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## Virginia Bar Exam, February 2016, Section 2

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VIRGINIA BOARD OF BAR EXAMINERS  
Norfolk, Virginia – February 23, 2016

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

6. Peter and Mary Jane Parker are retired and live in the sleepy town of Harmony, located in Wise County, Virginia, in a house that is situated on 200 acres of land. Because the Parkers' home is located at the northeastern corner of their large lot, the Parkers initially were unaware of the Superhero and Villain theme park under construction on the land owned by Eddie Electro ("Electro") adjacent to the far southwestern corner of their property. Located in that vicinity near the boundary of the Parker property and the Electro property is a grove of approximately 75 mature magnolia trees which are 50 to 70 years old.

The theme park, which will be open to the public, is set to open in 10 days, to coincide with the end of the public school year. The final phase of the construction project involves the creation of a permanent access road which is necessary for the theme park to open. The Parkers just discovered that Electro is planning to cut down the grove of magnolia trees to accommodate the access road, under the belief by Electro that he owns the land on which the grove stands. Electro has instructed his chainsaw crew to start cutting down the trees in three days to support the theme park's scheduled opening. The Parkers are adamant—based on a property survey conducted two years ago—that the trees in question are situated on their property.

Electro is not willing to delay cutting down the trees pending a resolution of the Parkers' claim of right. He asserts that any delay in opening the park to the public will require him to obtain an extension of his bank financing at a cost of about \$30,000, in addition to any lost profits from the operation of the theme park.

The Parkers have come to you with a desperate plea to "save their magnificent magnolia trees." Based upon your experience dealing with such boundary disputes, you know that scheduling a trial on the merits will take at least six months based on the Wise County Circuit Court docket.

- (a) **Is there a remedy you could seek that would prevent Electro from cutting down the magnolias pending resolution of the dispute between the Parkers and Electro, and, if so, will you be able to establish the prerequisites for obtaining such relief? Explain fully.**
- (b) **If the Court were to grant the relief sought, what further requirement would it likely order the Parkers to satisfy before the relief would become effective and why? Explain fully.**

\* \* \* \* \*

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

7. In 2001, Tom and Wanda, both residents of Virginia, married later in life. Tom had no children of his own. Wanda had an adult child named Sandra, who was born out of wedlock in a non-marital relationship between Wanda and another man that had ended in 1995. Tom never adopted Sandra nor did they ever live together in the same household. However, at social gatherings Tom repeatedly let it be known that he had feelings of affection for Sandra and that, “She is the daughter I never had.”

In 2005, Tom executed a valid will leaving “all my property to my wife, Wanda and, if she predeceases me, to her children.” When Wanda died in 2010, Tom’s health began to decline, and he had to be hospitalized from time to time for treatment. On one such occasion a few months before Tom’s death, during a bedside visit by Sandra, a nurse was adjusting Tom’s intravenous medication. Tom introduced Sandra to the nurse, saying, “She’s my deceased wife’s daughter and the daughter I wished I had. But it’s never too late. I’ve left her everything in my will. I was looking for it just before I had to be brought here, but I can’t remember where I put the darned thing. It’s somewhere in the file cabinet at home where I keep my important papers or maybe in my safe deposit box at the bank. Anyway, it’s all Sandra’s when I go.”

Tom died in 2015, survived by Sandra, his brother, Jack, and a niece, Melanie, who is the daughter of Tom’s deceased sister. Although Sandra and Jack conducted a diligent search, no one has been able to find the original of the executed will since Tom’s death. Sandra did, however, find a photocopy of the fully executed will in the file cabinet in Tom’s house. The individuals who signed it as witnesses are dead.

Sandra filed a petition in the appropriate Circuit Court seeking to establish the photocopy as the will of Tom and asserting her claim to the entire estate. Jack opposed the action and filed a cross-petition seeking a declaration that Tom died intestate.

At the hearing, Sandra testified, relating the bedside remarks Tom had made in the presence of the nurse, and she called the nurse as a witness, who confirmed what Tom had said and that Tom appeared to be fully in command of his faculties. Sandra also called as witnesses two social acquaintances of Tom, who testified they often heard Tom express his feelings of affection for Sandra.

Jack, on the other hand, testified that he had paid Tom a visit at the hospital just before the visit Sandra testified about. During that visit, Jack said, while he and Tom were alone together in the room, Tom told him that he had torn up his 2005 will intending to draft a new one leaving everything to Jack and Melanie but never got around to it.

Sandra and Jack filed cross-motions to strike the other’s evidence of the hospital conversations with Tom, each invoking the Virginia Dead Man’s Statute.

- (a) How should the Court rule on the cross-motions to strike the evidence? Explain fully.**

- (b) **Is the evidence Sandra produced at the hearing sufficient to establish the photocopy as Tom's will, and, if she succeeds, can she inherit under the will? Explain fully.**
- (c) **If Sandra does not succeed, to whom and in what proportions should Tom's estate be distributed? Explain fully.**

\* \* \* \* \*

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

8. While on routine traffic patrol, Officer Wilson observed a minor traffic accident on Main Street in Tazewell, Virginia. A car driven by Jerry failed to stop at a stoplight and collided with another vehicle. The drivers of the vehicles involved in the accident were not injured, but Jerry's vehicle was disabled by the collision and could not be driven off Main Street.

In order to issue Jerry a citation for his failure to stop at the traffic signal, Wilson asked Jerry for his driver's license, which Wilson ran through an electronic database of criminal records. The search of the database revealed that there was an active warrant for Jerry's arrest.

In light of this information, Wilson informed Jerry that he was under arrest and proceeded to pat Jerry down for weapons and search the contents of his pockets. Jerry told Wilson that he had a permit to carry a concealed weapon and that he had a handgun in a holster beneath his coat. Wilson seized the weapon.

Wilson then reached into a pocket of Jerry's coat and found an opaque bag, which he had to open in order to see its contents, and found four smaller, sealed clear baggies that each contained a white powdery substance and a piece of note paper on which was written "8 pm, corner 5<sup>th</sup> & B St." Based on his training and experience, Wilson believed that this substance was cocaine. Subsequent laboratory analysis confirmed that the four smaller bags seized from Jerry's coat pocket each contained almost one gram of cocaine.

Wilson also found \$1,515 in small bills and a cell phone in the front pocket of Jerry's pants. Wilson confiscated the money and searched through the digital contents of the cell phone. He read several text messages that Jerry had sent to various individuals that night informing them that he would meet them at various locations, including 5<sup>th</sup> and B St. at 8 p.m. He also found an image of Jerry snorting a substance that appeared to be cocaine from the surface of a large glass table.

Pursuant to the standard procedure of the Tazewell Police Department concerning stalled or disabled vehicles, Wilson arranged to have Jerry's car towed to the impound yard maintained by the department. Later that day, Wilson, in compliance with standard police department procedures, searched Jerry's car to make an inventory of its contents to prevent items from being lost and avoid accusations of theft by the police. In the back seat of the car, Wilson found digital scales covered with a white powder, and he seized them as evidence.

Jerry was charged with possession of cocaine with the intent to distribute it. Prior to his trial, he moved to suppress the opaque bag and its contents, the handgun, the cash, the cell phone and its contents, and the digital scales found in the car on the ground that these items of evidence were obtained in unlawful warrantless searches.

It is Jerry's intention at trial to assert the defense that the Commonwealth's admissible evidence will not support a conviction of possession with intent to distribute (as opposed to mere possession for personal use).

- (a) **How should the Court rule on the motion to suppress as to each item of evidence? Explain fully.**
- (b) **Based on the admissible evidence, can the Commonwealth make a *prima facie* case that Jerry possessed the cocaine with intent to distribute? Explain fully.**

\* \* \* \* \*

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

9. Plumlee Brothers Insulation & Coatings Company ("PBIC"), a Virginia corporation with its executive offices in Tysons, Virginia, manufactures chemical roofing materials in its plant in Winchester, Virginia. PBIC sells materials to companies that install roofs. PBIC itself does not install the materials. The materials are, in fact, chemicals, which are sold in a liquid form that is sprayed onto the roof sub-base. The chemicals and their fumes can be hazardous during application, but after application the finished roofing product is harmless.

Ready Roofing, Inc. ("Ready"), a North Carolina corporation with its main office and property yard in Henderson, North Carolina, is in the business of installing and repairing roofing systems. Ready's president, its chief financial officer, and all other corporate officers, other than Ready's regional vice presidents, regularly work in and direct operations from the Henderson office.

In 2012, Ready signed an "Applicator Agreement" under which Ready agreed to use PBIC's products in its operations. In return, PBIC agreed to sell the chemicals as well as to provide brochures, samples, and application training videos to Ready. The Applicator Agreement, signed by the parties, states in pertinent part:

The Applicator [Ready] shall be liable for the injury, disability, or death of workers and other persons resulting from Applicator's operations and Applicator shall defend, indemnify, and hold harmless PBIC from any liability, loss, expense, claim, or settlement arising from Applicator's acts or omissions, including any legal expenses incurred by PBIC with respect to such acts or omissions. . . . This Agreement shall be interpreted, construed, and governed by the laws of the Commonwealth of Virginia.

For larger jobs, Ready often has a "project office" located in a mobile trailer on the job site, which is the office of Ready's project superintendent and sometimes a regional vice

president, whose duties are to assist with the administration of the project and to market Ready's services to prospective customers in the area of the project. Ready established such a project office in Petersburg, Virginia, as of January, 2016.

In 2015, pursuant to its contract with the City of Greenville, Ready installed a roofing system on the Greenville municipal complex in Greenville, South Carolina, using the materials supplied by PBIC. Alleging that they were injured by exposure to noxious fumes from chemicals, ten municipal employees who worked for entities housed in the Greenville complex during the application process sued Ready and PBIC in various South Carolina state court actions for a total of ten million dollars, alleging negligence by both PBIC and Ready. PBIC tendered the defense of the suits to Ready and asserted its right to indemnity under the Applicator Agreement. Ready refused the tender and denied any obligation to indemnify.

PBIC filed a declaratory judgment action in the U.S. District Court for the Eastern District of Virginia, contending that the Applicator Agreement requires Ready to defend and indemnify PBIC against any costs incurred as a result of the South Carolina litigation.

In defending the suit, Ready made the following assertions:

- (a) **The federal court lacks subject matter jurisdiction over this matter.**
- (b) **The indemnity provision in the Applicator Agreement is unenforceable because, read literally, that provision purports to protect PBIC from injuries caused by its own negligence, and, under South Carolina law, which Ready cites correctly, a party may not contract against its own negligence.**
- (c) **The indemnity provision violates Virginia Code §11-4.1, which provides in pertinent part:**

**Any provision contained in any contract relating to the construction, alteration, repair or maintenance of a building, . . . or any provision contained in any contract relating to the construction of projects other than buildings by which the contractor performing such work purports to indemnify or hold harmless another party to the contract against liability for damage arising out of bodily injury to persons . . . suffered in the course of performance of the contract, caused by or resulting solely from the negligence of such other party or his agents or employees, is against public policy and is void and unenforceable.**

**How should the Court rule on each of Ready's assertions? Explain fully.**

\* \* \* \* \*

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