

KENTUCKY BAR EXAMINATION

February 27, 2007

ESSAY QUESTIONS 1 - 6

QUESTION #1

1. Dr. Montague Saufley is a board certified neurosurgeon and has practiced for some 20 years. He recently moved from Seattle, Washington to Louisville, Kentucky after he broke up with his girlfriend. Dr. Saufley has accepted a position with Greenview Surgical Associates, L.L.C. in Louisville. As part of his acceptance of the new position, Dr. Saufley has been asked to sign an employment agreement with the new practice. Dr. Saufley negotiated his salary and other compensation issues with Greenview to his satisfaction and those terms are included in the agreement.

Greenview has now insisted the document also contain a restrictive covenant which would preclude Dr. Saufley from practicing his medical specialty within 200 miles of Louisville for a period of 24 months should he leave the group practice of his own accord.

You are an attorney practicing in Louisville. Dr. Saufley comes to you for advice concerning whether he should sign this employment contract, which includes the restrictive covenant.

In your opinion, if Dr. Saufley signs this agreement, is the restrictive covenant enforceable under Kentucky law? Fully discuss the issues of enforceability and possible defenses should Dr. Saufley sign this restrictive covenant and then leave the group practice of his own accord.

2. Dr. Kay Sandling is a 35-year old thoracic surgeon who lives and practices in Lexington, Kentucky. Sandling's home is located in the posh Lone Oak subdivision in Lexington and was recently appraised at just under \$750,000.00. Last month, Sandling's home was heavily damaged by an accidental fire. At the time of the fire, Sandling's residence was equipped with an AAA fire alarm system.

Before the system was installed in her home, Sandling read over and then signed a form contract with AAA. It provided for an installation fee of \$250.00; for a term of one year with a \$25.00 a month fee for service and maintenance, and AAA retained title to the system. This contract further provided, in bold letters, a clause purporting to limit the liability of AAA to \$250.00 as liquidated damages in the event its equipment failed to function properly. It is undisputed that the AAA system failed to alert the AAA monitoring service or the local fire department of the fire at Sandling's home.

An investigation revealed that the fire was accidental and most likely caused by faulty wiring in the home. The alarm system did not cause the fire. It was determined the alarm system failure was a malfunction in the alarm monitor control panel, which AAA placed in Sandling's home.

Sandling has filed a lawsuit in the Fayette Circuit in Lexington against AAA, alleging negligence and strict products liability against the company. In discovery responses, Sandling has indicated she is seeking damages against AAA in the sum of \$745,000.00 for damage to the residence. The discovery responses further disclose the home was fully insured; Sandling has been paid; and this is a subrogation claim on behalf of the insurance company which paid the Sandling claim. The insurance contract permits this action to be maintained in the name of Dr. Sandling.

AAA states it offered Sandling the \$250.00 amount required of it by the contract and Sandling refused to accept. Sandling calls the \$250.00 offer an insult and argues the contractual language is not enforceable. The validity of the liquidated damages clause is now pending on motion for summary judgment in the Fayette Circuit Court. You are the law clerk for the judge considering this motion.

The judge has asked you to draft a memorandum outlining the best arguments for Sandling and for AAA on this issue. Discuss in detail the arguments in favor of Sandling and the arguments in favor of AAA to support the clause limiting liability.

QUESTION #2

Betsy and Billy Builder have lived in Bliss Bottoms Subdivision for fifteen years. Bliss Bottoms has fifteen (15) homes and is located in the City of Blissville, Kentucky. Buddy Builder, the Builders' fifteen year old son, will soon be driving, and the Builders ordered a specially designed automobile over the internet from a custom aftermarket manufacturer. Due to the number of special requests for the hot car, it will take fifteen (15) weeks to build. The Builders plan to have the automobile arrive for Buddy's sixteenth birthday. They want to surprise Buddy with the new car.

In planning for Buddy's sixteenth birthday, the Builders realized that they will need an additional garage for the automobile. However, wanting the new car to be a surprise, the Builders decided to construct a detached garage, telling Buddy that it is to be a residence for Grandma Bertha Builder.

When the Builders purchased their home, they received a deed that contained the same restrictive covenants as were in all of the deeds to the fifteen (15) lots in the subdivision which would be binding on the land, including the following:

No house erected upon any lot shall be used for other than a single family residential purpose; that each house must have a two-car garage attached, located in the basement, or unattached; all unattached garages must be approved by the Home Owners Association.

The Builders attended the monthly Home Owners Association (HOA) meeting and requested approval for the building. However, Billy Builder previously had a conflict with Nelly Novizits, President of the HOA, regarding a broken ankle Billy suffered after tripping over a sign in Mrs. Novizit's yard that read "No Solicitation"

when he had stopped at Mrs. Novizit's house to sell property insurance to her. Needless to say, the Builders and Novizits do not like each other. After the Builders' presentation of the garage plans to the HOA, the HOA discussed the matter for five minutes and then denied the Builders' request. Mrs. Novizit did not vote on the issue but did inform the Builders that the HOA would seek legal action against them if they proceeded to build the structure. Mrs. Novizit is not an attorney. She is an actress and plays a judge on television and thinks she knows all about legal matters.

The Builders were beset with anger; after all, there were other neighbors who have fences and pools that do not conform to the restrictive covenants. For example, Suzy Swimmer installed a waterfall by her pool that does not conform to the restrictions; the waterfall is six inches higher than the height limitation allows. And, Nancy Nimby installed a redwood fence across the back of her yard to block the view of Wal-Mart (nonetheless, under the cover of darkness, Mrs. Nimby secretly shops at Wal-Mart). By the same restrictive covenants, fences are not allowed without prior approval, but Mrs. Nimby didn't get approval. The Builders believe this is unfair.

The Builders decided to proceed with the building of the detached garage (all the while telling Buddy that it was for Grandma Builder). The Builder believed that once the HOA saw how nice the garage is and that it is not any more unsightly than Suzy's waterfall or Nancy's fence, the HOA would not protest. Besides, they believe Mrs. Novizit has no business advising that the HOA would sue; after all, she isn't a real judge or an attorney.

The Builders went to great extremes to make the structure nice, including making the facade look exactly like their house. It took four months (which was good timing since Mrs. Novizit was “on a shoot” most of the time) and \$150,000, but the structure is beautiful. In fact, it looks like a smaller version of their own house. The Builders are well pleased with their efforts.

Unfortunately, the HOA and the Builders’ neighbors are not at all pleased and filed suit within a month of the beginning of the construction for a permanent injunction and to have the building torn down. However, the Builders were successful in dodging service until the garage was completed, thinking that once the structure was complete, the HOA could not make them tear it down. The HOA did not pursue an exparte restraining order.

Discovery has been completed in the matter, and the parties filed cross motions for summary judgment. They agree that there are no factual matters in dispute. They have submitted evidence in accord with the facts as given. The matter is now ripe for your disposition as the real judge: Who prevails and why?

QUESTION #3

Aaron and Barbara were going through a bitter and ugly divorce, which included a custody battle for their six year old son. During this custody litigation, Aaron reported to the police that Barbara grew, smoked and sold marijuana in their home when they were married and that the child had reported to him that she continued to do so now that they were separated.

Based upon this information, Sgt. Lane and Det. Morris went to Barbara's home to ask her some questions one evening when the child was not there. The home was located in a fairly secluded area, where no neighbors were close enough to see what might have been going on there, although the house was close to the street and plainly visible from the sidewalk. The officers proceeded from the sidewalk up the driveway. Sgt. Lane walked up the path to the front door and began to knock.

Without waiting to see if anyone answered, Det. Morris walked around to the rear of the house. There was no path to the rear of the home and the back yard was enclosed by a ten foot brick fence. But the gate to the back yard was standing wide open. Det. Morris went through the gate and into the back yard, where he found there was no back door at all, but where he did smell an odor he believed to be marijuana coming from a slightly cracked rear window.

In the meantime, after only a few knocks, and not knowing it was a police officer, Barbara answered the front door and spoke with Sgt. Lane. He informed her they had received information that she was cultivating, using and selling marijuana in the home

and asked for permission to search the home. Barbara denied that she was growing, using or selling marijuana and declined his request to search. Sgt. Lane walked away from the home to the sidewalk, where he met Det. Morris. While Det. Morris was informing Sgt. Lane of the marijuana odor in the rear of the house, both officers observed Barbara through the large picture window. She was hurriedly carrying and moving what appeared to be flower pots, potting trays and grow lamps. The officers immediately returned to the home, forced their way in and conducted a search of the residence, where they found marijuana, both growing and harvested, as well as other evidence that marijuana had been grown, used and sold in the home.

Prior to trial, Barbara files a motion to suppress all evidence obtained by virtue of this warrantless search.

Will she prevail? Explain why or why not, including a discussion of the officers' actions.

QUESTION #4

Sue Roberts and her husband, Bob, have come to see you about damages to their home. They built this home in 1960, under contract, a turnkey job for \$250,000.00. They indicate there have been no problems with the home until this year. Recently, the roof and chimney began leaking, doors and windows throughout the house drag or will not open, cracks are appearing in the walls and brickwork, both inside and outside the house, and the fireplace brickwork is broken and mortar joints are separating.

The homeowner tells you an estimate was done by a local contractor, reflecting a repair cost of \$230,000.00, per the estimate brought with them. The Roberts also have a land appraiser who has recently appraised the fair market value of the property before and after the recent changes, which reflect a difference of \$230,000.00 as per a report they bring with them. The Roberts indicate to you they have spent about \$5000.00 doing temporary repairs in the last several months since they noticed the leaks that have recently started. They state these temporary repairs were done to prevent worsening of their damages.

Sue and Bob indicate they have regularly painted, cleaned and performed routine maintenance over the last forty-five plus (45+) years and have had no problems like this in the past. The Roberts state that they routinely mow their grass, weed in areas where there are shrubs and flowers, wash the windows outside and inside regularly, and have noticed no problems like they are now encountering in the last little while. In fact, these problems only started when construction on the local highway began. A state

agency had widened a local road, hiring a licensed road contractor, Cut Through, Inc.

Shortly after the road project began, Sue and Bob Roberts were in bed one morning and were awakened when a picture on the wall fell, shattering the frame, followed by a loud boom. Sue jumped out of bed and looked out the window, and saw dust rising from the area where the road work was being done. Bob got out of bed and drove over to the project and told the project manager about the picture falling and the noise, but the manager responded that they were on state property and there was nothing Bob could do. This road work continued, and the noise and vibrations became so bad at the home that Sue called the police. Officer Copper came out and talked to the Roberts, who shared their fears with him, and the officer indicated he would go talk to the company.

Officer Copper came back and told the Roberts the only person there was Johnny Dynamite, a licensed blaster, who informed the officer the blasting being done was within state regulated guidelines, and produced blasting records which documented this fact. Mr. Dynamite told the officer that he was present when Bob came to talk to the project manager and after Bob left, the manager stated that the State owns this property, blast away. These statements so angered Bob and Sue Roberts, the homeowners, that they have come to see you for advice. They want to know specifics and ask the following questions:

Please answer the following with rationale:

1. (a) Do the Roberts have a cause of action in circuit court against Cut Through, Inc.? State why or why not?

(b) Regardless of your answers to 1(a), would the State agency (Commonwealth of Kentucky) have liability in circuit court? Please explain.

2. What damages, if any, can be sought in a circuit court action based upon these facts, assuming there can be a recovery? Please discuss each element of damage that you feel would be available in a circuit court action and explain why, and the amount you feel could be sought.

QUESTION #5

Aunt Bea is a shop owner who was hospitalized for a serious illness. Her nephew, Andy, took care of the shop for several weeks while Bea was sick. In the hospital, Aunt Bea told Andy, "If you keep running the shop until I am well, I will sell you my coin collection for \$10,000.00." The coin collection is worth well over \$10,000.00. Andy agrees and suggests that the agreement be put into writing. She calls her attorney, who hastily drafts the agreement and sends it over to Bea's hospital room. A hospital employee, who is also a notary, notarizes Andy and Bea's signatures, and makes photocopies for them.

Andy runs the shop successfully for several more weeks until Bea returns. He then tenders the \$10,000.00 payment and demands the coin collection. Aunt Bea says: "I have no idea what you are talking about, Andy. I would never sell my coin collection."

Andy files suit to enforce the agreement. Bea denies the existence of the contract and pleads further that, if she did sign such an agreement, she was under the powerful influence of medications which rendered her incompetent. The case goes to trial. Several issues arise at trial, including the following:

- A. Andy moves to introduce into evidence his photocopy of the original contract. He says that he never saw the original document after the hospital worker took it to make copies. In pre-trial discovery, Bea had said that she never saw the contract at all. The hospital worker has no recollection of the transaction. The attorney who prepared the document died in a fire at his office, which also destroyed all of his records. The attorney for Aunt Bea objects to the introduction of the photocopy of the alleged agreement, arguing that the Kentucky Rules of Evidence state that "to prove the contents of writing, the original writing is required." How should Andy's attorney respond to persuade the Judge to admit the photocopy into evidence?
- B. To prove the circumstances surrounding the signing of the agreement, Andy called as a witness the hospital employee who notarized and

photocopied the document. His attorney asks the witness:

“What did you do with the original signed agreement after you made a photocopy?”

The witness answered as follows:

“I have no memory of this event at all, because in my job at the hospital I notarize and copy so many documents for our patients. I have made it a habit to always leave the original with the patient. Always! So, yes, I am sure I left the original document with Bea.”

Bea’s attorney objects, and moves to strike that answer from the record, on the grounds that the witness’s habit is inadmissible. You are the judge in the Kentucky Court where this case is being tried. How do you rule on that issue? State the reasons for your ruling.

- C. Aunt Bea calls to the witness stand a friend who had visited her room on the day in question. The visitor testifies, “Nurse Jones told me that Aunt Bea had been confused and disoriented that whole day.”

Andy’s attorney objects, citing as his reason, the rule against hearsay.

Bea’s attorney responds, “it is not hearsay because Nurse Jones is here to testify.” Again, you are the judge. Rule on the issue and explain your ruling. Would your ruling be any different if Nurse Jones had died prior to the trial?

QUESTION #6

A, B, and C decided to form a corporation and had drafted its Articles of Incorporation, which, inter alia, limited the corporation's debt to \$1,000,000.00. Before the Articles of Incorporation were executed, a promissory note for \$500,000.00 was prepared, which showed the contemplated corporation as maker, and which A, B, and C each signed as incorporator. After the Articles of Incorporation were executed and recorded, A and B voted for and C voted against, a resolution to authorize the corporation to borrow an additional \$700,000.00 by increasing liability on the note up to \$1,200,000.00, and the correct officers of the corporation executed such amendment to the note.

Months later, the corporation defaulted in regard to the note, the terms of which allowed the lender to accelerate all amounts due on the note. At that time, the total outstanding on the note was \$1,100,000.00 and the corporation had assets worth \$950,000.00 that could be used to pay said note. The only activity regarding said note had been to borrow more on it (\$500,000.00 to \$1,100,000.00) and pay interest.

What rights, if any, does the lender have against whom, and what rights for contribution or indemnity, if any, does anyone else have? Please explain your answers.