

VIRGINIA BOARD OF BAR EXAMINERS
Fredericksburg, Virginia – February 21, 2023

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

6. Drake Davis was involved in an automobile accident in Fairfax County, Virginia. Drake's car struck and killed a pedestrian in a crosswalk. Drake and his passenger, Theresa Freeman, were not injured.

Officer Carla Ramirez, the investigating police officer, arrived at the scene within a few minutes of the crash. As she exited her car, Officer Ramirez overheard an eyewitness to the accident standing on the street corner, who kept yelling into his phone, "*He drove right through the red light! He almost hit me!*"

When she spoke to Drake, Officer Ramirez asked if she could look at his phone. Drake handed her the phone that was in his lap and gave her the password to open it. Officer Ramirez saw that an unsent and incomplete text message was visible on the phone, which read, "*Joe- I am running late to your house. Theresa and I will get there as...*" Drake told Officer Ramirez that he was on his way to Joe's house immediately before the accident.

Officer Ramirez then noticed that Drake's passenger, Theresa, also had a cell phone in her hand. Officer Ramirez asked Theresa, "*Were you taking a video of Drake just before the crash?*" Without saying a word, Theresa nodded her head and handed Officer Ramirez her phone. Based on Theresa's reaction, Officer Ramirez concluded that she had, in fact, been videotaping right before the crash. With Theresa's permission, Officer Ramirez looked at her phone. The only video clip found on Theresa's phone was a video in which Drake could be heard laughing as the camera zoomed in on the speedometer of his car showing 92 mph.

Drake was charged with involuntary manslaughter, and at his trial, the prosecutor called Officer Ramirez to the stand:

Prosecutor: "*Officer Ramirez, tell the jury what the eyewitness said on his phone at the scene of the crash.*"

Defense: "*Objection. The question calls for inadmissible hearsay.*"

The court overruled the objection and allowed Officer Ramirez to testify that, at the scene, she overheard the eyewitness yelling into his phone, "*He drove right through the red light! He almost hit me!*"

Next, Officer Ramirez testified that when she asked to see Drake's phone, he took it from his lap, gave it to her and gave her the password. Then, the following exchange took place:

Prosecutor: "*Officer Ramirez, when you first looked at the phone Mr. Davis handed you, please tell the jury what you read.*"

Defense: "*Objection. The question lacks a proper foundation establishing the authorship of the statement and calls for inadmissible hearsay.*"

The court overruled the objection as to foundation, finding a sufficient foundation had been laid that Drake was the author of the text, but found that the unsent text message on the phone was inadmissible hearsay.

Finally, the prosecution sought to enter the following into evidence:

Prosecutor: “*Officer Ramirez, please describe to the jury Theresa’s behavior when you asked her, ‘Were you taking a video of Drake just before the crash?’ and show the jury the video you found on her phone.*”

Defense: “*Objection. The question calls for inadmissible hearsay and, therefore, the video lacks a proper foundation and should not be shown to the jury.*”

The court overruled the objection and allowed Officer Ramirez to describe how Theresa had nodded her head and handed the phone to Officer Ramirez in response to her question, and Officer Ramirez’s conclusion from this reaction was that Theresa had, in fact, been videotaping just before the crash. With this foundation, the court permitted the jury to see the video.

- (a) **Did the court err in overruling the objection and allowing Officer Ramirez to testify that at the scene, she overheard the eyewitness yelling into his phone, “He drove right through the red light! He almost hit me!” Explain fully.**
- (b) **Did the court err in finding that a sufficient foundation had been laid establishing that Drake was the author of the incomplete and unsent text message on his phone? Explain fully.**
- (c) **Did the court err in excluding the incomplete and unsent text message on Drake’s phone as inadmissible hearsay? Explain fully.**
- (d) **Did the court err in overruling the objection to Officer Ramirez’s description of Theresa’s reaction to the question, “Were you taking a video of Drake just before the crash?” as hearsay and in allowing the jury to see the video? Explain fully.**

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

7. Harley was near the banana display at XYZ Market when she observed her ex-husband, who had cheated on her, approximately twenty feet away from her. She screamed, “You jerk!” in his direction and when he turned toward her, she hurled a banana at him. The banana went over his head and was about to strike Barb, another customer. Barb saw the object at the last second, ducked and avoided it. While ducking, Barb lost her balance and fell backward, striking her head on a metal refrigerated case.

Barb lay on the floor unresponsive. Charlie, her husband, saw the whole thing happen. When the ambulance arrived, Charlie described how Barb fell, violently striking her head. Charlie was distraught when Barb left in the ambulance, fearing she would die.

Barb was responsive by the time she arrived at the hospital. She remained hospitalized overnight and was released the following day. Barb was told at the hospital that she should follow up with her own doctor to make sure that she hadn’t suffered any further injury; however, Barb was busy and decided that she didn’t need to do so. A few months later, Barb began to have serious issues with hearing and speech. She underwent a full evaluation and was found to have suffered a traumatic brain injury because of her fall at the XYZ Market, resulting in significant medical expenses and leaving her unemployable. Her doctor opined that had she sought appropriate treatment and medication sooner, she would likely have had a full recovery.

Barb timely filed a civil Complaint against Harley in the appropriate circuit court, alleging personal injury based upon the following causes of action: assault, battery and negligence.

Charlie also filed a timely civil Complaint against Harley in the appropriate circuit court, alleging intentional infliction of emotional distress. Charlie's Complaint stated that, "although Charlie was not physically injured in the altercation, he has nightmares of Barb dying in front of him." He alleges that he has trouble sleeping, avoids public places and has sought care from a counselor to assist him with these issues.

- (a) **What arguments should Barb make in support of her claim of assault, what defenses might Harley reasonably raise in response, and who is likely to prevail? Explain fully.**
- (b) **What arguments should Barb make in support of her claim of battery, what defenses might Harley reasonably raise in response, and who is likely to prevail? Explain fully.**
- (c) **What arguments should Barb make in support of her claim of negligence, what defenses might Harley reasonably raise in response, and who is likely to prevail? Explain fully.**
- (d) **What arguments should Charlie make in support of his claim of intentional infliction of emotional distress, what defenses might Harley reasonably raise in response, and who is likely to prevail? Explain fully.**

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

8. In 2021, the City of Salem, Virginia (the City), appropriated funds for the construction of an outdoor pickleball complex. In early 2022, the City issued a press release for the grand opening of the complex for a June 1, 2022, tournament. The cost of participation was \$50 per team, with proceeds to assist with landscaping improvements at the complex.

The City hired an architect who specialized in pickleball courts to design the complex, but fired him shortly after breaking ground. City maintenance employees constructed the complex pursuant to the architectural plans and under the direction of Frank, the City's Director of Facilities. In late April, Frank discovered that the silica sand to be incorporated into the court's acrylic coating for grip was on backorder for over six months. Concerned about the timeline, Frank directed his employees to finalize the surface of the courts with smooth acrylic without added texture in order to have the complex ready for the grand opening tournament.

Frank was present for the festivities on the morning of June 1. The first doubles match was held on court 1 between Mayor Maggie and the City Attorney (Amy), and their friends, Polly and Claire. While warming up, Amy commented, "the court feels unusually slick." On the first point of the match, Polly moved forward for a routine shot, slipped, and fell violently, severely fracturing her elbow. Polly was taken by ambulance to the hospital to undergo emergency orthopedic surgery. All play ceased after Polly's incident and the courts were closed for months until they were resurfaced and texturized per the original plans.

Amy texted Polly a few weeks later, in July, to check on her. Polly promptly texted back, "Amy, I am sorry that you are the City Attorney, but I am going to sue the City because that pickleball court was dangerously slick. I have already had one surgery and will need at least one more." Amy failed to relay this information to anyone at the City and left for a job in California in December 2022.

On February 1, 2023, Polly filed a Complaint in the Circuit Court for the City of Salem alleging simple and gross negligence against the City in the design and construction of the pickleball court surface and that it was liable for her damages.

Amy's successor, the new City Attorney, filed a Special Plea on behalf of the City seeking dismissal of Polly's Complaint on the grounds of sovereign immunity and failure to comply with the applicable notice requirement.

- (a) **What arguments should the City make in support of its claim of sovereign immunity? What arguments should Polly make in response? How is the court likely to rule? Explain fully.**
- (b) **What arguments should the City make in support of its claim that Polly failed to provide the required notice of her claim? What arguments should Polly make in response? How is the court likely to rule? Explain fully.**

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

9. Cooper, Dean and Ronnie agreed to start a medical marijuana cultivation and dispensary business in the City of Richmond, Virginia. Cooper, who has experience in manufacturing, will be an investor and expects to spend his full time operating the business. Dean and Ronnie will be the other two investors and will not be involved in the business operations.

Cooper, Dean and Ronnie all made equal monetary contributions to the business. The three investors expect the business to be profitable commencing in its second year of operation and to produce a net profit and cash flow sufficient to pay them 20% annually on their investments.

Cooper, Dean and Ronnie consulted you, as their attorney, about their goals to (1) limit their individual liability for debts of the business, (2) have the flexibility to conduct other businesses over the coming years, and (3) understand how profits are to be distributed from each form of entity. They have narrowed the list of possible business entities to a corporation, a general partnership, a limited partnership, and a limited liability company. Please answer the following questions to address their goals and concerns:

- (a) **What legal steps must Cooper, Dean and Ronnie take to establish each form of business entity? Explain fully.**
- (b) **To what extent, if any, will the form of business entity shield the investors from personal liability for the debts of the entity? Explain fully.**
- (c) **How are profits and losses distributed from each form of business entity? Explain fully.**
- (d) **In view of their stated goals, which form of business entity will be most advantageous to the investors? Explain fully.**

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