk where water draining from an air conditioner had been allowed to accumulate and broke his leg. As a result, he was permanently disabled.

WMI, which is solely owned and operated by an individual named Quinn, is one of 500 Mountain Inns nationwide. Each Mountain Inn is a franchise owned by individual businesspersons and operated under a uniform franchise agreement between the individual and Mountain Inns Corporation ("MIC"). MIC has a website on which requirements for qualifying as a franchisee and the uniform franchise agreement can be conveniently viewed.

The key provisions of the uniform franchise agreement signed by Quinn provide (1) that the location, plans, and specifications of each motel be approved by MIC; (2) that Quinn pay an annual fee to support MIC's national advertising network, (3) that MIC must approve the sale or other disposition of a controlling interest in WMI before any transfer can occur, (4) that WMI's manager, housekeeper, and restaurant manager receive two weeks training by MIC at the commencement of their employment, (5) that Quinn conduct the business under the MIC "system," (6) that Quinn make quarterly reports to MIC concerning his financial operations, and (7) that Quinn submit to once-a-year inspections of WMI facilities and procedures by MIC representatives. Quinn scrupulously complied with those provisions of the uniform franchise agreement.

Gordon's parents retained Alvin, a local attorney, to represent them and Gordon in a personal injury suit to recover damages for Gordon's injuries. A brochure that Gordon's parents had obtained at the WMI described the WMI as, "Owned and operated by Quinn, WMI is one of a chain of 500 fine Mountain Inns across the country. For more information see www.mountaininns.com."

Alvin surmised that he would have a better chance of obtaining a large settlement or judgment by suing MIC rather than Quinn. Without doing any research or further investigation into the relationship between Quinn and MIC, Alvin signed and filed a complaint in Circuit Court naming MIC as the sole defendant. The complaint alleged that, "Gordon's injury was the result of the negligence of Quinn, the agent of MIC acting on behalf of and under the direction and control of MIC."

MIC filed an answer to the complaint, denying all liability. MIC also filed a motion for sanctions against Alvin for filing a frivolous lawsuit.

- (a) Should MIC be held liable for the negligence of Quinn? Explain fully.
- (b) On what basis, if any, might the court impose sanctions on Alvin? Explain fully.

Reminder: You MUST answer Question #3 above in YELLOW Booklet B

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4. Angus, a resident of Chilhowie, Virginia, made a loan of \$25,000 to his nephew, Bob. Angus prepared a draft of a promissory note, which, in addition to standard language of a promissory note, contained the following terms:

1. This note is payable so long as no earthquake measuring more than 3.0 on the Richter scale hits Chilhowie, Virginia during the term of this note.
2. The principal amount of this note is \$25,000 or its equivalent in Euros as of the due date.

3. This note is payable to the order of Angus or any other person.
4. This principal balance of this note, together with accrued interest is due on the earlier of Angus' 70th birthday (July 4, 2015) or on the date upon which the Chicago Cubs baseball team wins the World Series.

Angus wants the note to be fully negotiable, but is concerned that one or more of these specific terms might make the note non-negotiable.

Discuss separately each of the four enumerated terms, and explain fully as to each:

- (a) Whether, as stated, the term would make the note non-negotiable;
- (b) If not, why the term would not destroy negotiability; and
- (c) If so, why and what language would have to be deleted from the term in order to preserve negotiability.

Reminder: You MUST answer Question #4 above in YELLOW Booklet B

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→→ Now MOVE to Tan Answer Booklet C ←←

You MUST write your answer to Question 5 in Tan Answer Booklet C

5. In October 2007, Petula Jones took a six-month leave of absence from her job in Ashland, Kentucky, where she resided. She traveled to Gate City, Virginia and moved into a spare room in her mother's house so she could care for her elderly mother, who was recuperating from an extended illness. In December 2007, Petula was walking to her car in the parking lot of the City Mall in Gate City when she was struck by an automobile driven by Ruby Smith, a resident of Kingsport, Tennessee. Three friends of Ruby from Kingsport were in the car at the time of the accident. They were just wrapping up a shopping tour and preparing to return to Kingsport. City Mall is a Delaware corporation and has its principal place of business in Gate City, Virginia.

Ruby's passengers told the police officer at the scene that Petula was reading a magazine as she walked across the parking lot and darted out from behind a concrete column at the time of the accident. They also said that Petula was not watching where she was going. Petula told the police that her view was blocked when Ruby's car struck her because she had just walked out from behind a large concrete column supporting the upper level of the parking lot.

Petula sued Ruby and City Mall in the Big Stone Gap Division of the U.S. District Court for the Western District of Virginia, which is the district in which Gate City is located. Big Stone Gap is 35 miles from Gate City. Petula's complaint alleged negligent operation of a vehicle against Ruby and negligent maintenance of the parking lot against City Mall. She sought \$60,000 in damages for personal injuries against Ruby. Against City Mall, Petula sought an injunction ordering City Mall to

tear down the concrete support column, which she alleged was a safety hazard.

City Mall moved to dismiss Petula's complaint on the ground that the court lacked subject matter jurisdiction. At the hearing on City Mall's motion, the court received probative evidence that, if granted, the injunction would require City Mall to spend in excess of \$100,000 to comply with it. The court denied the motion.

Ruby then moved for a change of venue of the action to a U. S. District Court in Tennessee on the grounds that (1) venue in the Western District of Virginia is improper and (2) she is a citizen of Tennessee and it would be a hardship for her and her witnesses to travel to Virginia for trial. The court denied Ruby's motion for a change of venue.

Ruby then filed a notice of appeal to the lower court's denial of her venue motion to the U. S. Court of Appeals for the Fourth Circuit. The Court of Appeals dismissed Ruby's appeal.

- (a) Was the district court correct in denying the motion of City Mall to dismiss the complaint on the ground that the court lacked subject matter jurisdiction? Explain fully.
- (b) Was the district court correct in denying Ruby's motion for change of venue on each of the two grounds? Explain fully.
- (c) Was the Court of Appeals correct in dismissing Ruby's appeal? Explain fully.

Note: You may assume that the claim for injunction against City Mall is properly pleaded. Do not discuss the merits of whether the court could or should grant the injunction.

Reminder: You **MUST** answer Question #5 above in Tan Booklet C

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END OF SECTION ONE