

VIRGINIA BOARD OF BAR EXAMINERS
Roanoke, Virginia – July 26, 2016

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

6. Lincoln Insurance Company (“Lincoln”) provided property insurance coverage for real and personal property owned by George Mason University (“GMU”). Lincoln is an Illinois corporation with its executive officers, including its president, chief operating officer and chief financial officer, in Chicago, Illinois. Lincoln’s worldwide advertising office is located in Tysons, Virginia. Lincoln is qualified to do business in Virginia as a foreign corporation, according to the Virginia State Corporation Commission.

GMU is a public (or “state”) university. The Code of Virginia provides that GMU is “subject at all times to the control of the General Assembly” and that the real and personal property of GMU is “the property of the Commonwealth of Virginia.”

In the last week of April 2015, following a storm, rainwater flooded certain buildings on GMU’s campus in the City of Fairfax, Virginia (“City”), causing \$2.5 million in property damage. GMU timely filed an insurance claim of \$2.5 million, which following investigation, was fully paid by Lincoln.

Lincoln, as subrogee of GMU, thereafter sued the City of Fairfax in the U.S. District Court for the Eastern District of Virginia. The complaint alleged that the City’s negligence in the planning, design, engineering, construction and maintenance of its storm sewer system caused the flooding of the GMU campus, and sought to recover the \$2.5 million on two theories: first, that the City by its negligence created a legal nuisance, and second, that the damage resulting therefrom was a compensable “taking” of GMU’s property by the City in violation of Article 1, Section 11 of the Virginia Constitution, which provides that, “[n]o private property shall be damaged or taken for public use without just compensation to the owner thereof.”

The City’s attorneys timely filed an answer, including affirmative defenses, and a motion to dismiss on the grounds that (1) the District Court lacks subject matter jurisdiction, arguing that GMU is an indispensable, real party in interest, the joinder of which would destroy diversity of citizenship, and (2) the complaint’s claims are barred by Section 15.2-970 of the Code of Virginia, which states in part:

A. Any locality may construct a dam, levee, seawall or other structure or device ... hereinafter referred to as “works,” the purpose of which is to prevent the tidal erosion, flooding or inundation of such locality, or part thereof...

B. No person, association, or political subdivision shall bring any action at law or suit in equity against any locality because of, or arising out of, the design, maintenance, performance, operation or existence of such works but nothing herein shall prevent any such action or suit based upon a written contract. This provision shall not be construed to authorize the taking of private property without just compensation therefor and provided further that the tidal erosion, flooding or inundation of any lands of any other person by the construction of a dam or levee to impound or control fresh water shall be a taking of such land within the meaning of the foregoing provision.

The parties have stipulated that the City is a “locality” and that that the City’s storm sewer system is a “work” as those terms are used in Section 15.2-970 above. Also, it is undisputed that the City was negligent in the construction and maintenance of its storm sewer system.

The District Court judge asks you, as her law clerk, to answer the following questions:

- (a) **How should the Court rule (i) on the merits of the City’s argument that GMU is an indispensable, real party in interest, and (ii) on the motion to dismiss for lack of subject matter jurisdiction? Explain fully.**
- (b) **On the facts, could Lincoln prove that the City created a legal nuisance, and may Lincoln recover on such a claim? Explain fully.**
- (c) **On the facts, could Lincoln prove that the damage caused by the flooding was a “taking” of GMU’s property, and may Lincoln recover on such a claim? Explain fully.**

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

7. Cassius Ali (“Ali”), CEO of Fight Club International, LLC (“Fight Club”), a franchisor of boxing fitness centers, located in Richmond, Virginia, usually kept the company checkbook on the desk in his private office. All of the checks were imprinted with Fight Club’s name and address and words “Chief Executive Officer” beneath the signature line. The checking account was maintained at RVA Bank.

Sonny Frazier (“Frazier”) was a salesman working for Fight Club. One weekend after working late, Frazier entered Ali’s office and saw the checkbook. He stole a blank check, made it out to himself for \$4,500, and, being familiar with Ali’s signature, carefully signed a reasonable facsimile of it on the signature line.

Frazier purchased and took delivery of a new Apple desktop computer and four Apple iPhones from Computer City, a local electronics dealer, and endorsed the stolen check with his own name. Computer City accepted the check in payment for the computer and iPhones. Frazier then left town, and his whereabouts are unknown. Computer City presented the check to RVA Bank, which paid the check in cash.

When Ali received the next monthly statement from RVA Bank, he noticed the \$4,500 cancelled check. He immediately notified RVA Bank that it was a forged check and demanded that the bank credit Fight Club’s account with \$4,500.

- (a) **Must RVA Bank credit Fight Club’s account? Explain fully.**
- (b) **What arguments should Computer City make in response to a suit by RVA Bank to recover the \$4,500 from Computer City? Explain fully.**

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

8. Scout, an investment banker from Norfolk, Virginia, needed a break from the corporate world and decided to go on a “thru-hike” of the Appalachian Trail, backpacking from Georgia to Maine. Before she left, Scout dropped off her guitar, weight-lifting equipment, and fish tank at her friend Jimmy’s house. Jimmy agreed to store the property in his basement at no charge.

Scout signed an enforceable contract with Point to Point, Inc., an automobile transportation company, to ship her car to her grandmother’s house in Richmond, Virginia, where Scout intended to pick up the car upon completion of her trip.

Scout delivered the remainder of her personal possessions to Friendly Storage, a local storage facility. Scout entered into an enforceable contract with Friendly Storage and paid in full the storage fees for the upcoming year to avoid the hassle of payment during her trip. With the peace of mind that her possessions were in good hands, Scout embarked on her adventure.

While Scout was traversing the Appalachian Trail, the moisture in Jimmy’s basement—as a result of the unpredictably high rainfall—caused irreparable damage to Scout’s guitar.

Instead of delivering Scout’s car to her grandmother’s house, Point to Point, Inc. delivered the car to the homeless shelter next door. The homeless shelter, believing the car to be a donation, sold it to Morgan (the head of household of a local needy family) for \$1,000, which, consistent with disposal of donated property, was much less than the \$4,000 retail value of the car.

To make matters worse, only a month after Scout paid him, the owner of Friendly Storage mistakenly confused Scout’s storage locker for that of a delinquent customer. At a blind bulk auction where potential buyers bid on the entire contents sight unseen, the high bidder paid almost 200% of the value of Scout’s possessions.

Having decided to go completely “off the grid” during her trek, Scout was unaware of these happenings until she returned many months later. Upon her return, Scout’s feeling of personal accomplishment quickly turned to distress when she realized what happened to her belongings in her absence.

- (a) Is Scout likely to prevail in a suit for negligence against Jimmy to recover for the damage to her guitar? Explain fully.**
- (b) Is there an action Scout can file against Morgan in General District Court to recover the car, and is Scout likely to prevail? Explain fully.**
- (c) On what theories may Scout state a claim against Friendly Storage to recover for the loss of her personal possessions; is she likely to prevail on each; and how much would she be entitled to recover if she prevails? Explain fully.**

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

9. Blake is the owner of Spartan Metal Buildings, Inc., (“SMB”), a metal fabricator located in an industrial park in Salem, Virginia. Periodically, SMB needs to clear its storage yard of accumulated scrap metal.

One day at lunch with his friend Drew, who had just been laid off from his job, Blake was complaining about having to do the cleanup. Drew said he needed the work and asked Blake if he could help with the cleanup, take away the scrap metal on his flatbed truck, and, by way of compensation, sell the scrap metal and keep the proceeds. Blake agreed, and they met later that afternoon in the SMB yard.

For two hours, Blake directed his employees and Drew as they moved all of the scrap metal into a large pile. Blake operated a crane to load some of the larger pieces on the back of Drew’s flatbed truck. While moving one of the larger pieces, Drew tried to guide it onto the truck. At that time, the crane was dangerously close to a power line which crossed the yard. The metal piece Drew was guiding onto the truck came into contact with the power line and Drew was severely burned. Drew survived the incident but amassed over \$400,000 in medical expenses to be treated for his injuries. He filed a claim with SMB’s insurance carrier for workers’ compensation benefits, but the claim was denied.

Drew filed a Complaint in the Circuit Court for the City of Salem alleging negligence against Blake and SMB (“Defendants”) for personal injuries that he sustained. The Defendants answered with a general denial. When Blake was deposed in the discovery process, he testified: (1) that he was aware of the low height of the electrical line across the yard; (2) he should have warned Drew to stay clear from the crane and the scrap metal being moved; and (3) he was distracted just prior to the incident when his cell phone vibrated in his rear pocket, and he was reaching to check it when the incident occurred.

Drew filed a Motion for Summary Judgment asserting that Blake and SMB (under a theory of *respondeat superior*) were negligent as a matter of law based upon Blake’s own party admissions made in his deposition. The Defendants opposed the Motion for Summary Judgment arguing that (1) Drew, as a plaintiff, is not entitled to move for summary judgment, and (2) in the alternative, summary judgment cannot be granted because the motion relies upon Blake’s deposition testimony. The Circuit Court for the City of Salem agreed with both of the Defendants’ arguments and denied the Motion for Summary Judgment.

A month before trial, the Defendants filed a Plea in Bar alleging that the Circuit Court had no subject matter jurisdiction over Drew’s claim because at the time of the accident Drew was a “statutory employee” of SMB whose exclusive remedy for his injuries was under the Virginia Workers’ Compensation Act. Drew filed a Response in Opposition to the Plea in Bar asserting only that the Defendants waived any objection to jurisdiction because they had not raised this defense in their Answer to the Complaint.

By Final Order dated May 22, 2016, the Circuit Court granted the Defendants' Plea in Bar, holding that Drew was a statutory employee of Blake and SMB and that subject matter jurisdiction could not be waived by the Defendants.

On June 15, 2016, Drew filed a Notice of Appeal with the Clerk of the Circuit Court. He believes, but is uncertain, that he has an appeal to the Supreme Court of Virginia as a matter of right. He intends to base his appeal on the following assignments of error:

1. That the trial court erred in denying his Motion for Summary Judgment on the grounds that it did.
 2. That the Defendants' "exclusive remedy" jurisdictional objection was waived because it was not raised as a defense in their Answer to the Complaint.
 3. The Defendants should have been estopped from asserting the jurisdictional objection because SMB's insurance carrier denied his claim for workers' compensation benefits.
- (a) **Did Drew timely file his Notice of Appeal? Explain fully.**
- (b) **Does Drew have an appeal to the Supreme Court of Virginia as a matter of right? Explain fully.**
- (c) **If his case properly comes before the Supreme Court of Virginia, what disposition will the Court make on each of the enumerated assignments of error? Explain fully.**

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