

**JULY 2009**

**OUT-OF-STATE ATTORNEYS' EXAM**

**QUESTIONS AND BOARD ANALYSIS**

**QUESTION 1**

*(20 Points - 30 Minutes)*

On August 3, 2008, Patrick , a business invitee, suffered multiple injuries when he fell into an abandoned well on Dale's farm located in Cecil County, Maryland.

Suit was filed on his behalf in the Circuit Court for Cecil County on April 10, 2009. Dale is the named defendant in the suit, which alleges that Dale's negligence was the proximate cause of Patrick's injuries.

At the close of all the evidence presented to the jury, Dale's attorney moved for judgment on the ground that the evidence presented was insufficient to support a finding that Dale was negligent, or in the alternative, that Patrick was contributorily negligent. The court denied the motion.

The trial was concluded on Friday, May 1, 2009. The jury returned a verdict in favor of Patrick and assessed damages at \$52,000.

On Monday, May 4, 2009, as directed by the court, the clerk of Court made the following entry in the court's docket registry:

“Verdict for Plaintiff. Money judgment of \$52,000 awarded by jury to Plaintiff–May 1, 2000.”

On May 14, 2009, Dale's attorney filed a Motion for Judgment Notwithstanding the Verdict (NOV).

On June 3, 2009, Dale's attorney filed a Notice of Appeal to the Court of Special Appeals of Maryland from the verdict and monetary award of the jury.

On June 15, 2009, the trial judge denied Dale's Motion for Judgment (NOV).

- a. Was Dale's post-trial Motion for Judgment NOV timely filed?**
- b. What effect, if any, does the Notice of Appeal have on the pending Motion for Judgment NOV?**

## **BOARD'S ANALYSIS - QUESTION 1**

- a. Dale's Post Trial Motion for Judgment NOV was timely filed. Maryland Rule 2-532 states that, in a jury trial, a party may move for judgment notwithstanding the verdict, only if that party made a motion for judgment at the close of all the evidence and only on the grounds advanced in support of the earlier motion. Since Dale made the motions at the close of all the evidence, he is entitled to file the Motion for Judgment Notwithstanding the Verdict.

Rule 532(b) states that the motion must be filed within 10 days after entry of Judgment on the verdict. The verdict was entered on May 4, 2009. Dale's Motion for Judgment NOV was filed on Ma 14, 2009. That is within the 10 days of entry of the judgment b the Court. Additionally, Maryland Rule 1-203(a) provides in pertinent part that, in computing any period of time, the day of the act, after which the designated period of times begins to run, is not included.

- b. The Notice of Appeal does not have any effect on the pending Motion for Judgment NOV. Maryland Rule 8-202(c), provides in pertinent part that a Notice of Appeal shall be filed within 30 days after entry, disposing of a motion pursuant to 2-532. It further provides that a Notice of Appeal filed before the disposition of the Motion for Judgment NOV, does not deprive the trial court of jurisdiction to dispose of the Motion. In this case, Dale filed his Motion for Judgment NOV on May 14, 2009 and his Notice of Appeal on June 3, 2009 before a ruling on the Judgment NOV. The Notice of Appeal did not deprive the trial court from ruling on the Motion for Judgment and the Court did, in fact, rule on the Motion on June 15, 2009.

## **QUESTION 2**

*(12 Points - 25 Minutes)*

James was charged in the Circuit Court for Montgomery County, Maryland, with kidnapping, theft and related offenses. The record reflected that he was served with an indictment, a warrant, and a notice of the penalties of the various charges. On November 22, 2008, James appeared without an attorney and the presiding judge determined that he had received a copy of the charging documents; that he understood that he had a right to an attorney; and that if he could not afford an attorney, the Office of the Public Defender would represent him. James indicated that he had spoken to an attorney but had not yet retained one.

On January 7, 2009, James appeared before a different judge for a status conference without an attorney and was again advised of his right to and the benefits of having counsel. James indicated that he did want a public defender.

On February 17, 2009, James appeared on his first scheduled trial date without counsel and advised the trial judge that he had decided to represent himself . The judge told him that he was making a mistake and again went over why an attorney would be helpful to him. After James reiterated his desire to represent himself, he informed the judge that the state had not furnished discovery materials to him and that he wanted to view certain specific pieces of evidence before trial. The State was ordered to provide complete discovery and a new trial was scheduled for May 10, 2009. The State complied with the court order.

On April 25, 2009, before another judge for motion hearings, James once again was questioned about his lack of representation and declared his intention to represent himself.

On May 10, 2009, James appeared before the court’s administrative judge and requested a postponement of his trial date claiming a failure of discovery on the state’s part. This request was denied. James then sought a continuance to obtain counsel; this request was denied. On the same date, James went to trial before a jury representing himself *pro se*. James was convicted of all the offenses with which he was charged and appealed his convictions.

James argues that he was improperly denied his right to counsel and that the trial court, on May 10, 2009, erred in failing to comply with the provisions of the Maryland Rules.

- a. **Was James’ waiver of counsel deficient under the Maryland Rules?**
- b. **Did the court abuse its discretion in refusing his request to withdraw his waiver and permit him a continuance to obtain counsel?**

## **BOARD’S ANALYSIS - QUESTION 2**

- a. No. Rule 4-215(b) addresses “express” waivers of the right to counsel. As indicated in the facts, James made several court appearances before different judges, appearing without counsel, **and asserted his** desire to represent himself. His formal waiver of counsel occurred on February 17.
- b. Rule 4-215(b) states in part that “After there has been an express waiver no postponement of a scheduled trial or hearing date will be granted to obtain counsel unless the court finds it is in the interest of justice to do so.”

### QUESTION 3

*(23 Points - 40 Minutes)*

April 1, 2008, Plaintiff, a resident of Carroll County, Maryland, was driving her 2008 Harrier SUV on Interstate 70 in Howard County, Maryland. Plaintiff was traveling at approximately 60 miles per hour and was in the process of passing another vehicle when, suddenly and without warning, the left front tire of Plaintiff's vehicle separated from the wheel rim causing loss of control. The Harrier rolled over in the median between the East and West bound lanes. Plaintiff was severely and permanently injured.

Initial investigation following the accident indicated that neither the Plaintiff nor any roadway condition or object caused or contributed to the happening of the accident. Examination of the tire and wheel rim revealed no obvious defect in either.

Plaintiff purchased the Harrier from Howard County Motors, Inc., a Maryland corporation of Ellicott City, on March 10, 2008. Howard County Motors is a new car dealer for Soto Motor Company of New York, Inc., the manufacturer of Harriers and other vehicle which are produced at various manufacturing plants in the United States and elsewhere.

Plaintiff's Harrier was produced by Soto's plant in Paducah, Kentucky. The tires were manufactured by Superior Rubber Company in Akron, Ohio, and the wheel and rim assemblies were fabricated by Car Parts, Inc., of Delmar, California. Superior Rubber also makes tires for the secondary market with dealerships throughout the country, including one in Baltimore, Maryland. Car Parts, Inc. sells its products only to automakers in accordance with the manufacturer's specifications. Car Parts, Inc. has a contract with Soto to supply wheel rims exclusively for the Harrier SUV.

On October 1, 2008, Plaintiff files suit in the Circuit Court for Carroll County against Howard County Motors, Inc., Soto Motor Company of New York, Inc., Superior Rubber Company, and Car Parts, Inc., claiming breach of express and implied warranties, strict liability and negligence, all properly alleged in the Complaint. Based on the given facts:

- a. Can Plaintiff obtain personal jurisdiction over the defendants or any of them in Maryland?**
- b. Is venue appropriate in Carroll County?**
- c. How may Plaintiff obtain service of process on each of the defendants?**

**Answer fully with appropriate references to the Maryland Rules.**

**Additional Facts Pertaining to Question 3**

Assume the following facts for this part:

Each of the defendants was served with a summons and complaint on November 3, 2008

Soto's engineering test and analysis of the tire and wheel rim assembly of Plaintiff's Harrier, conducted on June 1, 2008, indicated that both the left front tire and wheel demonstrated latent defects which contributed to a sudden loss of air pressure. Soto's analysis and conclusions were based in part on data generated by the use of computer models.

**d. Based on these facts what pleading or pleadings should Soto file in this case and when should they be filed?**

**e. At trial, can Soto introduce the computer generated data and conclusions? If so, under what circumstances?**

### **BOARD'S ANALYSIS—QUESTION 3**

- a. As to Howard County Motors, Inc., Sec. 6-102 CJ Art. Is applicable. Facts indicate this defendant was organized under the laws of Maryland and maintains its principal place of business in this state and is subject to personal jurisdiction.
- b. As to Soto Motor Company of New York, Inc., Sec. 6-103(b)(1)(2) & (4) are applicable. The facts establish that this defendant transacts business and contracts to supply a manufactured product in Maryland. It also derives substantial revenue from manufacturing products used in this state and is alleged to have caused tortious injury in Maryland by an act or omission outside the state. Thus, Soto is subject to personal jurisdiction.
- c. As to Superior Rubber Co., Sec. 6-102(b)(4) &(5) are applicable. The facts establish that this defendant regularly does business in Maryland, derives substantial revenue from manufactured products (tires) used in this state, and uses or possesses real property in Maryland. Superior's business in Maryland is continuous and substantial and renders it subject to exercise of personal jurisdiction.
- d. As to Car Parts, Inc., the facts do not support the conclusion that it is subject to personal jurisdiction in Maryland. Maryland's Long Arm Statute, Sec. 6-103 provides for in personam jurisdiction over all nonresident defendants who purposely avail themselves of the privilege of conducting activities in Maryland, consistent with the Fourteenth Amendment's due process clause as declared by the United States Supreme Court.

A defendant must have certain minimum contacts with Maryland such that maintenance of the suit does not offend traditional notions of fair play and substantial justice. Therefore, it is essential that there must be some act by which defendant purposefully avails itself of the privilege of conducting activities within this state and invoking the benefits and protections of its laws. (Poole & Kent Co. v. Equilease Assoc., 71 MD App 9 1987). Merely placing products in the stream of commerce is insufficient to confer personal jurisdiction. The defendant's conduct must be directed toward the forum state. The test is whether or not the defendant created a substantial connection to the forum state by actual and purposeful activity directed to the forum state, or otherwise invoked the benefits of protections of the laws of the forum state. Under the facts in this case, Car Parts, Inc. is not subject to personal jurisdiction.

**Venue.** Suit can be brought in Howard County where the cause of action arose and where Howard County Motors, Inc. carries on a regular business, Sec. 201 CJ Art. All of the defendants in this case who are subject to personal jurisdiction can be sued in Howard County, since one of the defendants carries on a regular business in the area and the cause of action arose there.

Superior Rubber Company carries on a regular business in Baltimore City. Thus, all of the defendants subject to personal jurisdiction can be sued there.

Soto Motors can be sued in Howard County under the above provision. It can also be sued in Carroll County where the plaintiff resides because it does not have a principal place of business in Maryland. Sec. 6-202 CJ Art. Sec 3; in Howard County where the cause of action arose; or in any county in the state. Sec. 6-202(11).

Where there is more than one defendant and there is no single venue applicable to all, all may be sued in the county in which any one of them could be sued, or in the county where the cause of action arose. Under the facts, Howard County is the most appropriate but not the only available venue.

**Service of Process:** As to Howard County Motors, Inc. service would be made on its resident agent, president, secretary or treasurer. If no resident agent and good faith attempts to serve one of its officers failed, service could then be made by serving the manager, a director or lower level officer or any other person expressly or impliedly authorized to receive service.

Delivery by a person over eighteen years of age who is not a party is permissible by personally delivering to the defendant a copy of the summons, complaint and other papers.

If there is no resident agent, substitute service may be made upon the State Department of Assessments & Taxation per Rule 2-124(m).

Soto Motors, as a nonresident New York corporation is required to register a resident agent in Maryland. Service will be made on a resident agent in the manner provided for a resident corporation such as Howard County Motor Sports, Inc. If none, substitute service may be made upon the Department of Assessments & Taxation. Rule 2-124(b). Certified mail, delivery restricted to a senior officer or a foreign corporation, return receipt requested, has been sanctioned by the Court of Appeals so long as it was reasonably calculated to apprise the defendant of the pendency of the action.

**Pleadings of Soto:** If Soto wants to challenge jurisdiction, venue or sufficiency of service of process, it must do so by a preliminary motion under Rule 2-322. Failure to file a motion raising these issues results in waiver. Either the motion or the answer must be filed within sixty days after service of the summons and complaint. Filing of the motion extends the time for filing an answer for fifteen days after entry of the court's order on the motion.

In addition to an answer, Soto should file a cross claim against Superior Rubber Company and Car Parts, Inc. The cross claim should be filed within thirty days after the time for filing of Soto's answer. This time will be affected by whether or not Soto files a preliminary motion. Rule 2-331(b)(c)(d).

**Computer Generated Evidence:** The evidence is computer generated evidence as defined in Rule 2-504.3. It is visual or other sensory depiction of an event or thing and a conclusion formulated by a computer program or mode. Soto may introduce such evidence if it provides written notice to all other parties within the time provided in the court's scheduling order, if any, or within ninety days before trial. Among other things, Soto must provide a statement of what the computer generated evidence purports to prove or illustrate, and preserve the evidence and furnish it to the clerk of court in a manner suitable for transmittal as

#### **QUESTION 4**

(12 Points - 20 Minutes)

M & M, Inc., a Maryland corporation with its office and warehouse in Garrett County, Maryland, is engaged in the transportation and storage of personal property in Maryland and throughout the eastern United States.

David and Dan, also of Garrett County, are employed by M & M to drive the company trucks to pick up and deliver personal property for storage at M & M's warehouse and to deliver stored goods to designated locations throughout its service area.

David and Dan both claim that the company has underpaid them for overtime hours worked in the year 2008. David claims \$25,000 and Dan claims \$31,000.

After a futile effort to resolve the pay issue, David and Dan retained Rumbold, a Maryland attorney, with offices in Frederick county, Maryland, to institute suit against M & M's Inc. to recover the claimed amounts.

Rumbold filed suit against M & M, Inc. in the District court for Frederick County, Maryland, alleging each client's claim in separate paragraphs of the Complaint. M & M, Inc. was appropriately served at its office in Garrett County.

**As attorney for the corporation, what response or responses would you make to the Complaint based upon the facts recited?**

#### **BOARD'S ANALYSIS—QUESTION 4**

These facts raise issues of jurisdiction and venue (also including the discretionary power of the trial court to transfer an action to another valid venue on the grounds of forum non conveniens).

M & M's attorney should file a motion to dismiss both claims prior to the date on which an answer is required. Failure to do so waives the venue issue. Eastman v Young, 250 MD 516; Rule 2-322(a).

Jurisdiction. The District Court of Frederick County does not have jurisdiction over Dan's claim for \$31,000. This amount exceeds the District Court's jurisdiction: CJ 4-401. The amount in controversy "exceeds" \$30,000.

The District Court does have jurisdiction over David's claim of \$21,500.

M & M can file a demand for a jury trial in which case both claims would be removed to the Circuit Court per CJ 4-402(e); MD Rule 3.325. M & M must file within 10 days after the time for filing a notice of intention to defend Maryland Rule 3-325. Failure to do so constitutes waiver. MD Rule 3-325(a)(2).

Venue. Frederick County is not the appropriate venue under the facts provided. Venue is set forth in CJ 6-201(a), CJ 6-202 and CJ 6-203.

On the facts presented venue is not appropriate in Frederick County. M & M carries on a regular business in Garrett County, Maryland and maintains its principal offices there. The facts are not sufficient to find that it carries on a regular business in Frederick County.

Forum non conveniens. Maryland Rule 3-326 provides for the transfer of an action to another county where action might have been brought if it is for the convenience of the parties and witnesses and serves the interest of jurisdiction.

Both plaintiffs and defendants are residents of Garrett County and either plaintiff or the defendant may file a motion to transfer.

## QUESTION 5

*(15 Points - 25 Minutes)*

Community Watch, Inc. (CWI), comprised of residents of Kent County, Maryland, was formed to monitor the activities of the county government and its various agencies. In particular, CWI has been critical of the county zoning board (Board) and what CWI calls its indiscriminate granting of variances to the home construction industry to permit the development of residential subdivisions in violation of the county zoning ordinance.

On March 3, 2009, after a public hearing, in which CWI participated, the Board granted Builders, Inc. a variance permitting it to construct 20 dwellings in a planned subdivision. The Board's written decision was dated March 16, 2009, and a copy was received by CWI on March 17, 2009.

On April 16, 2009, CWI filed a petition for Judicial Review in the Circuit Court for Kent County in compliance with Maryland Rules.

The Clerk of Court mailed a copy of the Petition to the Board on April 17, 2009. The Board mailed written notices to Builders, Inc. and CWI of the filing of the petition on April 22, 2009, and a Certificate of Compliance was filed with the Circuit Court on the same date.

On May 1, Builders, Inc. filed a Motion to Dismiss CWI's Petition for late filing.

**How should the court rule?**

On May 15, 2009, the Clerk of Court sent written notices to CWI and Builders, Inc. of the filing of the record made before the Board.

On June 19, 2009, Builder, Inc. moved to dismiss CWI's petition for failure to timely file a memorandum as required by the Maryland Rules. On June 25, 2009, CWI filed its memorandum. A judicial review before the court is scheduled for September 25, 2009.

**How should the court rule on the motion? Why?**

### **BOARD'S ANALYSIS—QUESTION 5**

Rule 1-203 provides that in computing any period of time prescribed by the Rules or Order of Court, the day of the actual event or default after which the designated period of time begins to run is not included

CWI's Petition for Judicial Review was filed on April 16, 2009 within the 30 days allowed by Rule 7-293 which requires that a petition for judicial review must be filed within 30 days after the latest date of the date of the action for which review is sought or the date the administrative agency sends notice of the order or action to the petitioner, or the date the petitioner received notice of the agency order.

The court should deny the motion to dismiss the petition for judicial review.

Written notice of the filing of the record and before the Board was sent to both CWI and Builders, Inc. on May 15, 2009.

Rule 7-207 requires the petitioner, CWI, to file its memorandum within 30 days after notice is sent by the Clerk of Court. CWI did not file a memorandum within the time prescribed. However, Rule 78-207(c) and 7-207(d) do not mandate dismissal unless the court finds that the opposing party was prejudiced by the late filing.

The court review is not scheduled until September 25, 2009, and unless Builders, Inc. can show prejudice, the court should deny the Motion to Dismiss.

### **QUESTION 6**

*(10 Points - 20 Minutes)*

On September 1, 2008, Waters, charged with a felony, appeared in the Circuit court for Washington County and prayed a jury trial. Thereafter, Waters retained Attorney Burns and the case was scheduled for trial on March 1, 2009.

One week before the scheduled trial, Burns negotiated a plea agreement with the Assistant State's Attorney which was acceptable to his client, Waters. However, contrary to local practice, Burns failed to notify the court that a jury was no longer required on the trial date.

Waters was present on the trial date but Burns failed to appear.

The assistant State's Attorney indicated that Burns had contacted him approximately one week prior to trial and indicated that he was a member of the city council of Frostburg, Maryland, and that he would be unable to attend court due to legislative duties. However, Burns indicated that he had secured substitute counsel to attend in his place and, by agreement with the State's Attorney, the case was to be entered on the stet docket.

When the case was called neither Burns nor substitute counsel appeared for trial. It was later learned the substitute counsel was detained in Frostburg due to a snow storm. A jury was present for the trial. Defendant Waters waived his right to counsel and accepted the state's offer to place the case on the stet docket.

The trial judge issued a show cause order directed to Attorney Burns as to why he should not be sanctioned for direct criminal contempt and docketed the contempt proceeding as a separate proceeding. A special prosecutor was appointed and the contempt proceeding scheduled for a separate date. On the date that the contempt hearing was scheduled the original trial judge decided to proceed summarily against Burns. After the court took judicial notice of the trial transcript the court found Burns in direct criminal contempt of court.

- a. Could the court proceed summarily against Burns?**
- b. Can the trial judge vacate te order initiating contempt proceedings and convert to contempt proceedings that are summary in nature?**

**Explain fully.**

- a. No. The trial court could not have treated Burns failure to appear as a direct contempt because pursuant to Maryland Rule 15-203 Burns, the alleged contemnor, should be afforded an opportunity to present exculpatory or mitigating information.
- b. Pursuant to Rule 15-203 a court against which a direct contempt is committed can punish the contempt summarily at the time it is committed or immediately after the proceeding. When the court chooses not to summarily punish the contemnor,

it foregoes the chance to proceed summarily. Proceeding summarily at a later date circumvents compliance with Maryland Rule 16,204 and 15-205. The trial court therefore erred in not following the procedures in Rules 15-204 and 15-205.

### **QUESTION 7**

(8 Points - 20 Minutes)

Andrew brought suit against Berry Rental Agency. The suit contends that Andrew suffered physical harm as a result of Berry negligently renting a home which was alleged to contain mold and lead paint. Andrew's lead paint expert was deposed by videotape which was stenographically recorded. The Notice of Deposition specified that the videotaped deposition was to be used at trial. At the time of trial however, Andrew decide not to offer the deposition into evidence as part of his case. Berry, believing that parts of the deposition helped the case, asked the courts' permission to read portions of the stenographic transcript into evidence. Andrew objected and requested the videotape be played. Berry explained he preferred to read the excerpts to save time and avoid stopping the videotape at irrelevant portions of the transcript and at portions the court had previously ruled inadmissible.

### **BOARD'S ANALYSIS—QUESTION 7**

- a. No rule specifically allows the procedure the defendant wants to employ. Rule 2-419(d) is not applicable because there is no showing that the witness is unavailable. Rule 2-419(a)(4) makes no mention of using the transcript but refers specifically to the videotape and says in pertinent part: A videotape deposition... of any expert witness may be used for any purpose even though the witness is available to testify if the Notice of Deposition specified it was to be taken for use at trial.
- b. Rule 2-416(a) specifically authorizes a stenographic record of the deposition. Read together with 2-419 and absent any allegation or proof of prejudice would allow the court to permit readings of portions of the stenographic transcript. Additionally 2-419(a)(1) is broad enough to cover the stenographic transcript. It's difficult to understand why the rules would permit a stenographic transcript if it could not be used for some purpose. In any event, the analysis is more important in this portion of the answer than the conclusion.