

FEBRUARY 2003

OUT-OF-STATE ATTORNEYS' EXAMINATION

QUESTIONS AND BOARD'S ANALYSIS

QUESTION 1

(10 Points 20 Minutes)

Developer, Inc., a West Virginia corporation whose principal office is in Jefferson County, West Virginia, is engaged in developing residential subdivisions and the sale of building lots.

On February 1, 2000, Developer, Inc. purchased a 15 acre tract of land in Frederick County, Maryland, on which it created Heavenly Homes Subdivision. Developer, Inc. plans to build 15 homes in the subdivision.

On April 1, 2000 Developer, Inc. contracted with Ace Excavating Co. of Carroll County, Maryland to do all of the excavating, site preparation and landscaping in the subdivision at a fixed price of \$150,000. Payments to Ace are made based on monthly billings for work completed. On September 1, 2000, Ace completed the excavation, site preparation and landscaping on the 15 lots laid out on the subdivision plat and 10 of the homes have been sold and conveyed by Developer, Inc. Ace has been paid \$80,000 under the contract.

On October 5, 2000 Developer, Inc. informed Ace that further payments could not be made until the remaining homes were sold. There is no dispute between the parties concerning Ace's work or the amount owed.

Ace is concerned about Developer's financial situation and, on October 10, 2000 seeks your advice on what action you, a Maryland attorney, could take, if any, to protect his company's interest.

Developer is not qualified to do business in Maryland and does not have a resident agent.

- a) **Based on these facts what action or actions would you propose to take on Ace's behalf?**
- b) **How would you obtain service on Developer, Inc.?**

BOARD'S ANALYSIS

There are two procedures suggested by the facts by which Ace's interest expeditiously may be protected in light of Developer's tenuous financial condition:

1. Under Rule 2-115 an ex parte request for an order directing the issuance of a Writ of Attachment against the five lots which are still titled in the name of Developer. The request should be filed as a part of the initial complaint in contract against Developer for the remaining debt owed to Ace. Developer could obtain a release of the attachment by posting bond in an amount equal to the value of the property. Filing of a contract action without the request for Writ of Attachment would not adequately protect Ace under these circumstances because the remaining lots could be sold to a bona fide purchaser before a judgment could be entered against Developer.

CJ3-303 specifically authorizes attachment before judgment if the debtor is a nonresident or a corporation which has no resident agent in this state.

2. The facts also suggest the possibility of obtaining a mechanic's lien under Rule 12-301, et seq, if it can be established that Ace provided work or materials for or about a building per Rule 12-301(1).

Rule 2-124(c) provides that service on a corporation is made by serving its resident agent, president, secretary or treasurer.

If there is no resident agent or if a good faith effort to serve the noted officials has failed, service can be made on any person expressly or impliedly authorized to receive service of process.

Under Rule 2-124(m) the Department of Assessments & Taxation may be served if the entity being sued has no resident agent.

Rule 2-121 allows for service by certified mail, restricted delivery to the person to be served a copy of the summons, complaint and all other papers. Here however, this method of service is less likely to be reasonably calculated to give actual notice of the action which is the due process standard. In this case, the provisions of Rule 2-124 would be the preferred method of service.

QUESTION 2

(30 Points 45 Minutes)

PART A

On December 26, 1995, Porter, a resident of Garrett County, Maryland, sustained personal injuries when his vehicle collided with Dow's car in Somerset County, Pennsylvania. Dow died on December 28, 1995 as a result of injuries he sustained in the accident. Dow was a resident of Somerset County, Pennsylvania. His vehicle was registered in Pennsylvania jointly in the names of Dow and Wilma, his wife, and it was insured against liability by a policy issued in Pennsylvania. On December 28, 1997 suit was filed on behalf of Porter in Somerset County, Pennsylvania against Wilma as Personal Representative of Dow's estate. The Pennsylvania case was dismissed by the trial court on January 3, 1998 as barred by Pennsylvania's two year statute of limitations.

On April 15, 1998 Porter's attorney filed a personal injury action in the Circuit Court for Garrett County, Maryland against Wilma, Personal Representative of Dow's estate. In fact, no personal representative or executor had been appointed for Dow's estate in any jurisdiction. Service was obtained on Wilma at a consignment shop operated by Dow and Wilma prior to Dow's death. The business was conducted in a leased storeroom in Frostburg, Allegany County, Maryland.

The Summons and Complaint, with a set of Interrogatories addressed to Wilma as Personal Representative, have been forwarded to you, a Maryland attorney, by Keystone Insurance, Dow's insurance company with the request that you take the necessary steps to protect the interests of the insurer and its insureds.

The Complaint is a standard personal injury action containing appropriate allegations and claims money damages only against Dow's estate.

- a) **What procedural and/or jurisdictional issues are raised by the facts stated?**
- b) **What motions or pleadings should you file to address such issues?**
- c) **How and when would you respond to the Complaint and the Interrogatories?**
- d) **If you want to invoke Pennsylvania law, how and when is it done?**

PART B

On May 25, 1998, prior to any court action, Plaintiff filed an “Amended Complaint” in the Circuit Court for Garrett County in which Wilma, individually and t/a “Consignments Unlimited” is named as an additional Defendant. Wilma was served with process at the Frostburg store. The Amended Complaint alleges that at the time of the accident Dow was an employee, agent and servant of Wilma acting in the course of his employment. In fact, Dow was in route from the Frostburg store to his home in Pennsylvania at 11:30 p.m. when the accident occurred. A separate set of Interrogatories addressed to Wilma, individually, was attached to the Amended Complaint.

- e) **What preliminary motions would you file, if any?**
- f) **What responsive pleading will you file to the Amended Complaint on behalf of Wilma?**
- g) **Can Plaintiff file another set of Interrogatories in this case?**

PART C

On July 15, 1998, Wilma closed the Frostburg store which had been unprofitable. On August 1, 1998, Plaintiff petitioned the Orphans’ Court for Allegany County, Maryland to appoint a Personal Representative or a Special Administrator of Dow’s estate in Maryland. After hearing, on September 15, 1998, the Orphans’ Court dismissed Porter’s petition on the ground that Dow had no property in Maryland which was subject to probate. On appeal, *de novo*, the Circuit Court affirmed the Orphans’ Court decision. Porter filed a timely appeal to the Court of Special Appeals of Maryland from the decision of the Circuit Court.

- h) **Is the Circuit Court decision an appealable order? Explain.**

PART D

On October 20, 1998, Plaintiff Porter petitioned for and succeeded in having a Personal Representative of Dow’s estate appointed by the probate court in Somerset County, Pennsylvania, upon whom Porter served by certified mail a “Second Amended Complaint” on November 7, 1998. The Second Amended Complaint sought to add the Pennsylvania Personal Representative as a Defendant in the pending case in Maryland. Simultaneously, Porter filed a motion in the Maryland Circuit Court to substitute the Pennsylvania Personal Representative of the estate of Dow in lieu of Wilma as Personal Representative “pursuant to Rule 2-241(a).”

- i) **What response would you make to the motion to substitute?**

- j) What defenses would you raise to the Second Amended Complaint?**
- k) When should they be filed?**
- l) Does the appointment of a Personal Representative in Pennsylvania affect the appeal pending in the Court of Special Appeals?**

BOARD'S ANALYSIS – PART A

(a) Initially, the attorney for Dow's estate should file a preliminary (mandatory) motion to dismiss the complaint for lack of jurisdiction over the person and improper venue in accordance with Rule 2-322. The facts show that Wilma is not Dow's Personal Representative. However, this is not evident in the complaint and the motion should include an affidavit pursuant to Rule 2-311(d) from the Somerset County Probate Court attesting that no Executor or Personal Representative has been appointed for Dow's estate in that jurisdiction. Failure to raise this issue would be a waiver of defense. A request for a hearing on the motion should be included per Rule 2-311(f).

(b) An answer is generally required thirty days after service of the complaint and summons upon the Defendant. However, filing of the motion to dismiss will automatically extend the time for filing an answer to fifteen days after entry of the court's order on the motion. Per Rule 2-321(c).

Venue in this case is governed by CJ 6-201(a). It is where the Defendant resides, or on these facts, where the Defendant (Dow) carried on a regular business. In tort actions for negligence it can also be where the cause of action arose (Pennsylvania) per Rule 6-202. The applicable venue in this case is not where the Plaintiff resides but in Allegany County where Dow carried on a regular business.

(c) In this case the Answers to Interrogatories as well as the Answer to Complaint (assuming that the motion is denied) must be filed within fifteen days after the court enters a ruling on the Motion to Dismiss. Rule 2-421(b).

(d) Section 10-504 in CJ requires that a party who wants to present any admissible evidence of foreign law (Pennsylvania) or have the court take judicial notice of a foreign law, reasonable notice must be given to the adverse party. This can be done in the pleadings or by written notice. Here, if the Defendant believes that the substantive law of Pennsylvania is more favorable to the defense, written notice must be given to the adverse party.

BOARD'S ANALYSIS – PART B

(e) The amendments to pleadings are freely permitted under Rule 2-341. An amendment may join a party or add a party so long as one of the original plaintiffs and one original defendant remain as parties to the action. Here, although there is pending a Motion to Dismiss for lack of jurisdiction of the person, the court has not yet ruled on the Motion. Adding Wilma as a principal of Dow is permissible. Whether or not Dow was an agent of Wilma at the time of the accident is a factual issue and cannot be reached by a preliminary mandatory motion. The issue of improper venue should again be raised by preliminary motion as well as the permissive motion for failure to state a claim upon which relief can be granted under Rule 2-322(b).

The Garrett County Circuit Court should dismiss the suit against Wilma as Personal Representative and transfer the action against Wilma individually to Allegany County pursuant to Rule 32-327(b) which permits the court to transfer an action to any county in which it could have been brought. CJ 6-201.

(f) In a tort action in which Plaintiff claims only money, Rule 2-323(d) allows a general denial of liability as to each count of the Complaint.

However, counsel for the Defendant may also elect to file affirmative defenses of contributory negligence, statute of limitations and a separate defense denying agency under 2-323(g) and (h).

(g) Plaintiff is entitled to serve another set of Interrogatories. Wilma has been brought into the case individually and not in a representative capacity. In Rule 2-421(a) a party may serve one or more sets of Interrogatories having a cumulative total of not more than thirty Interrogatories to be answered by the same party.

BOARD'S ANALYSIS – PART C

(h) CJ 12-501 provides for direct appeal of a final judgment of the Orphans' Court to the Court of Special Appeals. CJ 12-502 permits an appeal de novo from a final judgment of the Orphans' Court to the Circuit Court. It is a new proceeding and the Circuit Court's decision refusing administration of Dow's estate and the appointment of a Personal Representative is a final order and is appealable to the Court of Special Appeals. Rule 6-111 provides for administration of decedent's estate in the county where decedent is domiciled or in the county in which the larger part in value of the property is located. The facts indicate that Dow had no personal property (consignments) or real property in Maryland (rental premises).

BOARD'S ANALYSIS – PART D

(i) A Motion to Dismiss based on Rule 2-241 which sets out the criteria for substitution of parties. Wilma was never a Personal Representative of Dow's estate. There is no existing Personal Representative for whom the Pennsylvania Personal Representative can be substituted. In addition the original action against Wilma as a Personal Representative would have been dismissed at the time the case was transferred from Garrett County to Allegany County.

(j) Except for the venue issue, the same defenses would be raised to the Second Amended Complaint as the Amended Complaint.

(k) The same time elements apply with respect to the Second Amended Complaint as those applicable to an initial Complaint, including extension of time upon filing of a Motion to Dismiss.

(l) The appointment of a foreign Personal Representative in Pennsylvania would render the issue of an appointment in Maryland moot.

QUESTION 3

(15 Points 25 Minutes)

Adams, a Maryland attorney, filed suit in the Circuit Court for Montgomery County, Maryland on behalf of Clark claiming monetary damages from ABC Leasing Corporation for breach of contract.

Clark had contracted with ABC to lease special machine tools which would be delivered to Clark at his Montgomery shop on or before June 1, 2002.

Clark's suit claims that ABC failed to timely deliver the tools which Clark needed to fabricate parts under a contract with Propulsion Lab, a designer and builder of small jet engines used in rocket manufacturing. Clark's efforts to obtain the tools and equipment from other sources was unsuccessful and Propulsion Lab canceled Clark's contract for failure to perform. As a consequence Clark suffered significant losses, including the profit from the Propulsion Lab contract. He was also removed from Propulsion Lab's list of approved suppliers.

After ABC filed its answer, ABC filed proper notice of the taking of the deposition for "use at trial" of Jones, a witness who lives in Ohio. ABC Leasing is incorporated and has its principal place of business in Ohio.

- a) **Can ABC be sued in Maryland? If so, where?**
- b) **What can Clark do to insure he has adequate opportunity to prepare for the deposition?**

- c) **What procedure is ABC required to follow to obtain the deposition of the witness?**
- d) **ABC, through its counsel, refuses to answer four of Clark's Interrogatories on the ground that the information elicited is irrelevant to the issues of the case. What action should Adam take?**

BOARD'S ANALYSIS

(a) CJ 6-103 provides for personal jurisdiction on nonresident defendants who contract to supply goods, services or manufactured products in Maryland. If the Defendant is a corporation and has no principal place of business in Maryland it may be sued where the Plaintiff resides - Montgomery County. CJ 6-2202(3).

(b) Rule 2-403. A motion for protective order which shows good cause to delay the deposition can be filed. Discovery guidelines suggest that contact be made with opposing counsel to seek agreement on discovery dates before filing the motion. See 2-401(c). Re: Discovery Plan.

(c) Rule 2-412(a)(2) and Rule 2-414 provide that in any other state, depositions shall be taken before any person authorized to administer an oath by the laws of the place where the deposition is taken or before any person appointed by the court. Per 2-401 the parties may stipulate to take a deposition before any person at any time or place. Any person not a party may be required to attend a deposition outside the state in accordance with the laws of the place where the deposition is held. Notice of the taking of the deposition must be given pursuant to Rule 2-412.

(d) Rule 2-432 provides for a motion to compel discovery for failure to answer Interrogatories. Rule 2-432 provides for immediate sanctions under 2-433(a) without an order compelling discovery if there is a complete failure to serve a response. Sanctions are spelled out in Rule 2-433(a) and (b) for failure to obey an order compelling discovery.

QUESTION 4

(10 Points 20 Minutes)

In a trial before the Circuit Court for Howard County on April 2, 2002, Plaintiff was granted a money judgment against the Defendant for the sum of \$120,000. On that day the Clerk entered the judgment into the computerized docket as follows:

“Judgment entered in favor of the Plaintiff Jones and against the Defendant Brown in the amount of \$120,000.”

On April 12, 2002, the Court signed a separate document titled "Judgment" which read as follows:

"The within case was tried by the Court on April 2, 2002 at which time the Court granted judgment to the Plaintiff, for and against the Defendant in the sum of \$120,000 and costs."

The document was filed by the Clerk on April 12, 2002 and entered into the computerized docket on April 15, 2002. The docket entry reads:

"Judgment. Copies to the Plaintiff and Defendant and counsel."

No post trial motions were filed in the case.

On May 10, 2002, the Defendant's attorney filed an Order of Appeal with the Clerk of the Circuit Court for Howard County. Plaintiff's counsel responded with a Motion to Dismiss the appeal in the Court of Special Appeals.

How should the Court of Special Appeals rule on Plaintiff's Motion? Explain.

BOARD'S ANALYSIS

Rule 2-601(a) provides that a judgment must be set forth on a separate document. The effect of this rule has been to convert the official form of a judgment from the docket entry to a separate document, and it is the entry of the separate document that is on the docket which constitutes the entry of the judgment under this Rule and Rule 8-202.

Rule 2-601(b) provides that the clerk shall enter the judgment by making a record of it... according to the practice of each court and shall record the actual date of entry. That date shall be the date of the judgment.

April 15, 2002 is the date of that entry which commences the running of the time for noting an appeal. See Annotation, Section 2-601.

The court should overrule the motion. The appeal was timely filed within thirty days of the entry of the signed separate document.

QUESTION 5

(15 Points 25 Minutes)

Dick wrote a letter to the editor accusing Paul of being a convicted child molester. The letter was published in a local newspaper in St. Mary's County, Maryland, on June 1,

2000. Dick based his accusation on a rumor that someone saw it on the Internet. In fact, Paul was an exemplary citizen who has never been charged with any criminal conduct. As the direct result of the publication of Dick's letter, Paul was fired from his job on June 5, 2000 and dismissed as a scoutmaster that same day.

On May 29, 2001, after being served with a Complaint and filing an Answer in proper person asserting a general denial, Dick confronted Paul in front of a local bank in St. Mary's County and asked "how can you sue me, you pervert? Dick then attempted to punch Paul in the face. Paul fell while trying to avoid the punch and fractured his skull. On June 11, 2002 Paul died of complications directly caused by the fractured skull. Paul was survived by Susan, his wife.

On June 12, 2002, Susan was appointed Personal Representative of Paul's estate. Susan immediately hired Larry to represent her and Paul's estate. Larry amended the Complaint against Dick in the pending defamation case to substitute the Personal Representative of Paul's estate and Susan as surviving spouse, as co-plaintiffs.

Larry filed a second action on behalf of the Personal Representative of Paul's estate and Susan as surviving spouse as co-plaintiffs for the assault on Paul on June 10, 2001, and a false light invasion of Paul's privacy on June 1, 2002.

He then filed a third action on behalf of the estate for Paul's wrongful death on June 11, 2002 resulting from the assault a year and a day earlier. The wrongful death count sought damages for Paul's pain and suffering and for Paul's lost wages before and after his death.

Dick consults you, a Maryland attorney, regarding the filing of a petition to dismiss all claims.

What procedural grounds can Dick assert in a motion to dismiss? Can Dick succeed in having all claims dismissed?

BOARD'S ANALYSIS

A cause of action for slander abates upon the death of either party unless an appeal has been taken from judgment for a plaintiff. Maryland Annotated Code, Court's & Judicial Proceedings, §6-401(b). For the purpose of abatement there is no difference between oral and written defamation. The original defamation action abated upon the death of Paul. Libel and slander actions must be filed within one year of the date they occur. CS 5-105.

Otherwise, a cause of action survives death and may be brought or continued by the personal representative. Maryland Annotated Code, Courts & Judicial Proceedings, §6-401(a).

An action for assault must be brought within one year of the accrual of the cause of action. Maryland Annotated Code, Courts & Judicial Proceedings, §5-105. Susan's claim for assault must be dismissed because the cause of action belongs to the Personal Representative and because the statute of limitations has expired. The Personal Representative's claim for assault must be dismissed because the statute of limitations has run, unless Paul was under a disability after suffering the skull fracture, in which case the statute of limitations was tolled during the disability, Maryland Annotated Code, Courts & Judicial Proceedings, §5-201(a).

Even though the invasion of privacy relies on the same facts as the defamation claim, it survives and can be brought within three years of the accrual of the cause of action. But the cause of action belongs to the Personal Representative, not Susan.

Even though the wrongful death resulted from the assault, an action for wrongful death may be brought within three years from the date of death. The action can be brought by Susan, but not by the Personal Representative. Damages for pain and suffering and loss of earnings prior to death are not recoverable in a wrongful death action. Loss of future earnings from the date of death may be recovered in a wrongful death action.

QUESTION 6

(15 Points 25 Minutes)

The Slow Growth Alliance of Cecil Council, Maryland, an unincorporated association (SGA), aggrieved by an adverse decision of the County Zoning Board (Board), filed a Petition for Judicial Review in the Circuit Court on June 31, 2002.

The Board's decision, following a public hearing to which SGA was a party, granted Home Builders, Inc., (HBI) a variance permitting the construction of some but not all of the homes HBI sought to build in a new subdivision. The Board's written decision, dated June 1, 2002 was sent to SGA and HBI by ordinary mail on June 2, 2002, as required by the zoning ordinance.

The Clerk of Court mailed a copy of SGA's petition to the Board on July 1, 2002 and the parties received the Board's notice sent pursuant to Rule 7-202(d)(3) on July 5, 2002. The Board filed its Certificate of Compliance on the same date. On July 15, 2002 HBI filed a Response and preliminary motion to dismiss SGA's Petition for late filing.

a) How should the court rule on the preliminary motion?

On August 27, 2002, the Board delivered a certified copy of the record of the June 1, 2002 hearing to the Clerk of Court who notified the parties of the filing on the same date.

On October 30, 2002, HBI filed a Motion to Dismiss SGA's Petition for failure to file a memorandum as required by Rule 7-207(a). On November 5, 2002, SGA filed its

memorandum and served a copy on HBI's attorney. HBI then amended its Motion seeking dismissal for failure to timely file a memorandum.

A nonjury trial is scheduled for March 3, 2003.

b) How should the Court rule on HBI's Motion to Dismiss? Why?

BOARD'S ANALYSIS

(a) A petition for judicial review must be filed within thirty days after the latest of the date the agency order or action for which review is sought; or the date the administrative agency sent notice of the order or action to the petitioner if it is required by law to send notice to the petitioner.

The zoning ordinance required that the Board decision be sent by ordinary mail and this was done on June 2, 2002. The thirty day period in which to file the petition for review would have expired on July 2, 2002. The motion to dismiss should be denied.

(b) The record of the agency proceedings was sent to the Clerk on August 27, 2002 which was within sixty days of the filing of the petition for judicial review. HGA's memo was filed eight days late. Under Section 7.207(c) sanctions are provided for late filing including dismissal of the action if the late filing caused prejudice to the opposing party. Dismissal is not mandated. The trial of the action is not scheduled until March 3, 2003 and unless the moving party can show prejudice the court should deny the motion.

QUESTION 7

(5 Points 20 Minutes)

On May 1, 2002 Kate was arrested and charged with shoplifting a purse in a department store in Montgomery County, Maryland. Prior to the trial in the District Court, Kate's attorney successfully persuaded the State's Attorney to enter a *nolle prosequi* to the charge. On July 15, 2002 Kate decided to apply for a job with a state agency. She does not want to disclose the shoplifting arrest in her application.

What appropriate action can you take on Kate's behalf that would relieve her from disclosing the theft?

BOARD'S ANALYSIS

In this case, Kate has been arrested and charged with a crime and a petition for expungement can be filed in the original criminal action pursuant to Rule 4-504. Because the period of time between the charge and the petition is less than three years. Kate

will also have to sign a general waiver and release of liability of the law enforcement agency which made the arrest and filed the charges.

Nol pros of a criminal charge is not an acquittal and does not preclude prosecution for the same offense under a different charging document. Rule 4-247 (Annotation).