

February 2003 Bar Examination

Question I

John Able owned a farm in Eaton County, Georgia, where he raised goats and cattle. Through the middle of the farm and John's pasture ran a power easement on which Thunderbolt EMC (EMC) maintained a 10,000 volt transmission line.

John, along with his best bull, was found dead from electrocution near the base of one of the power poles.

John's widow brought suit in Eaton Superior Court against EMC for the wrongful death of her husband. Her suit alleged that EMC was negligent in wiring the poles, causing electricity to run down the pole ground wire and into the ground. She alleged that this current killed John when he walked near the pole.

EMC filed an answer denying liability. EMC also filed a third party complaint against Cane Erectors, Inc. (CEI) alleging that CEI had installed the wire and made the connections under contract with EMC.

CEI filed an answer to the third party complaint, but did not answer the original complaint. CEI also filed a motion to dismiss for improper venue, upon the ground that CEI was not a resident of Eaton County.

After discovery EMC moved for summary judgment against the plaintiff, asserting that John was killed by lightning. EMC attached the affidavit of L.N. Bolt, a certified meteorologist, who testified that the records of the National Weather Service (which were not attached to the affidavit) showed significant lightning activity in the area of John's farm at the time of his death. Bolt also stated that in his opinion the death was caused by lightning. EMC also attached to the motion the affidavits of five adult neighbors, each of whom stated that he/she saw lightning near John's farm about the time of his death.

Plaintiff filed nothing in rebuttal of the affidavits, but moved the court to strike the affidavit of Bolt. She also filed in response the affidavit of C. E. Sparks, an electrical engineer, who stated that he had inspected the line and was of the opinion that it was improperly wired. Plaintiff also moved for default judgment against CEI upon the ground that it did not answer the complaint.

Assume you are the trial court judge:

1. Rule on CEI's motion to dismiss for improper venue. Explain your ruling.
2. Rule on plaintiff's motion for default judgment. Explain your ruling.
3. a. Rule on EMC's motion for summary judgment. Explain your ruling.
b. Explain why you will/will not consider the affidavits of:
 - (1) L. N. Bolt
 - (2) The neighbors

4.
 - a. If the court grants the motion for summary judgment, what effect will that have on the third party complaint? Explain your answer.
 - b. What can plaintiff do to insure that she can proceed against CEI regardless of the ruling on the motion for summary judgment?
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Question II

Pyro Smith was operating a 2001 Chevrolet Monte Carlo when he was stopped by Deputy Sheriff Clark on Highway 171 in Louis County, Georgia. After issuing a warning citation for failure to maintain the lane, Deputy Clark asked Smith for consent to search his car. Smith refused.

Clark detained Smith for 30 minutes until a drug dog could be transported to the scene. Clark says his justification in detaining Smith was that he gave conflicting information about his itinerary; he was in a rental car; he was nervous; and Smith was an unauthorized driver, according to the rental agreement.

Upon the arrival of the drug dog ("Snort"), he immediately alerted to the trunk of the vehicle. Clark opened the trunk and discovered a plastic bag containing what appeared to be marijuana. Also in the trunk were five empty "Coleman Fuel" cans.

Smith was arrested for possession of marijuana. On the way to the Louis County Jail, Clark heard over the radio that a residence belonging to one Pyro Smith burned, and that the charred body of a woman identified as Pyro Smith's wife was located in the master bedroom area of the house. The fire only damaged the master bedroom.

Clark proceeded to Pyro Smith's residence. He informed Arson Investigator Wesley of the "Coleman Fuel" cans found in Smith's trunk. Wesley stated that this fuel is a common accelerant used by arsonists. Wesley called for "Blaze," the county arson dog. Wesley also retrieved samples from the "hot area" of the house, and sent them to the crime laboratory for analysis.

Blaze, a dog trained to indicate the presence of chemical accelerants, alerted to the same "hot spots" from which Wesley retrieved samples.

Smith was then arrested for arson in the first degree, felony murder, and malice murder. Smith was released on bond and returned to his home for the purpose of securing the premises.

Prior to trial, Smith's attorney filed a Motion to Suppress the evidence seized by Deputy Clark (marijuana and Coleman Fuel cans). The trial court denied Smith's motion.

At the trial of the case, the State contended that Pyro Smith struck his wife over the head rendering her unconscious. To cover his crime, he then emptied several cans of Coleman Fuel throughout the master bedroom and ignited the same. The origin of the fire was in the master bedroom area of the home, where Mrs. Smith's charred body was found.

Smith contended that he was not present when the fire occurred and that he had left home early that morning prior to Mrs. Smith's waking up. He stated that he drove to work in the automobile

that Mrs. Smith had rented while her automobile was in the shop. He admitted that he was an unauthorized driver, but he had no idea how the Coleman Fuel cans and marijuana got in the trunk of the vehicle.

The testimony from Arson Investigator Wesley and from other firefighters indicated that the progress of the fire and burn patterns in the house were consistent with the presence of an accelerant. However, fire debris sent to the State Crime Lab by Investigator Wesley was negative for the presence of accelerants. The State proffered evidence that Blaze, a dog trained to give an alert when he smells certain hydrocarbons, had given such an alert at the site in the house where investigators had come to believe an accelerant was used. This evidence was objected to by the defense because there was no evidence at the trial that dog alerts had reached a state of verifiable certainty nor scientific reliability. The dog alert was the only substantive evidence purporting to show the presence of an accelerant. The objection was overruled.

Arson Investigator Wesley testified that when Blaze detected the presence of hydrocarbons, he would lie down and point with his nose or paw to the area where the accelerants were present. It was based on Investigator Wesley's analysis of the dog's behavior that an opinion could be reached that an accelerant was present.

During the trial, the State brought in Professor Fulmer from the Tennessee State Police and Fire Academy to testify about the cause of the fire. The District Attorney presented an ex parte order to the trial judge wherein the trial judge authorized Professor Fulmer to enter the residence of Pyro Smith for the purpose of conducting a forensic examination. The trial court's order specifically said that the entry was not for purposes of search and seizure but only to allow Fulmer to view the scene. Professor Fulmer went to the Smith home with Investigator Wesley and broke into the home. He stated that he formed an opinion of the cause of the fire after he had had an opportunity to view the fire scene. The ex parte order and subsequent entry in the home by Professor Fulmer was unknown to the defense until Professor Fulmer testified.

The defense vehemently objected to the opinion testimony of Professor Fulmer on the grounds that his testimony was tainted by an illegal search. This objection was overruled and the trial court allowed Professor Fulmer to testify.

Pyro Smith was convicted of the offenses of possession of marijuana, arson in the first degree, felony murder, and malice murder.

You are the law clerk for Justice Wisdom of the Supreme Court of Georgia. You have been directed to give a written memorandum to Justice Wisdom concerning the following enumerations of error raised by Pyro Smith on appeal:

1. The trial court erred in denying Smith's motion to suppress evidence seized (marijuana and Coleman Fuel cans) from the 2001 Chevrolet. Your analysis should include a discussion on the (a) stop of the vehicle; (b) detention of Smith; and (c) Clark's probable cause to search the vehicle.
2. The trial court erred in allowing evidence that Blaze had alerted to accelerants.
3. The court erred in allowing the opinion testimony of Investigator Wesley that an accelerant was present in the Smith's master bedroom.
4. The court erred in allowing the opinion testimony of Professor Fulmer as to the cause of the fire.

Question III

You consult with Sue and Bob Smith, the owners of a local antique shop, which was recently destroyed as a result of a motor vehicle accident. With them was Will Williams. Will's wife, Mary Williams, was injured and ultimately died as a result of the same accident. According to the parties the facts of the accident, which occurred six months ago, are as follows:

The Smiths opened the antique shop approximately two years ago. The business was located in a building immediately adjacent to a four lane highway, with driveway access from the highway. On the day in question, Tom Thompson, a driver for Big Blue Trucking Company, was driving his vehicle on that highway. He lost control of the vehicle; it entered through the parking lot and crashed into the building. The impact resulted in a severe fire which destroyed the interior of the shop and damaged the exterior. Mary was a clerk working for the Smiths in the antique shop and was the only person in the building at the time of the accident. Each of the parties is interested in your firm's representation of them for their various claims for damages. Please review the following questions and respond accordingly. (NOTE: FOR THE PURPOSE OF QUESTIONS 1 AND 2, IGNORE ANY ISSUE OF PUNITIVE DAMAGES)

1. In regard to the claims of Sue and Bob Smith: Sue owned the building in which the antique shop was located, having inherited it from her family prior to her marriage to Bob. Sue and Bob formed the business and jointly purchased the furnishings and fixtures utilized in the business and the inventory. The business had been in operation for approximately two years prior to the date of the accident. For the first year, the business showed no profit. For the twelve months preceding the accident and resulting fire, the business had shown a profit, which had been steadily increasing in each subsequent month.

In regard to Sue and Bob Smith: What are the elements of damages you would you seek in regard to their losses as a result of the accident, and what is the measure for each element you identify?

2. Mary was 38 years old at the time of the accident. She and her husband Will had been married for 12 years and had two children, both of whom are minors. Mary had been previously married and has two additional children, one of whom is a minor and one is over the age of majority. In accordance with Mary's will, Will has qualified as the personal representative of her estate. Prior to her death, which occurred two months after the accident, Mary incurred medical expenses totaling \$45,000. She was earning a salary of \$500 per week as the clerk and manager of the antique shop. In regard to claims relating to Mary's injuries and subsequent death, please respond to the following:
 - A. In regard to Mary's personal injury claims prior to her death (DO NOT INCLUDE ANY CLAIMS RELATED TO WRONGFUL DEATH IN THIS SECTION):
 1. What would you argue are the elements of damages recoverable and what is the measure for each element you identify?
 2. Who or what is the appropriate party or entity to pursue these claims?
 3. Assuming that a recovery is made on one or more of the elements of damages you identified above, who would be entitled to ultimately receive those proceeds?
 - B. In regard to any claim for the wrongful death of Mary:
 1. What would you argue are the elements of damages recoverable and what is the

- measure of damages for wrongful death?
2. Who or what is the appropriate party or entity entitled to pursue this claim?
 3. Assuming that a recovery is made for wrongful death, who is entitled to share in the recovery and in what proportions?
3. For the purposes of question 3, add the following facts to the facts previously provided: It is determined during the investigation of the accident that the driver was intoxicated at the time of the accident. His blood alcohol level was .24. It is also determined that he had been an employee of Big Blue Trucking Company for at least 20 years and this was the third time he had been found guilty of driving a company vehicle in Georgia with a blood alcohol level above the legal limit of .08. It is also determined that Big Blue was aware of the prior convictions for DUI. With those additional facts, please answer the following questions.
- A. Is there any theory under which Sue and Bob Smith could seek punitive damages, in addition to the damages they may be entitled to recover under question 1 above? If so, state the theory upon which those damages could be recovered and whether or not any cap would apply.
 - B. In regard to the claims relating to Mary, are there any theories under which punitive damages could be sought in regard to Mary's injuries and/or death? If so, please outline those theories, state whether they could be claimed in regard to the personal injury claims, the wrongful death claim or both, and state whether any caps would apply.
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Question IV

After a long and contentious session, the Georgia Legislature passed the "Georgia Patriot Act" and presented it to the Governor for his signature. A copy of the legislation and an excerpt from the speech given by Senator Will B. Ready when the Act was introduced are provided below:

On the Floor of the Georgia Senate

Remarks of Senator Ready

Our country is in crisis. We stand at the brink of a war that will test our resolve as Americans to protect our citizens from terrorist attacks and to protect ourselves and the world from the proliferation of weapons of mass destruction. Yet even as we prepare for war, a recent study has shown that the young men and women of our state, our future generation of leaders, do not share the fire of patriotism in which we were baptized in our youth.

I am proud to present to you today for your consideration the Georgia Patriot Act. The Act will require that every child in Georgia learn to recite the pledge of allegiance and learn the proper protocols for the display, protection, and honoring of the flags of Georgia and of the United States. The Act will also acknowledge the sacrifice of our young men who register for the draft by providing them at the time of their registration with a Certificate of Appreciation and a check for \$500.00 that can be used towards their tuition at any Georgia university, college, or technical school.

The Georgia Patriot Act

Section 1. This enactment shall be known as the "Georgia Patriot Act."

Section 2. The recitation of the Pledge of Allegiance shall be a regular part of the morning activities of every school in this state. Every school in this state shall include in its curriculum instruction as to the proper protocols for the display, protection, and honoring of the flags of Georgia and of the United States. At the beginning of the fourth grade, every child attending a public or private school in the State of Georgia shall demonstrate knowledge of the words of the Pledge of Allegiance as then defined in the United States Code.

Section 3. Georgia citizens that register for the draft shall receive upon their registration for the draft or upon their presentation to the Office of the Georgia Secretary of State of proof of their registration, a tuition credit check in the amount of \$500.00, which may be used only to offset the tuition or fees charged by any university, college, or technical school operated by the State of Georgia.

The Governor has indicated that he will sign the legislation so long as there exist reasonable arguments in favor of the Act's constitutionality under both the Georgia and United States Constitutions. As counsel for the Governor, you have been asked to provide a memorandum discussing whether the legislation could withstand a constitutional attack based on the First Amendment and the Equal Protection Clause of the United States Constitution. (Another attorney has been asked to examine the legislation's ability to survive an attack based on the Georgia Constitution.)

You have been asked to confine your memorandum to the following issues.

1. Describe the challenge that might be made to the legislation under the free speech clause of the First Amendment.
2. Explain the test or standard that will be applied by a court in resolving this free speech challenge.
3. Applying that test or standard, describe the strongest arguments you think can reasonably be made in favor of the constitutionality of the Act under the free speech clause.
4. Describe the challenge that might be made to the legislation under the Equal Protection Clause of the United States Constitution.
5. Explain the test or standard that will be applied by a court in resolving this Equal Protection challenge.
6. Applying that test or standard, describe the strongest arguments you think can reasonably be made in favor of the constitutionality of the Act under the Equal Protection Clause.