

JULY 2015
TENNESSEE BAR EXAMINATION

(MPT-1) In re Bryan Carr

In this performance test item, examinees are associates at a law firm representing Bryan Carr, who seeks legal advice regarding his potential liability for certain credit card purchases that his father made using Bryan's credit card account. There are a number of credit card transactions (automotive repair, groceries, fuel, books, and power tools) made at different vendors over a period covered by four credit card statements. Bryan has not yet paid the most recent statement, but he paid the others before realizing that his father had used the credit card for items other than the automotive repair (which is the reason he gave his father the card). Examinees' task is to draft an opinion letter to the client. In the letter, examinees are to analyze each of the credit card transactions in light of the facts, relevant statutes, and case law to determine the client's responsibility for payment for each charge. The File contains the instructional memorandum from the supervising attorney, the firm's guidelines for drafting opinion letters, a transcript of the partner's telephone conversation with the client, a copy of a letter Bryan Carr wrote authorizing his father to use the credit card, and credit card statements for the months at issue. The Library contains various sections of the federal Truth in Lending Act, excerpts from the Restatement (Third) of Agency, and two cases.

QUESTION 2

Joe is accused of robbing a drug store in Nashville and stealing prescription medications, cash, and gift cards. He is on trial in state court. The facts are as follows:

Moments after the robbery, Nancy Neighbor saw a man she recognized as her neighbor Joe running from the store. She did not talk to the police after the robbery but came forward two months later, telling Officer Smith:

I saw Joe run out of the store. He is a no-count low-life. He's always in trouble. He drinks and smokes pot and steals vegetables from my garden. He probably robbed the store to support his bad habits. I wouldn't say anything, but I have cancer, and my doctor told me that I might not make it through the year.

Nancy died two months later and, thus, cannot testify at trial.

Police interviewed Joe's ex-wife Cindy. She reported that when they were married Joe told her that she was a goody-two-shoes and he wanted a divorce so that he could "make a big score" since he couldn't do that with her around. Prior to divorce, she saw internet browsing history on Joe's tablet that included chat room discussions of the street value of prescription medications and a true-crime novel about armed robberies of convenience stores.

Police also collected cell phone videos from two store patrons who were on the floor during the robbery. Neither wants to testify due to fear. All statements made by the robber can be heard on the videos, though his face is never clearly visible.

At trial, the prosecution attempts to present certain evidence over properly made objections by defense counsel. For each question below, state whether the evidence should be admitted and discuss the applicable rules of evidence.

- A. The prosecution makes a proffer of testimony by Officer Smith regarding the comments by Nancy Neighbor including what she saw and her actual statements. Should the judge allow the testimony? Explain why or why not.
- B. The prosecution makes a proffer of testimony by Cindy about Joe's "make a big score" statement and the internet browsing information. Should the judge allow this testimony? Explain why or why not.
- C. The prosecution seeks to have Officer Smith show the cell-phone videos to the jury and explain what they show. He plans to identify Joe as the robber in the videos based on his voice, speech patterns, size, and movements. Should the judge allow the evidence to be presented? Explain why or why not.
- D. Are there any differences under the Federal Rules of Evidence for questions A-C that would lead to a different ruling or an alternate analysis of the admissibility of the evidence?

QUESTION 3

Reverend Able regularly preaches weekdays on a street corner in downtown Winchester, Tennessee during the hours of 10 a.m. until 2 p.m. Reverend Able does not always obtain a required permit for public demonstration activity as

(Question 3, CONTINUED:)

required by local ordinance. In pertinent part, the local ordinance provides the following:

It shall be unlawful for any individual, club, organization, or similar group to hold any meeting, parade, demonstration, or exhibition on the public streets without first securing a permit from the recorder. No permit shall be issued by the recorder unless such activity will not unreasonably interfere with the peace and quiet enjoyment of other citizens of public areas of the City....Any such meeting, parade, demonstration, or exhibition shall be conducted only on weekdays during the hours of 9:00 a.m. and 5:00 p.m. . . .

The ordinance further prohibits the use of sound amplifying devices during public demonstration, and also gives the city recorder no discretion as to whether to issue a permit upon payment of the applicable fee.

During the Wednesday lunch hour, Reverend Able was preaching with the aid of a bullhorn and went on at length during his discourse about the "sorry state of our local government." "This bunch of redneck, two-faced, inbred buffoons on city council and county commission should be locked up," Reverend Able proclaimed. "There is not a one among them who had the backbone or guts to support the placement of a display of the 10 Commandments in the Courthouse entrance or City Hall reception

area. There is also not one willing to sponsor a resolution to put "In God We Trust" over the entrance door to either government building. Godless no-accounts like these don't deserve to live," he concluded.

Deputy Baker of the County Sheriff's Office was returning to his cruiser having finished his lunch at a downtown café. As he approached Reverend Able on the sidewalk, Baker told the Reverend he would be well advised to "tone your language down. People are trying to have lunch and conduct business around here." Reverend Able construed the remark as provocative and, pointing his finger inches from Baker's face, told Deputy Baker he would "say anything I damn well please. I will whip you or anyone else that tries to interfere with my exercising my rights."

Deputy Baker quickly pushed Reverend Able's finger out of his face, gripped the Reverend's wrist and announced, "I am placing you under arrest for assault and for demonstrating without a permit if you don't have one."

A struggle ensued. In an effort to handcuff Reverend Able, who actively resisted (punched and kicked), Deputy Baker struck Able with his fist four times, twice in the face and twice in the chest. Able's resistance ceased and he was handcuffed, led across the street, placed in the Deputy's cruiser and driven to the county jail for booking. At the jail, Deputy Baker escorted Able to the jail's booking area. Before seating Able in a nearby chair, Deputy Baker suddenly and forcefully kned Able on the back of his thigh and exclaimed "this ought to teach you not to assault a police officer next time, asshole." Reverend Able was initially unable to make bond on charges of assaulting an officer, resisting arrest, and violation of the permit ordinance. He remained confined in the county jail for four (4) days until he was finally able to come up with sufficient funds to make bond. During the four-day period, he repeatedly complained of pain in his jaw. A jail nurse evaluated him on the two occasions he asked to be seen, and provided him with a muscle relaxer. It helped some with the pain.

Two days after his release, Reverend Able presented himself at the local hospital where a further evaluation disclosed a hairline fracture of his jaw. In six (6) weeks the fracture healed on its own.

His trial on the criminal charges is set to commence in one week. It has been continued from previous settings twice before, each time upon the motion of Reverend Able's criminal defense counsel with the full agreement of Reverend Able, who is very pleased with the representation his criminal defense lawyer is providing.

He has appeared this morning in your office for an initial consultation regarding the above-described events that occurred eleven (11) months ago. He admittedly did not have his permit on this occasion, having never sought one even though he could have paid the nominal \$5.00 permit fee. He contends that his constitutional rights have been violated in multiple ways associated with the circumstances leading up to and surrounding his arrest. He wants to file suit.

Reverend Able asks you to analyze and explain in detail the following:

- What, if any, of Reverend Able's constitutional right(s) may have been violated and may serve as the basis for any claim(s); and
- What is/are the defense(s) that could apply?

QUESTION 4

PART I:

On March 1, 2013, Paul was diagnosed with severe food poisoning the day after eating at a restaurant owned by Dan. After being notified of the incident, Dan contacted his attorney to investigate the potential claim by Paul. Dan's attorney interviewed several individuals who had dined at the restaurant on the same day as Paul. Dan's attorney prepared written statements summarizing the interviews that were signed by each of Dan's customers. Dan's attorney also sent food samples from Dan's kitchen to a lab for testing. The lab reports confirmed the presence of salmonella. Additionally, Dan's attorney hired a consultant to examine the restaurant's food preparation practices. The consultant prepared a report which concluded that the practices used by Dan's employees were unsanitary and unsafe.

On June 1, 2013, Paul filed suit in the Circuit Court of Davidson County, Tennessee against Dan for \$50,000 in compensatory damages and \$100,000 in punitive damages based on theories of negligence, recklessness and strict liability. The complaint alleged that Dan has engaged in a pattern of unsafe food preparation practices.

Paul's attorney submitted document requests under Rule 34, Tennessee Rules of Civil Procedure, requesting that Dan produce the following:

- all reports, written statements, and lab tests prepared or obtained in connection with Paul's food poisoning incident.
- all emails and other electronically stored information ("ESI") relating to any food poisoning incidents at Dan's restaurant occurring over the last ten years.

Dan informed his attorney there was a previous salmonella incident in 2007. However, the electronic files he kept for that incident were corrupted, and it will cost \$10,000 for a forensic specialist to access that data. Dan also has a hard-copy file related to the 2007 incident.

A) Should Dan be required to produce the customer statements, the lab tests and the consultant's report? Why or why not? Explain your answer.

B) Should Dan be required to produce the ESI related to the 2007 incident? Why or why not? Explain your answer.

QUESTION 4, PART II:

Two weeks after Paul's lawsuit was filed, Paul learned that Dan and his wife, Dana, had posted statements on the internet that Paul was a convicted felon who was trying to extort money from them by filing a frivolous lawsuit involving food poisoning. More than a year later, on July 1, 2014, Paul, believing that the statements posted by Dan and Dana had harmed his reputation, filed a motion to amend his complaint to include the following: 1) a new claim against Dan for libel; and 2) adding Dana to the lawsuit as a codefendant to the libel claim. Dan and Dana opposed Paul's motion to amend, asserting it is improper the Rules of Civil Procedure and barred by Tennessee's one-year statute of limitations applicable to libel claims.

C) How should the court rule on the motion to amend? Explain your answer.

QUESTION 5

After 7 years together, Martin proposed to his girlfriend, Gina, with a 4-carat diamond ring. Gina gladly accepted Martin's marriage proposal as Martin slipped the dazzling sparkler on her ring finger. Martin was excited to marry Gina, but he wasn't too thrilled about joining her family. Gina's family was known to be less than upstanding citizens in the Chattanooga community, especially Gina's brother, Tommy. While Martin had some reservations about Tommy, he decided to support Tommy in his latest business endeavor as a show of goodwill towards his future brother-in-law. Tommy recently opened a second-hand furniture store, "New 2 Me Furnishings," and Martin wanted to purchase new furnishings for his soon-to-be marital home. Martin purchased a leather sofa and large plasma screen television for a total of \$500. Martin moved the furniture into his residence.

A week before his wedding, Martin was at home lounging on his leather sofa watching his large plasma screen television when his favorite program was interrupted by a breaking news broadcast. The news reported that Tommy had been arrested for possession of stolen property and fraud. Reportedly, Tommy stole home furnishings from his neighbors to stock his furniture store. Tommy also purchased furniture from individuals using "bad checks" and counterfeit money. Later that day, Martin received a call from the police advising that Martin's plasma screen television was stolen property as police had confirmed that Tommy removed the television from Tommy's neighbor's home without consent while housesitting for the neighbor. The neighbor reported the television missing after returning from her month-long vacation. The police also advised that Tommy obtained Martin's leather sofa using counterfeit money. Martin was mortified! After speaking with the police, Martin immediately called Gina to break off their engagement and explained that he had to think about his reputation. Gina was heartbroken. Martin demanded Gina return the engagement ring immediately.

- A. Martin wants to keep the items he purchased from New 2 Me Furnishings. Discuss Martin's ownership interest in the (a) plasma screen television; and (b) leather sofa.
- B. Gina refuses to return the engagement ring. Discuss whether Gina is entitled to retain the engagement ring.

QUESTION 6

Dandy Lawn Service, Inc. ("Borrower"), a corporation formed under the laws of the State of Tennessee, sells lawn care products.

In May 2010, Lending Bank extended a line of credit to Borrower. Borrower and Lending Bank signed a security agreement whereby Borrower granted Lending Bank a security interest in all the assets that Borrower "now owns and hereafter acquires" to secure its obligations to Lending Bank. The assets include inventory, mowers, machinery and other equipment, trucks, and accounts receivable. On May 15, 2010, Lending Bank perfected its security interest by filing a financing statement in the appropriate governmental office.

Borrower would now like to expand into Mississippi. Selling Lawn Company, located in Mississippi ("Seller"), agrees to sell its business to Borrower. Seller also agrees to finance Borrower's purchase of the business. In June 2015, Borrower signs a promissory note payable to Seller. Borrower and Seller sign a security agreement whereby Borrower grants Seller a security interest in all the assets being purchased from Seller. The assets include all the same type of collateral in which Lending Bank has a security interest. On June 29, 2015, Seller sends a letter to Borrower's creditors and advises that Seller is extending purchase money to Borrower for Borrower's purchase of Seller's assets which includes the same type of assets in which the creditors have a security interest. On July 1, 2015, Seller perfected its security interest by filing a financing statement that complies with the law in the appropriate governmental office. On July 15, 2015, Borrower buys Seller's assets. Shortly after Borrower buys Seller's assets, Borrower decides to change its name. On August 1, 2015, Borrower changes its name to Spraying Lawn Service, Inc. Borrower sends Lending Bank and Seller a letter informing them of the name change.

- A. If you were giving advice to Selling Lawn Company where would you advise it to file its financing statement? Would your advice be any different if you were giving advice to Lending Bank? Please explain your answer.
- B. Does Seller or Lending Bank have priority in Borrower's collateral? Fully explain your answer. (Question 6 continued next page)
- C. What effect does Borrower's name change have on the secured parties' perfection status?

QUESTION 7

Anna and Bob are each 60 years old and have been married to each other for 38 years. They live in a beautiful home in

Tennessee and have two children: Carl, who is 28 years old, severely disabled, and still resides in the marital residence; and Daisy, who is 17 years old and currently attends an elite and very expensive boarding school in New York. Daisy was sent to boarding school after she had a child, Ethel, when she was 16 years old. Ethel lives with Anna and Bob who provide for all of her needs. Bob is a dermatologist and has managed his successful medical practice for 30 years. Anna worked as a nurse before she had children but has not worked outside of the home since Carl was born. Anna spends a significant amount of time working out and shopping. Anna's lavish spending has been an issue of contention between Anna and Bob for many years.

Last month Bob filed for divorce alleging that Anna is guilty of inappropriate marital conduct because he learned that she is having an affair with her personal trainer. Bob seeks to be awarded the majority of the marital assets due to Anna's bad behavior and overspending during the marriage. Anna filed an answer denying the allegation of inappropriate marital conduct and a counter complaint for divorce. In her counter complaint, Anna seeks a majority of the marital assets, including the value of Bob's medical practice, alimony, child support, and attorneys' fees.

- A. What factors should the court use when determining the type, amount, and duration of alimony, if any, to award Anna? Discuss. Include in your discussion the types of alimony available to Anna, and the modifiability of each type of alimony available.

- B. Assume Anna is named the primary residential parent of her children and Ethel continues to reside with Anna. Can Anna be awarded child support from Bob for Carl and/or Ethel? Explain.
- C. Assume that the trial court awards Anna \$1,000,000 from Bob's 401(k) plan, after determining it was marital property. Anna elects to have her portion distributed to her in periodic payments of \$10,000.00 per month. Anna spends \$5,000.00 of the amount received each month on beauty treatments, but invests the remaining \$5,000.00. Anna's investments are successful and result in an additional income of \$25,000 per year. Discuss how both the periodic \$10,000 payments and the income generated by Anna's investments will be considered for the purposes of determining Anna's ongoing right to receive alimony or child support.

QUESTION 8

Davis owned a large parcel of land in Bedford County, Tennessee. In 1990, Davis created a plat of her property through which she subdivided her tract into three lots: Lot A, Lot B, and Lot C. The plat depicted the boundaries of Lot A, Lot B, and Lot C, as follows:

- (a) Lot A is bounded to the North by a bend of the Duck River, to the East by Lot B, to the South by River Road, and to the West by Lot C;
- (b) Lot B is bounded to the North and East by forest land, to the South by River Road, and to the West by Lot A; and
- (c) Lot C is bounded to the North and West by forest land, to the East by Lot A, and to the South by River Road.

In addition to showing the boundary lines of the three Lots, the Plat memorializes a 10 foot wide footpath across Lot A for pedestrian ingress and egress for the benefit of Lot C, and the Plat also reflects an easement across all three Lots, which Davis reserved for herself and her heirs.

After creating the Plat, Davis lost interest in Lot A, Lot B, and Lot C and did not sell or even maintain the Lots. In fact, the footpath across Lot A for the benefit of Lot C had become overgrown with grasses so that it could not be distinguished from the remainder of Lot A. In 2000, Alan purchased Lot A from Davis due in large part to the secluded character of the Lot and its access to the Duck River. In fact, Davis listed Lot A for a price higher than Lot B and Lot C due to its access to the Duck River. In 2009, Betty purchased Lot B from Davis. In 2010, Courtney purchased Lot C from Davis.

Betty incorrectly believes that the Plat created an easement from Lot B across Lot A for access to the Duck River; so, every day, Alan watches as Betty walks from Lot B onto Lot A to go fishing for her dinner in the Duck River. Betty believes that this is necessary because her doctor requires her to be on an all-fish diet. From time-to-time, Courtney drives her golf cart from Lot C across portions of Lot A to get to the Duck River for sightseeing and swimming.

Kenny is Davis's grandson. Kenny lives down River Road not far from Lot A, Lot B, and Lot C. Kenny likes to go kayaking on the Duck River. He drives to a boat ramp up stream, floats down river, then get out at Lot A and walk across Lot A up to River Road.

Alan is a private sort of person and is tired of people crossing onto his property, Lot A.

Prepare a memorandum that sets forth with specificity and detailed reasoning the following:

- A. What rights do each of Alan, Betty, Courtney, and Kenny have in Lot A? Explain in detail what elements comprise such rights and what evidences such rights.
- B. Which of these people can Alan keep from crossing onto Lot A?

QUESTION 9

Sixteen year old Robert Miller lived at home with his parents in Pulaski, Tennessee after flunking out of school because of recurring issues with drugs and alcohol. Robert did not have a job, but his parents provided food, shelter and occasional gas money. One day, Robert decided to pick up his friend, Alex Jones, age 17, to go to the lake to hang out. On the way to the lake, the boys purchased beer at a local gas station from an attendant who did not check their ID. After a day on the lake and a six pack of beer, the boys decided to visit a local sports bar. The bartender was working on a new signature alcoholic drink for the bar and used Robert and Alex as taste testers. The combination of beers and "test drinks" from the bartender caused Robert and Alex to act very obnoxiously. At one point, the boys became so unruly that they were asked to leave the bar. After leaving the bar, the boys got in Robert's car, with Robert behind the wheel, and soon thereafter crashed into a car driven by seventeen year old Donna Jackson in the middle of a four way stop. Donna never saw Robert coming because she was texting a friend. Unfortunately, a doctor was driving by immediately after the crash, but did not stop to help. Donna was severely injured in the crash, including having to amputate her leg. According to the emergency room doctors, if the doctor that passed the scene of the accident had stopped and taken simple steps to stop the bleeding, her leg likely would have been saved. Alex and Robert suffered less serious injuries, but were hospitalized overnight and the tip of Alex's index finger was severed.

Identify all possible defendants and discuss the causes of action and any problems or limitations for each cause of action.

QUESTION 10

James was 87 years old and lived alone in Maury County, Tennessee after his wife died in 2013. He was described by neighbors, friends and his doctor as very independent and in good physical condition until March, 2014 when he had some minor strokes after which he had occasional memory lapses, sometimes forgetting where he lived and names of his two children, Mary and Sam. At times, though, his mental status showed no deterioration.

Mary and Sam stated they had a good relationship with their father, but because they both lived out of state it was hard to visit often. In May, 2014, his niece, Nan, quit her job and moved into James' house to help him, performing numerous services including buying groceries, cleaning house, fixing meals, and taking him to doctor's appointments.

A couple of weeks after moving in James' house, Nan took him to an attorney's office where he executed a general power of attorney authorizing her to execute or perform any act that the principal

might or could do to manage James' legal, financial and other affairs. James owned his residence, two pieces of unimproved real property in Maury County and \$500,000 in an account at ABC Bank in his sole name on which he added Nan as authorized signer only.

Nan, using her power of attorney, opened a joint account at XYZ Bank in the name of Nan and James with right of survivorship and transferred funds from James' ABC Bank account leaving a balance of \$50,000. Nan used the funds in the XYZ Bank account to pay James' bills and had James' monthly social security and pension benefits direct-deposited into the XYZ Bank account. Nan, using the power of attorney sold his two parcels of land and put the proceeds in the XYZ Bank account.

Also using the power of attorney and funds in the ABC Bank account, Nan purchased a house next door to James in which she moved her daughter so her daughter could also help take care of James. The house was titled in the name of James and Nan with right of survivorship. In February, 2015, Nan took him again to the attorney's office where he executed a Will. James told the attorney that he was giving Nan \$50,000 in his bank account for taking care of him and that he was leaving Mary and Sam his residuary estate.

James died in March, 2015 and Nan filed to admit the Will to probate as the named Executrix. At James' death there was \$50,000 in the ABC Bank Account and \$300,000 in the XYZ Bank account.

- a. What claims or remedies would Mary and Sam have against Nan?
- b. Nan claims that all transferred funds, sales and purchases were done at the request of James. Describe on what legal grounds, if any, Mary and Sam would be entitled to recover any funds from Nan.
- c. Who would have the burden of proof?