

JULY 2000
OUT-OF-STATE ATTORNEY'S EXAMINATION
Questions and Board Analysis

FACTS APPLICABLE TO QUESTIONS I THRU VI

On December 23, 1999, Paul Customer was shopping in a Jewelry store owned by Sandra Shopkeeper and located in the Rockville Mall in Rockville, Maryland. As the store was closing and Paul and the other customers were leaving the store, Sandra suddenly noticed that a \$10,000 diamond bracelet was missing from the showcase. She remembered that Paul was one of the customers to whom she had shown the bracelet. She ran to the shop entrance, spotted Paul who was walking away and yelled "Stop that man, he has stolen a bracelet". Carl, a Baltimore City police officer, and John, the store security guard, ran after Paul. Carl caught Paul roughly by the shoulder and swung him around. Paul, unaware of the commotion behind him and believing that he was being attacked, struck Carl in the face with his fist. Carl then retaliated, knocking Paul to the ground and John then came up and kicked Paul in the face while he was on the ground. They then brought him back to the shop where he was held until the police arrived to take him away for medical treatment and to the county lockup. A search of his person did not produce the stolen bracelet. As a result of the attack, Paul lost several teeth and the sight in his right eye.

After recovering from his injuries, on February 15, 2000, Paul filed a Complaint in the appropriate Circuit Court and a demand for a jury trial. The Complaint charged Carl, John and Sandra, with counts of assault, battery, false arrest, false imprisonment, slander and intentional infliction of emotional distress. Each count demanded compensatory damages in the amount of \$500,000, costs and interest and "for such other and further relief as the court may deem just and proper".

QUESTION I

At the trial of this matter, Paul's attorney attempts to present evidence concerning an award of punitive damages. Counsel for the defendants object.

How should the Court rule on the objection and why?

BOARD'S ANALYSIS

Rule 2-305 of the Maryland Rules of Procedure requires that "a pleading..... shall contain a clear statement of the facts necessary to constitute a cause of action and a demand for judgment for relief sought". The pleading in question demands compensatory damages in the amount of \$500,000, costs and interest and "for such other and further relief as the court may deem just and proper". However, no specific claim is made for punitive damages. Therefore, the court should sustain defendant's counsel's objection.

Although the Court of Special Appeals held that the phrase "for such other and further relief as the court may deem just and proper" provided adequate notice of a demand for punitive damages [Scott v. Jenkins, 107 Md.App. 440, 669 A.2d 958 (1995)], it was specifically overruled by the Court of Appeals [Scott v. Jenkins, 345 Md. 21, 690 A.2d 1000 (1997)].

QUESTION II

You are the attorney for Sandra Shopkeeper.

- (1) What affirmative defense(s) might you raise on her behalf?**
- (2) How successful will your defense(s) be?**

BOARD'S ANALYSIS

I would file an Answer asserting as an affirmative defense, subsection 5-402, Courts and Judicial Proceedings Article of the Annotated Code of Maryland.

In order to claim the privilege afforded merchants under this section, I must first establish that Sandra is a merchant in accordance with subsection 3-1301(c) of the Courts and Judicial proceedings Article of the Code which defines a merchant as the owner or operator of a mercantile establishment. The facts state that she owns a jewelry store in the mall. We must next determine if a jewelry store is a mercantile establishment. Subsection 3-1301(d) defines mercantile establishment as any place where merchandise is displayed, held or offered for sale, either at retail or wholesale. The facts state that the bracelet allegedly stolen by Paul was on display in a showcase with an asking price of \$10,000.

Therefore, having established that Sandra was the owner of a mercantile establishment, we conclude that she was a merchant for the purposes of subsection 5-402. However, that section states that she is not civilly liable for the actions which she instigated against Paul if she had probable cause to believe that Paul had committed the theft. The only fact that Sandra had was that Paul was "one of the customers to whom she had shown the bracelet". The court could find that this information alone was insufficient to establish probable cause, and deny her the protection of this section.

QUESTION III

John, the store security guard, was served with the Complaint, summons and all supporting documents by a private process server who delivered them to John's wife at his home in York, Pennsylvania on March 2, 2000. She misplaced the papers and did not give them to him until April 14, 2000. He has now come into your office with a copy of the Complaint on April 15th.

- (1) Was the service on John proper? Discuss fully.**
- (2) What is the latest date upon which Paul must file his Answer or other responsive pleading? Why?**

BOARD'S ANALYSIS

Service of the complaint upon John's wife constitutes proper service. Rule 2-121(a)(2) allows personal service upon an individual by leaving a copy of the summons, complaint and all supporting documents at the individual's dwelling house or usual place of abode with a resident of suitable age and discretion. We must assume that John's wife is an adult having the normal discretion of an adult. Therefore, John has been properly served.

The next issue that we must deal with is, When is John's Answer due? Under Rule 2-321(a) an answer must be filed within thirty (30) days after service. However, since John was served outside of the State of Maryland, in accordance with Rule 2-321(b)(1), he has until sixty (60) days after service of the complaint upon him to answer. Rule 1-203(a) spells out how the time for filing John's answer must be computed. Since he was served on March 2, 2000, that day is not included in the computation. Therefore, John has until May 1, 2000 to file his answer.

QUESTION IV

You are the attorney representing Carl. You have reviewed the Complaint and have determined that there is no dispute concerning the material facts of the Complaint.

- (1) What argument(s) would you make to terminate his involvement in the litigation?**
- (2) Will you be successful? Discuss fully.**

BOARD'S ANALYSIS

Rule 2-501(a) of the Maryland Rules of Civil Procedure provides that any party may file, at any time, a motion for summary judgment as to all or any part of an action on the ground that there is no genuine dispute as to any material fact and that the party is entitled to judgment as a matter of law.

Carl should seek to invoke his immunity from civil liability based upon subsection 5-605 of the Courts and Judicial Proceedings Article of the Code. Since he is a Baltimore City police officer seeking to effect the arrest of a person whom he believes to be committing a crime in Rockville, he would be immune from civil liability. In making this determination, the court must find that he was attempting to prevent a crime or effecting an arrest in order to protect life or property, the action was not grossly negligent and it was taken at the scene of the crime or attempted crime.

The facts show that Carl reacted to Sandra's identification of Paul as a perpetrator of a theft. Reasonably believing that Paul was, in fact, a thief who had just stolen something from the jewelry store, Carl pursued Paul and made the arrest. His striking of Paul and knocking him to the ground was not only self-defense, but was an action reasonably necessary to subdue him in order to effect the arrest.

QUESTION V

John, the store security guard who resides in Pennsylvania, wishes you to file a motion to dismiss the Complaint as to him because he is not a Maryland resident.

Does the Maryland Court have jurisdiction to proceed against John? Discuss fully.

BOARD'S ANALYSIS

Subsection 6-103(b)(3) of the Courts and Judicial Proceedings Article of the Code provides that a court may exercise personal jurisdiction over a person who directly, or by an agent, causes tortious injury in the state by an act or omission in the state. John is a store security guard working in Maryland, and the tortious conduct occurred in Maryland. Therefore, the courts of Maryland may exercise personal jurisdiction over him.

QUESTION VI

On December 26, 2002, Paul comes to you complaining about the representation by his previous attorney. Specifically, he claims that the Baltimore City Government was not joined as a defendant in the previous litigation. He would like for you to file a suit on his behalf against them.

- (1) What defense(s) might the Baltimore City Government raise?**
- (2) What would be the likely result?**

BOARD'S ANALYSIS

Under subsection 5-304 of the Courts and Judicial proceedings Article of the Code, the Local Government Tort Claims Act, an action may not be brought against a local government or its employees unless a notice of claim is given within 180 days after the injury. The injury in this matter occurred more than three years ago. The facts do not indicate that the statutory notice was given. However, since the suit was prosecuted and the matter went to trial with Carl as a defendant, we must assume that the statutory notice was given. If the notice had not been given, Carl would not have been a defendant in the previous case.

The second defense that the government might raise would be the statute of limitations. Under subsection 5-101 of the Courts and Judicial Proceedings Article of the Code, a civil action

at law must be filed within three (3) years from the date it accrues unless another provision of the Code provides a different period of time within which an action shall be commenced. The incident for which Paul wishes to sue occurred on December 23, 1999. If Paul does not come into your office until December 26, 2002, the statute of limitations will have expired.

QUESTION VII

On July 4, 1999, Jane was driving northbound on Interstate 97, a divided highway in the State of Maryland. As she was approaching her exit in Anne Arundel County, her automobile suddenly stalled and her automobile was struck from behind by an automobile driven by Lance.

After recovering from her injuries, Jane filed a suit against Lance in the District Court of Maryland for Anne Arundel County demanding damages in the amount of \$10,000.

After being served with the Statement of Claim, Lance's attorney filed a Notice of Intention to Defend within the time required and filed a request for a jury trial.

As Jane's attorney, you receive a notice that the case has been transferred to the Circuit Court for Anne Arundel County. Thirty (30) days after receiving the Notice, Lance's attorney has filed no further documents, but has sent you interrogatories for Jane to answer.

As Jane's attorney, what action, if any, will you take to protect her interests?

BOARD'S ANALYSIS

Rule 2-236(b) of the Maryland Rules of Civil Procedure requires that a defendant who, has removed a case to the circuit court by means of a prayer for a jury trial, file an answer or other response to the complaint within thirty (30) days after receiving the notice from the clerk. Since the thirty (30) days has expired and no answer has been filed, you should file a Request for Order of default in accordance with Rule 2-613 of the Maryland Rules of Procedure.

FACTS APPLICABLE TO QUESTIONS VIII & IX

Jared, a 16 year old resident of Charles County, Maryland, was driving his father's 1965 Corvette on a highway in Charles County at about 7:30 P.M. on March 1, 2000. Officer Tom Joyner of the Maryland State Police was manning a speed trap using a radar device approved by the State of Maryland and properly calibrated.

As Jared passed through the speed trap, Officer Joyner determined that the speed of his automobile was 75 mph in a 55 mph zone and proceeded to pursue Jared. Upon hearing the siren behind him, Jared slowed the automobile and pulled over onto the shoulder of the road.

Officer Joyner approached the vehicle and requested Jared's operator's license and vehicle

registration which Jared provided. While looking at the license and registration, Officer Joyner noticed that Jared was perspiring and seemed extremely nervous. Becoming suspicious, Officer Joyner asked Jared to exit the vehicle and open the trunk so that he could inspect it. When Jared refused, Officer Joyner then took the keys from the ignition and opened the trunk. Inside the trunk was a closed gym bag. Officer Joyner then opened the gym bag and found a black plastic trash bag containing about 2 pounds of a green leafy substance which he believed to be marijuana. Jared was then placed under arrest.

A month later, Jared was indicted as an adult by the Charles County grand jury for possession with the intent to distribute marijuana. Jared and his parents have come to you

seeking your advice. The parents tell you that they wish to have Jared taught a lesson, but they don't want him to go to jail.

QUESTION VIII

During your interview with Jared, he tells you that the gym bag belongs to his father, but if the matter goes to trial, he will testify that it belongs to him so that his father will not be prosecuted.

- (1) Discuss all of the relevant motions or defenses you would file on Jared's behalf.**
- (2) How would you handle Jared's testimony when this matter is brought to trial?**
- (3) What other issues do you see regarding your professional responsibility in this matter?**

BOARD'S ANALYSIS

You must file a Motion to Suppress the evidence seized as a result of the search because the search was made without the benefit of a warrant and without any apparent probable cause. Rule 4-252(a)(3) of the Maryland Rules of Procedure. This is a mandatory motion, and if not filed in accordance with the Rule, is waived.

Since Jared is only sixteen years old, the next motion that you should file is a Motion to transfer To Juvenile Court under Rule 2-252(c). This is also a mandatory motion which, if not filed in accordance with the Rule, is waived.

Regarding Jared's possible testimony, you are faced with a dilemma. You have a juvenile client who intends to give false testimony. Under Rule 1.2(d), you are prohibited from counseling Jared to testify falsely. Moreover, you have an affirmative duty to counsel him concerning the consequences of his actions if he chooses to do so. In addition, under Rule 3.3(a), you are prohibited from allowing Jared to testify falsely. However, you need not inform the court of

Jared's intention to testify falsely.

In addition to these two problems, you have a possible conflict of interest. Rule 1.8(f) provides that a lawyer may not accept compensation for representing a client from one other than the client unless: (1) the client consents; (2) there is no interference with the lawyer's independence of professional judgment or the client-lawyer relationship; and (3) information relating to representation of a client is protected by Rule 1.6.

Here you have Jared's parents who are presumably paying the fee and they wish for Jared to learn a lesson from this experience. If their desires to have him learn a lesson conflict with your attempt to provide him the best possible representation, you may be in violation of the Rule.

QUESTION IX

You have been successful in having Jared's case removed to the Juvenile Court. Jared, having been found delinquent in an adjudicatory hearing, has appeared before a Master for a disposition hearing. As his attorney, you have received a copy of the Master's Report and Recommendation which recommends that Jared be detained at a State facility for juveniles.

When you receive the Master's report, you inform Jared's parents of the recommendation. Jared's father, who did not testify in the adjudicatory hearing, now wishes to testify and tell the court that the gym bag and its contents belong to him.

What action would you take on Jared's behalf?

BOARD'S ANALYSIS

You should file exceptions to the Master's report under Rule 11-111(c). These exceptions must be filed within five (5) days after service of the Master's report and request a de novo hearing.

The next thing that you should do is encourage Jared's father to retain his own attorney since you will not be able to represent his interests regarding this matter.