

JULY 2002

OUT-OF-STATE ATTORNEYS' EXAMINATION

QUESTIONS AND BOARD'S ANALYSIS

FACTS APPLICABLE TO QUESTIONS 1 through 4

In an effort to increase County revenues, Calvert County Government made a conscious effort to vigilantly enforce the towing of vehicles which are illegally parked, unregistered or have outstanding parking tickets. All such towing operations are a function of County government, performed by County employees.

On April 7, 2000, Marvin Maniac, a Calvert County tow truck driver and employee, spotted the illegally parked automobile of Tony Teflon and upon checking, immediately ascertained that Teflon also had a series of unpaid Calvert County parking tickets. As Maniac endeavored to hook and chain Teflon's automobile to the County-owned tow truck, Teflon suddenly emerged from the restaurant across the street, hopped in his vehicle and sped away. Incensed that Teflon eluded him once the towing process had commenced, Maniac hopped in the tow truck and sped off in hot pursuit of Teflon to complete the tow job.

While engaged in the chase, Maniac's truck plowed into the rear of Sally Still's vehicle, properly stopped at a red light, injuring Sally and causing her vehicle to plow into Paula Pedestrian, killing her instantly.

In May 2002, Sally and Peter, Paula's widower, came to see you, a newly-licensed Maryland attorney and solo practitioner, to file suit against Calvert County and Maniac in the Calvert County Circuit Court for \$500,000 in actual damages and \$1 million in punitive damages for injuries sustained by Sally and a wrongful death action on behalf of Peter and Mary, Peter and Paula's minor child, for Paula's death.

QUESTION 1

(15 Points 27 Minutes)

What problems, if any, do you see in representing Peter and Sally, as requested?

BOARD'S ANALYSIS

First, I would advise Peter and Sally that there is a potential for conflict of interest in representing both clients, as it is possible that the County may argue that Sally's action in some way contributed to Paula's death. Pursuant to Rule 1.7 of the Rules of Professional Conduct, I must not represent said clients if their interests are or may become adverse unless both consent after consultation.

Second, I would advise potential clients that even absent any conflict of interest, as a new attorney, I might have to either decline the case or associate myself with a more experienced attorney, unless I am able to quickly become competent in this area of the law since Rule 1.1 of the Rules of Professional Conduct mandate that I possess the requisite knowledge and skill necessary for the representation .

The third problem with filing said claims is that pursuant to Section 5-301 of the Courts and Judicial Proceedings Article, Calvert County is subject to the Local Government Tort Claims Act which requires potential plaintiffs to serve notice of a potential claim against the local government or its employee within 180 days of the injury. In this instance, 2 years and 1 month have passed and the facts do not indicate that the requisite notice has been provided.

QUESTION #2

(10 Points 18 Minutes)

What defenses might Calvert County assert?

BOARD'S ANALYSIS

As noted above, the County may argue that the action must fail because it was not brought within the 180 days of the injury, as required in Section 5-301 of the Courts and Judicial Proceedings Article.

Pursuant to § 5-303(c) of the Courts & Judicial Proceeding Article, the County will also assert that a local government may not be liable for punitive damages, so Sally's claim for \$1 million dollars in punitive damages against Calvert County should fail.

Moreover, pursuant to § 5-303(a) of the Courts and Judicial Proceedings, Article, Calvert County's liability, if any, may not exceed \$200,000 per individual claims or \$500,000 in total claims arising from the same occurrence, thereby foreclosing the amount sought by the Plaintiffs.

Aside from the lack of timely notice, (a prerequisite under the Local Government Tort Claims Act) and the above-referenced limitations on liability, Calvert County would likely assert that the County is not liable for Maniac's actions because speeding off in hot pursuit of Teflon was outside the scope of Maniac's employment. However, it is well established under the Local Government Tort Claims Act that local governments have no immunity from even intentional torts of their employees, unless committed with actual malice. *Thomas v. City of Annapolis*, 113 Md. App. 440, 688 A.2d 448 (1997) The overall test regarding scope of employment is whether the tortious acts were done by the employee in furtherance of the employer's business. *Ennis v. Crenca*, 322 Md. 285, 587 A.2d 488 (1991)

QUESTION #3

(5 Points 9 Minutes)

Assuming there is no impediment to filing said suit, what is the maximum amount that Sally could recover in damages?

BOARD'S ANALYSIS

Pursuant to Section 5-303 of the Courts and Judicial Proceedings Article the liability of a local government such as Calvert County may not exceed \$200,00 per individual claim, so any of Sally's damages imputed to the County are limited to this amount. If Maniac is found to have acted beyond the scope of his authority the County may indemnify him for any punitive damages entered against him, however.

QUESTION #4

(10 Points 18 Minutes)

Assuming you accept representation of Peter and Mary and file a Complaint pursuant to Maryland Rules 2-303 through 2-305, are there any other requirements of the Complaint given the nature of the claim?

BOARD'S ANALYSIS

Pursuant to Maryland Rule 15-1001(d), a Complaint for wrongful death must also state the relationship of each plaintiff to the decedent whose death is alleged to have been caused by the wrongful act.

FACTS APPLICABLE TO QUESTIONS 5 and 6

The Avenel community in Montgomery County has experienced a rash of arsons, all in the vicinity of the office of Dr. Joe Weider, a psychiatrist. The Montgomery County Police Department set up a surveillance of Dr. Weider's office and learned that a regular patient was Paul Poe. Paul Poe had been the subject of prior arson investigations but had never been charged. After following Mr. Poe for a few weeks the Police believed there was sufficient evidence to charge Mr. Poe. He was ultimately arrested and appeared before the Commissioner on May 1, 2002.

Mr. Poe was a resident of Montgomery County and a student at the local community college. He also had no prior criminal record. The Commissioner was aware of these facts and told Poe that there didn't appear to be any probable cause for his arrest. Nonetheless, at the urging of the police officer, the Commissioner imposed bail in the amount of \$50,000.

Upon posting bail, Poe went to the Law Office of Linda Hand, a family friend, and asked that she represent him. Although Linda was a tax attorney she agreed to take the case for a contingent fee of \$20,000 down with an additional \$15,000 to be paid if Poe is acquitted of all charges. On May 20, 2002, Linda Hand filed a motion for a preliminary hearing and a motion to reduce bail.

QUESTION #5

(10 Points 18 Minutes)

What problems do you see in Linda Hand's representation of Poe, and how would you rule on her motions?

BOARD'S ANALYSIS

Linda's representation of Poe runs afoul of several provisions of Rule 1.5 of the Maryland Rules of Professional Responsibility. Rule 1.5(a) requires all fees be reasonable. In assessing the reasonableness of a fee, factors to be considered include the experience, reputation and ability of the lawyer, the nature and length of the professional relationship with the client, and the skill requisite to perform the legal service properly. Linda's fee may not be reasonable since she has no experience in this area and no prior relationship with Poe. Moreover, Linda's fee was contingent and, therefore, in clear violation of Rule 1.5(d)'s proscription against such fees in a criminal matter.

Rule 4-213(a)(4) provides that a defendant is entitled to a preliminary hearing when charged with a felony if a request is made within ten days after being advised of his right by a Commissioner. Linda's request for a preliminary hearing came several days too late and should be denied.

However, Ms. Hand may be successful with her motion to reduce bail. Rule 4-216(e) notes that the Commissioner must consider several factors in her determination to release a defendant. Some applicable to the instant facts are the defendant's prior record, length of residence in the community, flight risk, and nature of the evidence against the defendant. The facts note that the Commissioner didn't believe there was probable cause to arrest Poe, that he had no prior record, and had strong ties to the community.

ADDITIONAL FACTS APPLICABLE TO QUESTION 6

On May 31, 2002, the State issued a subpoena to Dr. Weider requesting that the Doctor appear at the upcoming criminal trial and provide information concerning his sessions with Paul Poe. The subpoena was served upon Dr. Weider, a resident of Virginia, at the Circuit Court of Anne Arundel County by a private investigator who happened to be present at a hearing in which the doctor was providing expert testimony. The investigator urged the doctor to comply with the

subpoena, stressing that “it was just a matter of time before Poe kills someone and the Doctor will be responsible if that occurs.”

Dr. Weider immediately comes to you, a duly licensed Maryland attorney, and asks whether he must appear at the trial, whether he has an affirmative duty to disclose any information from his sessions with Poe.

QUESTION 6

(10 Points 18 Minutes)

What would you advise Dr. Weider and why? Discuss fully.

BOARD’S ANALYSIS

Service upon Dr. Weider was improper and the subpoena may, therefore, be quashed. Section 6-305 of the Maryland Courts and Judicial Proceedings Code Annotated expressly notes that “[a] nonresident person who is within the State for the purpose of testifying in or prosecuting or defending an action may not be served with process.” However, the State may argue that the doctor was not in the State solely to testify since he has an office in Montgomery County. Assuming service were proper, Dr. Weider’s testimony is subject to Section 9-109 of the Maryland Courts and Judicial Proceedings Code Annotated which provides that “a patient or his authorized representative has a privilege to refuse to disclose, and to prevent a witness from disclosing, communications relating to diagnosis or treatment of the patient’s mental or emotional disorder.” The subpoena may ultimately be quashed for this reason.

I would also advise Dr. Weider that the investigator was making an idle threat against him. Section 5-609 of the Maryland Courts and Judicial Proceedings Code Annotated provides a privilege against a cause of action or disciplinary action against a mental health care provider that fails to predict, warn of, or take precautions to provide protection from a patient’s violent behavior unless said provider knew of the patient’s propensity for violence and the patient somehow advises said provider of his/her intent to inflict imminent physical injury upon a specific victim or group of victims. Nothing in the facts indicate that Poe intended to inflict such injury.

FACTS APPLICABLE TO QUESTION 7

Jamal Tee died on February 25, 1998. Linda Gee was appointed the personal representative of his estate on March 22, 1998. At the time of his death, Jamal owed \$50,000 on a note that secured his condominium in Hawaii. On August 2, 1998, Linda Gee contacted Lee Ball, the attorney in Hawaii who represented the holder of the note (“Creditor”), to discuss satisfaction of the note. Linda Gee also asked Ball to assist her in establishing ancillary administration in Hawaii. Ball asked whether he needed to do anything in Maryland and was told that Gee, as personal representative, would handle everything in Maryland and he need not

file a claim since his client was a known scheduled creditor. Linda Gee sent a subsequent letter on August 20, 1998, confirming that Ball need not file a claim against the estate.

In January 2002, Ball filed suit in Hawaii on behalf of Creditor against Linda Gee as personal representative to recover the moneys owed on the note. Linda Gee did not respond to the suit and Ball was awarded judgment in the amount of \$50,000. Ball then filed a claim against the estate for the judgment amount. Linda Gee filed and mailed to Ball a Notice of Disallowance of Claim citing the applicable provision of law that all claims must be filed within six months of the date of death.

Frustrated, Ball comes to you a duly-licensed Maryland attorney, and asks whether there is a provision of Maryland law that would bar disallowance of the claim.

QUESTION 7

(10 Points 18 Minutes)

What procedural rule would you cite, and why?

BOARD'S ANALYSIS

Linda Gee, as personal representative, could not advise Ball that Ball need not file a claim as a known creditor, then use Ball's failure to file a timely claim against him. Doing so is arguably tantamount to the type of fraud addressed in Section 5-203 of the Courts and Judicial Proceedings Code Annotated, which provides as follows:

If the knowledge of a cause of action is kept from a party by the fraud of an adverse party, the cause of action shall be deemed to accrue at the time when the party discovered, or by the exercise of ordinary diligence should have discovered the fraud.

Accordingly, Ball should seek the court's help under Rule 6-141 (Bad Faith – unjustified proceedings) in setting aside Gee's Notice of Disallowance of Claim.

FACTS APPLICABLE TO QUESTION 8

John T. founded the Church of the True Believers in 1970, at the age of 62. The Church was duly incorporated in Maryland. According to the Articles of Incorporation and Bylaws the elected officers of the church are John T. and the bishops duly appointed by him. On January 1, 2000, Paul Profet disseminated a memorandum to the membership announcing that he was appointed as bishop by John T. and would be the Chief Executive Officer of the Church given John T.'s advanced age.

On February 1, 2001, Mary Mayden petitioned the Circuit Court for Prince George's County to issue a temporary restraining order and preliminary injunctive relief against Paul Profet to preclude him from referring to himself as bishop and CEO. In her complaint, Mayden

alleged that Profet was fraudulently collecting money in the Church's name and was disseminating misleading information as to his status as a Church leader.

On February 2, 2001, the Court ordered Profet, a resident of the District of Columbia, to show cause at a hearing held on February 27, 2001 why a temporary restraining order should not be issued. Profet failed to appear on February 27, 2001. Mayden testified at the hearing that most members of the Church did not know Profet, nor were they aware of his attempts to solicit monies. After reviewing the pleadings and testimony, the Court granted a preliminary injunction restraining Profet from collecting moneys or referring to himself as bishop or CEO of the Church. On February 28, 2001, Mayden personally served the temporary restraining order on Profet's seventeen-year old niece at Profet's residence.

QUESTION 8

(10 Points 18 Minutes)

Profet comes to you, a duly licensed Maryland attorney, and asks that you file a motion to dissolve the injunction. On what grounds would you base your motion?

BOARD'S ANALYSIS

I would petition the court for a dissolution of the injunction pursuant to Rule 15-504(f). Mayden did not show that there would be immediate, substantial and irreparable harm, as required by Rule 15-504(a). *See, also, El Bey v. Moorish Science Temple*, 362 Md. 339, 765 A.2d 132 (2001); *Coster v. Department of Personnel*, 36 Md. App. 523, 373 A.2d 1287(1977) Under the facts, Mayden also made no showing that she was authorized to bring the action.

Finally, Rule 15-502(d) provides that an injunction is not binding on a person until that person has been personally served or has received actual notice by any means. I would argue that Profet was not properly served since Rule 2-123 precludes service by a party. I would also argue that service of his underage niece does not satisfy the strictures of Rule 2-124. For these reasons the injunction should be dissolved.

FACTS APPLICABLE TO QUESTION 9

Steve Surfer is a resident of Ocean City, Maryland. He enjoys relaxing on the beach with his friends. He read in the Ocean City Newspaper an advertisement for a sale on beach clothes at the Rehoboth Beach, Delaware Outlet Stores. He also noticed on the billboard in Ocean City, Maryland that the outlet stores in Rehoboth were advertising this great sale.

Steve and his friends traveled to the Beach Store in Rehoboth Beach, Delaware, a sole proprietorship owned and operated by Buff Beach. While in the Store, Steve, who was not wearing any shoes, stepped on broken glass and severely injured his foot. As a result of his injury he was hospitalized for three days, and out of work for six months.

Steve comes to you, a duly licensed Maryland attorney, and asks you to file suit against the Beach Store. You believe he is entitled to approximately \$26,000 in damages, and intend to request that amount in your suit.

QUESTION 9

(10 Points 18 Minutes)

Under what authority, may you file suit in Maryland? In what court would you file suit? How may service of process be obtained against the defendant? Discuss fully.

BOARD'S ANALYSIS

Maryland Courts and Judicial Proceedings Section 6-103 confers personal jurisdiction for causes of action arising from tortious injury outside the State if the defendant "regularly does or solicits business, engages in any other persistent course of conduct in the State or derives substantial revenue from goods, food, services, or manufactured products used or consumed in the State." One could argue that the fact that the Outlets advertise in Maryland may make them subject to jurisdiction in Maryland.

With reference to how service of process can be made, Maryland Courts and Judicial Proceedings Section 6-304 notes that service may occur outside of the State: "[I]f the exercise of personal jurisdiction is authorized by this title (6-103)"

The suit must be brought in Circuit Court since the amount in controversy exceeds \$25,000. (Courts and Judicial Proceedings Code Annotated, Section 4-401) Since the Defendant is not domiciled in Maryland, suit may be brought in any Circuit Court. (Courts and Judicial Proceedings Code Annotated, Section 6-202)

FACTS APPLICABLE TO QUESTION 10

Mom's, a nationally known convenience store, received permission from the zoning authority to operate its convenience store in Prince George's County, Maryland. 7-7, a convenience store located also in Prince George's County, Maryland, is disturbed by the zoning decision and is aggrieved by the County's decision to permit a competitor convenience store, Mom's, to open two blocks from 7-7. The zoning authority's approval became final on April 10, 2002, and 7-7 received a copy of its decision on that date. On May 12, 2002, 7-7 filed its appeal of the Council's decision in the Circuit Court. On May 14, 2002, 7-7 served Mom's with a subpoena to produce all sales receipts for the past two years for its store in Harford County, Maryland.

Mom's immediately contacted you, a duly-licensed Maryland attorney, and asked that you do whatever was necessary to counter 7-7's appeal and the subpoena.

QUESTION 10

(10 Points 18 Minutes)

What pleading would you file on Mom's behalf, and why? Discuss fully.

BOARD'S ANALYSIS

I would file a Motion to Quash the subpoena. Although the Maryland discovery rules are quite broad, discovery requests are limited to any non-privileged matter relevant to the subject matter involved in the action. (Maryland Rule 2-402(a)) I would argue that the sales receipts for a particular Mom's in Harford County are not relevant to a zoning decision in Prince George's County. Moreover, and more importantly, an appeal of an administrative agency's decision is on the record absent a specific law that allows additional evidence to be introduced in the Circuit Court appeal. (Maryland Rule 7-208)

I would also file a Motion to dismiss the appeal pursuant to Maryland Rule 7-204(b). Rule 7-203 generally provides that a petition for judicial review be filed within 30 days of the later of:

1. The date of the order or action of which review is sought;
2. The date the administrative agency sent notice of the order or action to the petitioner, if notice was required by law to be sent to the petitioner; or
3. The date the petitioner received notice of the agency's order or action, if notice was required by law to be received by the petitioner.

7-7 did not note a timely appeal and it should, therefore, be dismissed.