

VIRGINIA BOARD OF BAR EXAMINERS  
Roanoke, Virginia – July 28, 2020

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

6. Claire Davis, a widow, died in June 2020 in a nursing home in the City of Newport News, Virginia. She was survived by her two sons, Delk and Ron, and a daughter, Wilma.

Until January 2018, when she was admitted to the nursing home, Claire lived at Phoebus House, the home she and her deceased husband had occupied on the Chesapeake Bay in Hampton, Virginia for many years. Phoebus House sits on 25 acres of land overlooking one of the widest, most accessible parts of the bay and was a prime location for development. Over the years, many developers approached Claire about buying the house and land, but Claire refused to sell the house and land even though she lacked the resources to support herself.

Claire's children respected her decision not to sell, and in 2009, the children and Claire entered into a written agreement that:

- Phoebus House and the adjoining land would not be sold prior to Claire's death; and
- the children would advance Claire money to support herself; and
- each of the children would contribute such amounts as they were able, and
- after their mother's death, Phoebus House and the surrounding land would be sold, the advances that the children made would be repaid to them, and the balance distributed equally among the three children.

Over the next ten years, each of the children made various cash contributions to their mother's support. The children recently had the house and land appraised at approximately \$4.5 million dollars.

After Claire's death, a Will signed on December 1, 2017 by Claire and attested before two officers of a local bank was found in Claire's safe deposit box at the bank. The Will contained provisions disposing of various articles of tangible personal property, leaving Phoebus House and the adjoining land to Delk, and the remainder of Claire's property consisting of stocks and investment accounts equally to her three children. The stocks and investment accounts were maintained in a brokerage account in Richmond, Virginia. The Will did not have self-proving provisions, and it named Wilma, now a resident of Baton Rouge, Louisiana, as the Executrix.

Delk found the Will and submitted it for probate in the Circuit Court Clerk's Office in Newport News, claiming Wilma could not legally qualify as Executrix. Claire's other children objected to Delk's actions.

- (a) **Where should Claire's estate be administered? Explain fully.**
- (b) **What is the effect of the written agreement among Claire and her three children on the disposition of Phoebus House and on the December 1, 2017 Will? Explain fully.**
- (c) **May Wilma qualify as Executrix of Claire's estate? Explain fully.**
- (d) **Is the 2017 Will entitled to probate, and if so, what steps should be taken to admit the Will to probate and enforce the 2009 agreement? Explain fully.**

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

7. On April 1, 2017, Paul, a plumber, was working on a project to renovate a high school in Roanoke County, Virginia. Dave, a roofer, was also working on site. While Paul was walking to his truck to get more tools, he passed Dave, who was pushing a cart stacked high with metal roofing pieces. The load was unstable, and Paul saw that a heavy saw was on the top of the cart, about 6 feet above the ground. The cart jerked and the saw began falling to the ground. Paul reached out to grab the saw and the blade stuck him on his right thumb and smashed his thumb and hand on the pavement. Paul's hand sustained obvious serious injuries; however, Paul refused Dave's offer to call the rescue squad. Paul said that he was an EMT and would leave and go immediately to the Emergency Room. Unbeknownst to Dave, Paul went home and did not seek medical treatment for 5 days. By then, the infection in his thumb was so advanced his right thumb was amputated.

On June 1, 2019, Paul filed a Complaint against Dave in the Circuit Court for Roanoke County. On July 1, 2019, Dave was personally served with the Complaint which alleged that Dave was negligent in transporting work materials and that his negligence caused a permanent injury to Paul, including amputation of his thumb, past and future medical expenses, past and future pain and suffering, permanent deformity, lost wages and a loss of earning capacity because he could not return to work using his hands in construction. The Complaint seeks \$2.5 million dollars in compensatory damages.

On July 19, 2019, Dave, by his attorney Alvin, mistakenly filed an Answer to the Complaint in the Circuit Court for Franklin County. The Answer denied any negligence on the part of Dave but did not include any affirmative defenses.

On July 25, 2019, Alvin received a call from the Franklin County Circuit Court Clerk's Office asking about the case because that office did not have any such case docketed in its court. Alvin realized the mistake, checked the Roanoke County online case information website, and discovered that Paul had just the day before filed a Motion for Default Judgment in Roanoke County. On July 26, 2019, Dave filed in the Circuit Court for Roanoke County a Motion for an Extension of Time to File a Responsive Pleading and attached the Answer he had filed timely on July 19, 2019, but in Franklin County instead of Roanoke County.

A month later, the Roanoke County Circuit Court heard Dave's Motion for an Extension of Time to File an Answer and Paul's Motion for Default Judgment. Upon consideration of the written motions and the argument of counsel, the Court granted Dave's Motion, contemporaneously filed his (original) Answer to the Complaint and denied Paul's Motion for Default Judgment.

Dave then learned for the first time in discovery that on the date of the accident Paul did not go to the ER but went home and failed to seek any medical treatment until 5 days later.

In advance of the trial, Dave timely exchanged with Paul proposed jury instructions, which included a proposed instruction on the defense of Failure to Mitigate Damages. Dave contemporaneously filed a Plea of the Statute of Limitations.

Paul filed a Motion *In Limine* to exclude Dave's defense (and corresponding jury instruction) of Paul's failure to mitigate his damages, and a Motion to Strike Dave's Plea of the Statute of Limitations because Dave failed to plead these affirmative defenses in his Answer, and they were therefore waived.

- (a) **Was the Circuit Court of Roanoke County correct in granting Dave’s Motion for an Extension of Time to File an Answer and in denying Paul’s Motion for Default Judgment? Explain fully.**
- (b) **What arguments should Paul and Dave each make on Paul’s Motion *In Limine* to exclude Dave’s defense of failure to mitigate damages, and how should the Court rule? Explain fully.**
- (c) **How should the Court rule on Paul’s Motion to Strike Dave’s Plea of the Statute of Limitations? Explain fully.**

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

8. Bud is the owner of a retail shop in Culpeper, Virginia, that sells a large variety of outdoor furniture, tents, cooking grills and yard equipment. Anticipating the summer season, Bud placed an order on March 4, 2020, for five hundred (500) grill covers from Wayne’s Wholesale, Inc. (“Wayne’s”) in Virginia Beach, Virginia, for the total purchase price of \$50,000. Bud used a simple purchase order form on the front of which he typed the following additional language: *“Grill covers shall be forest green; color shall not fade from exposure to sun or outdoor elements for at least sixty (60) days from first use.”* The entire purchase order form was printed on the front and back of a single piece of paper in the same black color, size and font with one exception on the back of the form. One of the fifteen conditions found on the back was printed in red ink and read as follows: *“Purchaser may reject any defective goods within thirty (30) days of delivery.”*

Wayne’s received and processed the order on March 12, 2020, and on the same day Wayne’s faxed to Bud a form titled “Wayne’s Wholesale, Inc. Order Confirmation.” This Order Confirmation form was printed on one page, front and back, using the same color, size and font throughout. The Order Confirmation included the following printed provisions: *“Any objection to goods shipped must be made within fourteen (14) days of receipt of the goods,”* and *“Wayne’s gives no warranties of any nature, either express or implied.”*

Bud received the grill covers on April 23, 2020, and stocked its store with the grill covers the same day. Ten covers were sold the first week. Two weeks later, six customers returned the grill covers because they had already faded badly in the sun. Bud called the other customers that purchased the covers and found that their new grill covers had also faded. Bud determined that the grill covers were not suitable for outdoor use and sent Wayne’s an email on May 20, 2020, advising Wayne’s that he rejected the entire order as being defective. Bud promptly returned the unsold covers to Wayne’s. Wayne’s refused to accept the returned grill covers, telling Bud that the agreement required him to reject the covers within fourteen (14) days of receipt.

Bud filed suit in the Circuit Court of the City of Virginia Beach and properly served Wayne’s. Bud alleged that the covers were unfit for the purpose for which they were designed and were not merchantable. He asked for judgment in the sum of \$50,000 and for an award of attorney’s fees.

In its Answer, Wayne's argues in defense that:

- (a) **Under the terms of the agreement, Bud was required to reject the grill covers within fourteen (14) days of receipt, and he failed to do so.**
- (b) **Wayne's gave no warranties, either express or implied.**
- (c) **The Court does not have authority to award attorney's fees.**

**How should the Court rule on each of Wayne's defenses? Explain fully.**

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

9. Jim Johnson ("Johnson") owned and operated a milling business in Appomattox, Virginia. He had several employees, including David. David had worked for him for many years. David lived near Appomattox in Farmville, Virginia. At the close of business one day, David was permitted by Johnson to use a milling business truck to transport a large bag of flour that David had bought from Johnson's business to David's home in Farmville. David drove to Farmville and delivered the flour to his home. He began the journey back to Appomattox to return the truck. David stopped at Acme Barbecue on the way. While there, he ate dinner and started drinking beer.

David finished drinking and started to drive Johnson's truck back to the business. On the way, he lost control of the truck, crossed the center, and struck another vehicle. Peter, the driver of the other car, was seriously injured. David fled the scene and returned to his home in Farmville. The police were given a description of the truck, contacted Johnson and found David at his home in Farmville. David was charged with driving while intoxicated and leaving the scene of an accident. He pleaded guilty to driving while intoxicated.

The injured driver, Peter, then filed a civil lawsuit for personal injury against David and Johnson seeking damages for his personal injuries under theories of respondeat superior and negligent entrustment.

During discovery, Peter obtained the following evidence through depositions:

- On the day of the accident, two witnesses had been present for the conversation between David and Johnson. The witnesses confirmed that Johnson agreed to let David borrow the truck to take the flour home but that he was told not to drive anywhere else and to bring the truck immediately back to Appomattox.
- Johnson admitted that the truck loaned to David was often used in his business to make deliveries. He admitted that David had purchased the flour from the milling business and was therefore a customer entitled to delivery.
- David testified that he had consumed three shots of liquor while he was at his house when he dropped off the flour. He also testified that he had four beers at Acme Barbecue, immediately before the accident. All of the alcohol had been consumed within less than two hours of David leaving the milling business.

- David admitted that he regularly drank beer and liquor but stated that he never got drunk. David admitted that he had been in other accidents but denied that any had to do with alcohol.
  - David denied that he was drunk when this accident occurred, and only pleaded guilty to driving while intoxicated as part of a plea deal. His Blood Alcohol Content two hours after the accident was still over the legal limit.
  - The server at Acme Barbecue testified that he served David four beers but thought he was getting tipsy, so he refused to serve him any additional beer. The server testified that David regularly came in and drank four or five beers. This was the first time that the server was concerned about his ability to drive. The server testified that he had seen Johnson come in the restaurant while David was there drinking.
  - Conrad was an employee at Johnson's milling business. He testified that David routinely drank on the job and regularly was drunk by the end of the day, and that Johnson knew that David was a drunk and had been in several accidents.
  - Johnson testified that he had never seen David drink alcohol, and that he did not allow any of his employees to drink while on the job. He claimed not to know that David had been in other accidents or that David regularly drank alcohol. He testified that he had allowed other employees to deliver flour from his mill using his truck. He gave all of them the same instructions that he gave David. They were to go directly home, deliver their flour, and return the truck immediately without stopping.
- (a) **What arguments should Peter make in support of his claim under a theory of respondeat superior, what defenses might Johnson assert, and who is likely to prevail? Explain fully.**
- (b) **What arguments should Peter make in support of his claim under a theory of negligent entrustment, what defenses might Johnson assert, and who is likely to prevail? Explain fully.**

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***Proceed to the Multiple Choice Questions in the Multiple Choice Blue Booklet.***