

## February 2015 Bar Examination

### QUESTION 1

Mercury smart phones (Mercury) are the hottest new item in the electronics marketplace worldwide. Supply has not caught up with demand for cases for the Mercury. Grizzly manufactures the most popular aftermarket cases for all smart phones. Grizzly cases for the Mercury have not yet been introduced to the retail market in the United States.

Seller is a Georgia resident that imports electronic goods and sells them to retailers in the United States. Buyer is a Georgia resident that owns a retail store in Atlanta that sells smart phones and accessories.

Seller imported what he thought were 600 Grizzly Mercury cases. Seller placed an advertisement on Bobslist, a classified advertisements website, offering to sell all 600 Grizzly Mercury cases for \$10.00 each, for a total of \$6,000.00.

Buyer contacted Seller regarding the cases, and they agreed to meet at Buyer's store to discuss the sale of the cases. Seller took 100 of the cases with him to the meeting so Buyer could inspect them, and explained that the other 500 cases were stored in his warehouse. Buyer and Seller agreed on the \$6,000.00 sales price for the 600 cases.

Seller left the 100 cases with Buyer, and in return Seller accepted a negotiable check from Buyer drawn on Big Bank for \$3,000.00 with the understanding that Buyer would pay Seller an additional \$3,000.00 upon delivery of the additional 500 cases by Seller the next day.

Seller warehouses his electronic goods in a rental unit at the We Carry Storage Warehouse (We Carry) in Atlanta. The rent for the storage unit is \$1,000.00 a month. Due to the recent soft market for electronics, Seller is three months behind on his rental payments to We Carry.

Pursuant to the rental agreement, We Carry has properly padlocked Seller's storage unit denying Seller access to the unit until the \$3,000.00 back rent is paid in full. Immediately after the meeting with Buyer, Seller took Buyer's \$3,000.00 check to We Carry and properly indorsed the check to We Carry in payment of the past due rent to gain access to the other 500 cases and the other goods stored in the unit at We Carry.

Buyer sold three of the cases purchased from Seller to retail customers the same day he purchased them from Seller. Just before the close of business that day one of Buyer's three retail customers returned the "Grizzly" case for their Mercury to Buyer complaining that the sync cable slot and the AC/DC adapter slot (access slots) on the case did not properly align with the Mercury access slots. This made it impossible to sync or charge the Mercury while it was in the case.

Unbeknownst to Seller and Buyer at the time of their agreement, the cases that Seller sold Buyer were designed and manufactured by a third-party manufacturer, not Grizzly. The fact

that Grizzly did not manufacture the cases sold by Seller to Buyer was discovered only upon their later investigation of the problem. The third party manufacturer's case design was based on a stolen early prototype of the Mercury. Before the Mercury was released to the retail market, some design issues caused Mercury to slightly relocate the access slots on the Mercury. Thus the access slots on the stolen Mercury prototype and the Mercury later released to the retail market were just different enough that the access slots on the Mercury and the access slots on the cases sold by Seller to Buyer did not align properly.

Immediately after discovering the alignment problem, Buyer called Seller telling him the deal was off because the cases were defective. Buyer also demanded that Seller return his \$3,000.00 check.

Seller explained to Buyer that a deal was a deal and besides, he no longer had Buyer's check, but had used it to pay off other debts earlier that day.

**Questions:**

1. What Georgia laws apply to this transaction? Briefly describe why these laws are applicable.
2. Explain the application of the statute of frauds as it relates to the agreement between Buyer and Seller.
3. Discuss any express or implied warranties and how they may impact the rights and obligations of the Seller and Buyer.
4. Explain the significance of Buyer's opportunity to inspect the smart phone cases to Buyer's acceptance, rejection, or revocation of acceptance of the cases.
5. We are told in the facts that Buyer's check to Seller was a negotiable instrument and that it was properly indorsed by Seller to We Carry. Explain the application of the "holder in due course rule" and its impact on the rights and obligations of Buyer, Seller, We Carry, and Big Bank with regard to the check.

## QUESTION 2

Wife and Husband's twenty-year marriage to one another ended in divorce in December 2009 in Atlanta, Georgia, after a two-day contested non-jury trial. Husband filed a new action in Atlanta against Wife last week, and she was personally served at her Atlanta home yesterday with a copy of the complaint, summons, the court's standing order, and rule nisi. Wife retained your senior partner this morning to represent her in the new action. The new action, which is the first court filing since the divorce, prays for modification of the legal custody and physical custody of the child and parenting time, modification of child support, and modification of alimony.

The averments of the new action are Wife's drug and alcohol abuse, Wife's co-habitation/meretricious relationship with a woman with whom she is romantically involved, wife's announced move with the child to Florida, and Husband's reduction in income since December 2009.

Husband demands a jury trial. The court has entered its standing order in the modification action. The standing order *inter alia* prohibits either party from removing the child from the jurisdiction of the court. The rule nisi schedules the temporary hearing in the modification action for seven weeks from now.

The Final Judgment and Decree awarded the following: (1) a total divorce to both Husband and Wife; (2) alimony to Wife for 10 years or until Wife dies or remarries or Husband dies, whichever first occurs; (3) primary physical custody of the then 9-year-old child of the marriage to Wife; (4) parenting time with the child to Husband; and, (5) child support to Wife. The court also awarded joint legal custody of the child to Husband and Wife. Various equities were divided in the decree, and Husband received his business. At the time of the divorce Wife was unemployed, but income was imputed to her of \$1,500 per month. Wife is still unemployed. Husband's monthly income was determined at the time of the divorce to be \$90,000. Husband alleges that his monthly income is now \$45,000.

Wife has provided to you a hand-written letter signed by the child, electing to live with Wife. She has also provided to you a copy of her letter to Husband giving him over thirty days advance notice that she and the child are moving to Florida tomorrow.

Wife has already sold her Atlanta home, and pursuant to the closing documents, she must surrender possession of the home tomorrow to the new owner. A moving service has been at her home for two days packing furniture and furnishings for the move to Florida.

**Address each of the following questions in a memorandum to your senior partner:**

1. Does the allegation that Wife and the child will move to Florida state a claim for relief?
2. Is the standing order enforceable against Wife?
3. What is the relevance of the child's written election to live with Wife?
4. Does the allegation of Wife's meretricious relationship state a claim for relief?
5. Does the allegation of Husband's reduced income state a claim for relief?
6. Does Husband have a right to a jury trial?

### QUESTION 3

On the night of the Super Bowl game, Defendant and Driver decided it was a good night to get rich. Defendant knew of a rented house that was used as a “shot house/frat house” where men congregated to drink whiskey, gamble on sports, play poker, and “hang out.” There was always a lot of money on hand.

Around 10:30 p.m., with Driver behind the wheel and armed with a .380 pistol, and with Defendant carrying an assault rifle, they arrived at the “shot house.” Defendant crossed the yard and sprayed bullets into the front of the house and through the open front door, while Driver remained in the car with the engine running.

Inside the house, Victims #1 through #6 were engaged in watching the game and hanging out. Victim #1 was killed during the initial spray of bullets. Victim #2 was wounded and paralyzed from the waist down. Victims #3 through #6 hit the floor and tried to low crawl to the back of the house. However, they all froze when Defendant yelled: “Give it up!”

Defendant kept the assault rifle pointed at them as he searched all six victims and took all of the money and guns that he could find. After spraying the ceiling with a burst of gun fire, he ran to the car and Driver sped off. Defendant and Driver were subsequently caught, arrested, and charged.

#### Questions:

1. State the crime with which Defendant might be charged regarding the homicide of Victim #1 and the wounding of Victim #2, giving the elements of each such crime.
2. As to the crimes charged, compare the status of the Defendant with that of Driver, who remained in the getaway car and never fired a weapon.
3. Within two (2) weeks of being arrested, Defendant was denied bond after a hearing before a Superior Court Judge. Because of delays in getting forensic reports from the crime lab, the case was not presented to the grand jury for several months. On the 95th day following his arrest, and prior to indictment, Defendant’s counsel filed a second motion for bail and brought it on for hearing on the 103rd day following arrest. In the intervening eight days, the Grand Jury indicted Defendant on the charged offenses, and the district attorney opted not to seek the death penalty. What are the considerations for bail? State whether the Court’s decision as to this second motion is discretionary, and explain why or why not.

4. Following his indictment, the Defendant was arraigned and entered a “not guilty” plea. Defendant’s counsel then filed a demand for speedy trial. Explain the purpose of this type of motion, and the duties, if any, imposed on the Court as to the setting of the case for trial.

#### QUESTION 4

Andy Adams owned three contiguous tracts of land (Parcels 1-3) located on the same city block very close to an access ramp off I-75 in Bibb County, Georgia (the "Adams Property"). Andy died in 1994 and, through a devise in his will, left the Adams Property to his sons, Ben and Charlie. Ben and Charlie received an executor's deed conveying title to the Adams Property. Neither the will nor the deed identified the form of ownership interest the sons were to receive.

1. Parcel 1 is leased to Gasco, a gas station and convenience store.
2. Parcel 2, which is located between Parcels 1 and 3, is vacant.
3. Parcel 3 is leased to tenant, Twenty-Four/Seven, a dine-in restaurant with a full-service menu, but famous for its breakfast items that are always available. The lease for Parcel 3 is a ground lease that was entered into by and between Ben and Charlie, as Landlord, and Twenty-Four/Seven, as Tenant, in September, 1996 (the "Lease"). The initial term of the Lease was for a period of three (3) years with options to renew. The ten (10) renewal options were for periods of five (5) years each.

Section 13 of the Lease includes a food service restriction that reads as follows:

"Landlord warrants and covenants that Landlord will not buy, sell, lease or otherwise make available any land either now controlled by Landlord or acquired subsequent to the date of this Lease within one city block or 1,000 lineal feet, whichever is greater, of the Demised Premises for operation of any breakfast-oriented restaurant for a period of five (5) years and for operation of Hot Shoppe, Eggs & Such, and Egger's for the entire term of the Lease. Landlord further agrees that Landlord will not convey any parcel of land within the restricted area except by lease or deed containing restrictive covenants equivalent to the above, which fully protect Tenant's interest herein. Any subsequent purchaser or lessee under Landlord does hereby agree to be bound by these same provisions and agrees that the foregoing covenant is attached to and running with the land."

There are 3 exhibits attached to the Lease:

1. Exhibit "A" – legal description of Parcel 3
2. Exhibit "B" – additional provisions/special stipulations regarding construction of the restaurant.
3. Exhibit "C" – another restrictive covenant, that reads as follows:

"Landlord warrants and covenants that Landlord will not sell, lease or otherwise make available the area which lies between the south side of Parcel 3 (leased to Tenant) and the north side of Parcel 1 (the existing Gasco parcel) for the operation of any freestanding restaurant for the term of the Lease and any renewal options thereafter. Landlord and Tenant further agree that said restricted area as mentioned above may be made available for food service purposes within the confines of a gas/convenience store or attached with a common wall, provided said food service operation does not derive more than 25% of its revenue from breakfast items, including, but not limited to, breakfast meats, eggs, donuts, waffles, pancakes, and breakfast sandwiches, biscuits, gravy and grits."

4. Exhibit "C" is the last page of the Lease. It is initialed by Tenant's authorized signatory and by Ben. Charlie did not initial this page of the Lease. No other Lease pages are initialed.

The Lease was recorded in the public records of Bibb County three months later, together with a document entitled Covenants and Restrictions Agreement (the "CRA").

The CRA is by and between Ben Adams and Tenant. Charlie Adams is not a party to this agreement. The Recitals in the CRA include acknowledgments that Ben and Charlie entered into a Lease with Tenant and that Tenant desires to establish certain restrictions with respect to Parcel 3.



Section 1 of the CRA reads as follows:

"Prohibited Uses. Ben covenants and agrees that he shall not consent to the sale, lease, use or operation of any portion of Parcel 2 for the operation of any freestanding restaurant for the term of the Lease and any renewal options thereafter. Notwithstanding the foregoing, the said restricted area may be made available for food service purposes within the confines of a gas/convenience store or attached to or with a common wall, provided said food service operation does not derive more than 25% of its revenue from breakfast items, including, but not limited to, breakfast meats, eggs, donuts, waffles, pancakes, and breakfast sandwiches, biscuits, gravy and grits."

Fast forward to 2014. Your firm represents Jim's, a fast food restaurant that wants to buy Parcel 2 and build/operate a freestanding restaurant on Parcel 2. A title search reveals the recorded Lease and the CRA in the public records of Bibb County. Jim's has asked your firm whether it can legally use the property for its intended purposes. Jim's is best known for its hamburgers, but has a full breakfast menu and a drive-through. The Lease with Twenty-Four/Seven is still in effect, the renewal options having been exercised each time for the appropriate renewal periods.

**Your senior partner has asked that you prepare a memorandum addressing the following:**

1. Discuss the types of ownership interests (tenancies) that are recognized in Georgia.
2. What type of tenancy was established when Ben and Charlie inherited the Adams Property?
3. Discuss whether Jim's will be restricted from building and operating its restaurant on Parcel 2 under (i) Section 13 of the Lease, (ii) Exhibit "C" of the Lease, or (iii) the CRA?
4. Is it relevant that the Lease was recorded? Please explain your answer.