

## VIRGINIA BOARD OF BAR EXAMINERS

Norfolk, Virginia - February 27, 1996

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*Answer Questions 5 and 6 in Answer Booklet D*

5. Tim was driving his new 1995 Ford truck in Fredericksburg, Virginia on January 8, 1995 during an unusually heavy snow storm. Suddenly out of nowhere Tim encountered a four wheel drive Jeep traveling at an excessive rate of speed and fishtailing in and out of Tim's lane. Although Tim was probably going a bit too fast under the circumstances, he tried to avoid hitting the Jeep and, in the process, lost control of his new truck and landed in a ditch. The Jeep did not stop. The road was deserted and Tim decided to walk to his home which was less than two miles away.

Later that day, Tim convinced his brother-in-law to help him retrieve his new truck. Tim's brother-in-law was a mechanic and owned an automotive repair shop in Caroline County. When they arrived they discovered that a snow plow, which was conducting emergency road clearing, had collided with Tim's new truck. The new truck suffered considerable damage. The snow plow was owned and operated by the city of Fredericksburg, so Tim called John, Fredericksburg's city attorney, to seek compensation from the City. John was also an old fishing buddy. John took detailed notes, which set forth the nature of the claim and the time and place of the incident. John hand-delivered the notes to the director of public works on February 10, 1995. He also hand-delivered a copy to the city manager. By this time Tim's brother-in-law had already repaired Tim's truck at his garage.

In April of 1995 Tim went fishing with John and during the outing he inquired about his claim. John was shocked that Tim had not heard anything from the director of public works regarding his claim and indicated he would look into the matter first thing Monday. John forgot to tell Tim that he had given the city manager and the director of public works a copy of the hand-written report. John neglected to inquire about Tim's claim, and Tim likewise neglected to follow-up with John or anyone else with the City.

On August 12, 1995 John drowned on a fishing trip. Shortly thereafter Tim called the director of public works about his claim. The director informed Tim that he did not feel the City was liable to him and refused to pay the claim. Tim has threatened to sue the City.

You have been hired as the interim city attorney. Please prepare a memorandum discussing fully the defenses, both procedural and substantive, available to the City, and whether or not the defenses would be likely to prevail in a suit for damages brought by Tim.

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6. Tom Smart, an experienced timber broker, approached Elder Citizen (EC), who owned 400 acres of oak and walnut timber in Russell County, Virginia. Smart offered

to purchase the right to cut and log the acreage for \$1,000 per acre. He said that, in his opinion, that is about what the timber was worth.

Later, and without disclosing to EC the relationship, Smart caused two of his former employees, Jim and Jesse, to visit EC at different times for the purpose of inspecting her timber and making offers for the same. By prearrangement with Smart, Jim told EC that, in his opinion, the timber was worth about \$800 per acre and offered her that much for it. When Jesse visited EC, he told her that the timber market was very weak and that, in his opinion, she would be lucky to get \$500 per acre. He offered her that much for it.

EC, a widow who had no experience in such matters, discussed the offers she had received with Larry, a young attorney she had met at a Sunday School picnic. Larry, who had just opened his practice and who knew nothing about timber values, but was eager to help EC, opined that, since she had received three offers, she should obviously accept the highest one. Based on Larry's advice, EC signed a contract, prepared by Larry, to sell the timber to Smart for \$1,000 per acre.

Larry subsequently told his father-in-law, who was in the logging business, about the good deal EC had received on her timber from Tom Smart. Trying hard not to laugh the father-in-law told Larry that he was familiar with the timber owned by EC and that it was worth at least \$8,000 to \$10,000 per acre.

Larry related this information to EC, who, after checking with other timber buyers as to value, determined that the timber was in fact worth at least \$10,000 per acre. She now wishes not to honor the contract with Smart.

- (a) What equitable remedy, if any, is available to EC, and what must she allege and prove in order to maintain a suit against Tom Smart for such a remedy? Discuss fully.
- (b) What, if any, defenses might Tom Smart reasonably assert in a suit brought by EC for equitable relief, and considering those defenses, what would be the likely outcome of the suit? Discuss fully.

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### ***Answer Questions 7 and 8 in Answer Booklet E***

7. Sam seeks your help in resolving several questions concerning the estate of his late father, Barney. Barney died intestate in Norfolk in 1994, and Sam qualified as administrator of the estate in the Clerk's Office of the Circuit Court of the City of Norfolk. Barney was survived by Sam, Wilma and Dina. Wilma is Sam's mother and Barney's widow. Dina is Sam's daughter by a prior marriage to Freeda, who died shortly after Dina's birth.

Barney always believed that land was the best investment, so he purchased real estate

whenever he accumulated any savings. Back in his bachelor days, Barney purchased Greenacre, a farm located in Wythe County, Virginia, and took title in his name alone.

After their marriage, Barney and Freeda purchased Blackacre, located in Nottoway County, Virginia, and took title as "joint tenants by the entirety with right of survivorship as at common law."

After Freeda's death when Barney remarried, to celebrate their first anniversary, Barney and Wilma purchased Whiteacre, a forty acre tract of land in Westmoreland County, Virginia. Two years later they purchased their home in Loudoun County, Virginia. Title to both Whiteacre and their home was held as tenants by the entirety.

Barney also owned a cottage on the beach in the Ocean View area of Norfolk, which he inherited from his father in 1956. Title to the cottage stood in Barney's name alone.

In 1990, four years before his death, Barney and Wilma executed a general warranty deed giving Sam fee simple ownership of Whiteacre. Barney gave Sam the deed of gift while they were at the lawyer's office, immediately after it was signed and notarized, but Sam did not record it until two days after Barney's funeral. Having forgotten about the deed to Sam, one month before his death Barney and Wilma executed a deed of trust on Whiteacre to secure a promissory note for \$100,000 to the First State Bank of Virginia. The deed of trust was recorded in the Clerk's Office of the Circuit Court of Westmoreland County on the day it was executed and before the Bank learned of Barney's deed of gift to Sam.

After his death, all of Barney's heirs agreed that Greenacre should be sold by Sam in his capacity as administrator to pay the debts of the estate. Sam found a buyer and obtained all required approvals for the sale. The buyer has said she would prefer that Sam deliver to her a deed "with general warranty and English covenants of title," but has said she would be satisfied if the deed contained the words "with special warranty."

Sam presents the following questions:

- (a) What interest do Sam, Wilma, and Dina each have in Blackacre, the home in Loudoun County, and the beach cottage? Discuss fully.
- (b) What interest, if any, does Sam have in Whiteacre, and, as between Sam and First State Bank, does the Bank have an enforceable interest that takes priority over Sam's interest? Discuss fully.
- (c) Given the choice of delivering a deed to Greenacre containing either the words "with general warranty and English covenants of title" or "with special warranty," which would you advise Sam to choose and why? Discuss fully.
- (d) After the disposition of Greenacre, what, if anything, must Sam do as

administrator to transfer ownership of the remaining real estate to the heirs?  
Discuss fully.

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8. Divorce depositions filed in the Circuit Court of Prince William County, Virginia, revealed the following:

Donna, age 19, and Bruno, age 20, were married in June, 1994. Donna was a high school graduate, but Bruno had dropped out of school while he was in the 11th grade and had taken a job with a construction company as a bulldozer operator.

Donna testified that Bruno lost his job in October, 1994, and shortly thereafter became an alcoholic. Donna also testified that Bruno refused to look for a new job, that he did no chores around the apartment, and that he refused to share the marital bed with her. "All he did was drink whiskey, watch TV, and chase women," according to Donna.

She testified that in early November, 1994, she came home from work and found Bruno and their next-door neighbor, Stella, sitting on the living room couch, "both of them buck naked from the waist up." Stella has moved away, and her whereabouts are unknown.

Donna also testified that a number of women telephoned the apartment, asking for Bruno, but that they never left messages with her. Donna also received at the apartment "a lot of suspicious hang-up phone calls," which she said must have been from Bruno's girlfriends.

Donna's mother, Patti Jo, testified that she knew Bruno was cheating on her daughter because, "Donna told me so."

Donna and Bruno continued to live together until November, 1995, when Donna moved out of the apartment because she "could not stand it anymore." Donna moved home to live with her mother. Donna has two part-time jobs, and her gross income is \$19,000 per year.

Bruno testified that Donna "always ran home to Momma" when there was the slightest disagreement, that she refused to cook for him and "keep house the way she should," and that she declined to admit him to their bedroom on nights when he had "a couple of drinks." Bruno is still unemployed, has developed a liver ailment, and lives with his parents.

Bruno's father, Clem, testified that Donna left his son "for no good reason I know of."

Donna filed for divorce in January, 1996, on the ground of adultery and asked for an

award of spousal support. Bruno filed an answer denying all allegations of wrongdoing on his part and opposing Donna's request for spousal support.

Considering the foregoing facts:

- (a) Would the Court be likely to grant Donna a final divorce on the ground of adultery? Discuss fully.
- (b) Are there any other grounds upon which, if pleaded by Donna, the Court might grant her a fault based divorce? Discuss fully.
- (c) Assuming that the Court would grant Donna a final divorce, what factors would the Court take into consideration in deciding whether to award her spousal support and how would the Court be likely to rule on Donna's claim and why? Discuss fully.

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***Answer Questions 9 and 10 in Answer Booklet F***

9. Paula Plaintiff was seriously injured when the car she was driving on Franklin Road in the City of Roanoke, Virginia, was struck in the side by a truck owned by U.S. Express and driven by its employee, Speedy Smith. At the time of the accident, Speedy was rushing to make his morning deliveries and failed to stop at a stop sign on Mountain Avenue before entering Franklin Road.

As a fledgling lawyer, you have been asked by your employer, a respected attorney specializing in plaintiffs' personal injury actions, to prepare the necessary pleadings to commence an action on behalf of Paula Plaintiff to recover damages of \$200,000 for her injuries.

You learn that Paula is a resident of the City of Roanoke, Speedy is a resident of Craig County, Virginia, and U.S. Express is a Delaware corporation with its principal place of business in Little Rock, Arkansas. Discuss fully the following questions.

- (a) (i) May you bring an action in the United States District Court for the Western District of Virginia, which sits in Roanoke?

Assuming that your answer to part (i) above is yes,

- (ii) who should you name as party or parties defendant?
- (iii) what pleading must be filed in order to commence the action?

- (iv) will the court have personal jurisdiction over the parties?
- (b) (i) Alternatively, in what state court(s), if any, may you bring the action?
- (ii) Who may be named party or parties defendant?
- (iii) What pleading must be filed in order to commence the action?
- (iv) Will the court have personal jurisdiction over the parties?
- (c) If the action is brought in state court, are there any circumstances under which it can thereafter be removed to the United States District Court? If so, what is the procedure for removal?

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10. Aztec Fabrics, Inc., is a Virginia corporation, located in Front Royal, Virginia. Since 1975, Aztec had been the exclusive supplier of athletic uniforms to the Northern Virginia Youth Sports Group, Inc., a Virginia non-stock and non-profit corporation, known as NoVaSports.

NoVaSports operates little league sports programs in each calendar season for the youth of the Northern Virginia area. It charges a participation fee for each child involved, and it pays referees and vendors from the participation fees. All of NoVaSports' programs are well subscribed, and, during the Spring of each of the last five years, NoVaSports has ordered baseball and soccer uniforms from Aztec and paid \$75,000 for the baseball uniforms and \$50,000 for the soccer uniforms.

All uniforms are of a distinctive color and, in addition to a uniform number and team name, the jerseys bear the words "NoVaSports" and the NoVaSports insignia, which has been registered as a servicemark both with the Virginia State Corporation Commission and with the U.S. Trademark Office.

NoVaSports' Spring 1996 order for baseball and soccer uniforms was "hammered out" following a round of golf in early November, 1995, between Aztec's good natured, but disorganized, sales manager, Chris Christiansen, and NoVaSports' vice president, Frank Dolt. Perhaps "hammered out" is too strong a term. All that happened was that, following the game, Dolt said, "Need the same Spring uniforms as last year at the same price and time, Chris. Can you do that?" To which Chris responded succinctly, "You bet, Frank." And Dolt's rejoinder was, "It's a deal."

The only writing that reflects the "deal" was an internal work order on an Aztec form that Christiansen filled out when he returned to the Aztec plant, specifying the number and types of uniforms and directing the production department to produce the uniforms.

Aztec has obtained and cut all the fabric for the uniforms and has manufactured nearly 10% of the Spring 1996 baseball and soccer jerseys for NoVaSports. Yesterday, Aztec's general manager, JoJo Convoy, heard at a sports merchandise show in New Orleans that NoVaSports has failed to pay the final installment due under its contract for footballs and basketballs with The Rawlings Corporation.

The president of Aztec, Pete Cane, meets with you at your law office in Front Royal, recites the foregoing facts, and asks your advice on the following:

- (a) Assuming that it becomes necessary for Aztec to sue NoVaSports for the price of the uniforms, can Aztec enforce the order placed by Frank Dolt? Discuss fully.
- (b) Other than attempting to terminate NovaSports' order or filing suit immediately, what should Aztec do to protect or enhance its rights under Virginia law in order to guard against the possibility that NovaSports may fail to pay? Discuss fully.

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