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VIRGINIA BOARD OF BAR EXAMINERS
Roanoke, Virginia - February 27, 1979

1. On January 5, 1979, Allen Miles filed a motion for judgment against Valley Pharmacy, Inc. seeking damages of \$50,000 for personal injuries. The motion for judgment contained two counts.

The first count alleged that on November 20, 1976, the defendant Pharmacy, through its servant and employee, negligently and carelessly filled, provided, dispensed and sold an improper, dangerous, erroneous, wrong and harmful medicine to plaintiff; that the defendant negligently failed to fill a prescription as directed by plaintiff's attending physician; that defendant breached its warranty, both express and implied, by not dispensing medicine which was proper and reasonably fit for its intended purpose, and that as a proximate result of defendant's negligence, plaintiff became sick and was permanently disabled.

The second count alleged that on November 20, 1976, the defendant breached its contract to furnish plaintiff with medicine which was fit for its intended purpose, thereby causing the plaintiff to become sick and permanently disabled.

The defendant filed its grounds of defense, denying that the plaintiff had sustained any injuries or damages as the result of any wrongful act on its part, and also filed a plea asserting that plaintiff's claim was barred by the "applicable statute of limitations".

What should be the Court's ruling on the defendant's plea of the statute of limitations as to:

(a) Count one?

(b) Count two?

2. Peters, a resident of Chesterfield County, brought an action at law in the Circuit Court of Henrico County against Davis, a resident of Henrico County, on a contract which had been entered into and breached in the City of Richmond, Virginia. The motion for judgment failed to allege where the cause of action arose, that the matter was within the Court's jurisdiction, or where the contract was entered into or breached, but simply alleged that a contract had been entered into between Peters and Davis; that Davis had breached it, and that Peters had suffered a loss as a result of Davis' breach.

Davis filed a demurrer upon the following grounds:

(a) The motion for judgment failed to allege where the cause of action arose.

(b) The motion for judgment failed to allege that the matter was within the Court's jurisdiction.

(c) The motion for judgment failed to allege where the contract was entered into or breached.

How should the Court rule as to each of the grounds of demurrer?

3. On November 3, 1978, Thomas Owen, a resident of Pike County, Kentucky, filed a motion for judgment in the Circuit Court of Wise County, Virginia, against Roy Mason, a resident of Wise County, Virginia, seeking to recover \$5,000 property damage sustained to his automobile as the result of a high-way traffic accident which occurred in Wise County on March 3, 1978. The motion for judgment alleged that the accident and resultant property damage was caused by the negligence of Mason in the operation of his automobile.

Mason received serious personal injuries in the accident and on November 17, 1978, he filed his grounds of defense and a counter-claim against Owen, asserting that the proximate cause of the accident was Owen's negligence and seeking to recover \$100,000 in damages on account of personal injuries which he received in the accident.

On December 3, 1978, Owen filed his verified petition in the United States District Court for the Western District of Virginia, reciting the foregoing proceedings and seeking removal of the case from the Circuit Court of Wise County to the United States District Court for the Western District of Virginia.

On December 13, 1978, Mason filed a motion to dismiss Owen's petition for removal, asserting that the Court was without authority to grant removal.

What should be the ruling of the Court?

4. Henry Lewis was indicted by a grand jury of Bland County upon a charge of breaking and entering the dwelling house of James Woodson with intent to commit larceny.

At the trial of this case the evidence established that the home of Woodson had been entered in the night of December 3, 1978; that certain personal property was taken therefrom, and that John Squealer had been apprehended by a neighbor of Woodson as Squealer was leaving the house carrying a large cloth

bag filled with silverware belonging to Woodson. At the trial of Lewis, Squealer appeared as a witness for the Commonwealth and testified that he and Lewis had previously planned the burglary and at the time he entered the house and stole the silverware, Lewis was waiting in an alley near the Woodson home with a get-away automobile.

Testifying in his own behalf, Lewis denied that he was in the vicinity of the Woodson home at the time of the burglary and stated that he was in Wytheville with one Walter Coleman at the time the offense occurred. Walter Coleman was not called as a witness, and when both parties had rested, the Commonwealth's Attorney requested and the Court granted, the following instruction over the defendant's objection:

"The Court instructs the jury that the unexplained failure of a party to produce a material witness raises a presumption that the testimony of such witness would have been adverse to the party thus failing to produce him. The presumption may be rebutted by the party explaining the absence of the witness and showing that he has been unsuccessful in procuring his presence despite diligent efforts made in good faith to produce the witness."

After the jury returned its verdict finding Lewis guilty of burglary, he moved the Court to set aside the verdict on the ground that the foregoing instruction was erroneous.

What should be the ruling of the Court?

5. Able Body lived next door to Weak Frame in Charlottesville, Virginia. Their relationship was not particularly pleasant, in part because of Roscoe, an aggressive German Shepherd dog owned by Able which frequently came on Weak's yard, dug up his garden, and frightened his children. Tiring of the unwanted visits by the dog which Able would not control, Weak had a fence installed by Handy Man, an independent contractor, to dissuade any more visits from Roscoe. After Handy Man had erected the fence, Able contended that it encroached on his property.

Able consulted his lawyer who on January 10th, 1979 filed a bill in equity in the Circuit Court of the City of Charlottesville seeking an injunction requiring Weak to remove the fence from Able's property.

Weak took the bill of complaint to his lawyer, Level Head. He explained to Level that he had given Handy Man a copy of his property survey, so that Handy could locate the fence properly within his property lines, but Handy had disregarded the survey and had erected the fence partially on Able's property. Weak contended that if the fence had to be moved, then Handy should be made to do it. Weak also asked Level to make Able keep Roscoe off his property. What procedural steps, if any, are

available to Weak in this suit a) to compel Handy Man to remove the fence, and b) to force Able to keep his dog off Weak's property?

6. A and B were members of the same union and decided to move from Newark, New Jersey to Newport News, Virginia to gain shipyard employment. They consulted a real estate broker who found a home for each one in a subdivision known as Laurel Acres. Sales contracts were executed between A and B and their wives and the Laurel Acres Development Company, the owner of the houses they sought to buy. After the sales contracts had been executed, the seller determined that A had a very poor credit history in Newark, with three judgments presently outstanding against him. The seller also learned that another of its agents had already sold the unit which B contracted for. Accordingly the Laurel Acres Development Company refused to convey the appropriate home to either A or to B. The two buyers seek your advice, asking whether they can file one complaint against Laurel Acres Development Company and compel specific performance for both A and B.

7. Ace Server was a pro of a tennis club in Suffolk, Virginia. His friend, Metal Worker, developed a new brand of aluminum tennis racquet which he persuaded Ace to sell under an exclusive sales agency agreement providing that Ace would not handle any other brand of metal racquet, that Metal would supply all the racquets Ace could sell, and that Ace would receive a twenty percent commission on each racquet sold. The agreement contained no provision regarding its duration.

Ace found that there was an extremely ready market for the racquet in and around Suffolk, and sought means to increase its sales throughout the state. To facilitate his idea, he formed a corporation to handle his sales activities, added a display and service room to his pro shop, launched an advertising program to promote sales of the racquet, and developed agreements with pro shops and sporting good stores throughout the state. This relationship prospered for about a year, when Metal Worker met Laura Lob, a lovely lady pro from Richmond, who explained the tremendous growth of women's interest in tennis, represented that she had an aggressive sales force to sell to both men and women, and asked Metal to permit her to take over the statewide sales efforts for the racquet. Metal then consulted you as to whether he might rightfully terminate his agreement with Ace as of the first day of the following month. How should you advise Metal Worker?

8. Western Express Company, an express company operating in Lynchburg, Virginia received a package sent by Thomas Blossom for delivery to his daughter Apple Blossom, an incoming freshman at Mandy Racon College, a private institution providing higher education for women. The package had a declared value of \$1,000 for which the appropriate tariff had been paid. Fred Fisher,

Western's driver, took the package to the college. He met Early Bird, a student who told him that Apple had not yet enrolled, but was expected to do so later that evening. Fisher left the package with Early Bird who told Fred that she would deliver it to Apple when she arrived. Early then put the package in her own room to await Apple's arrival.

Apple Blossom arrived at the college later that afternoon and was told that there was a package for her in Early Bird's room. When Apple went to Early's room, the package was not there. Despite a thorough search, it could not be located.

Later that night Apple received a telephone call from her father who inquired whether she had arrived safely and whether she liked the diamond stick pin which he had sent her for her birthday in a small package to be delivered by the Western Express Company. Apple then told her father about the sequence of events set out above. Thereupon, Mr. Blossom sought your advice whether or not he could assert a valid claim against (a) the express company or (b) Early Bird. How should you advise him?

9. Rockville Farm Machinery Company, Inc., is a Virginia corporation, and has its place of business in Remington, Virginia. There were three stockholders in the corporation, two of whom each owned 7% of the stock, and the remaining 86% was owned by John Appleton. Appleton and the other two stockholders were directors of the corporation and Appleton was also president and general manager. Due to certain business reverses Appleton found it necessary to make a loan to the corporation of \$30,000. Six months after that loan was made the directors of the corporation determined that the corporation was insolvent and the corporation ceased business operations. The corporation had only three creditors: the Remington State Bank which had a claim of \$15,000; the Old Idea Implement Company which had a claim of \$20,000; and Appleton's claim of \$30,000. The assets of the corporation consisted of an inventory, having a value of \$12,000, and accounts receivable in the amount of \$12,000. Promptly upon discontinuing business Appleton procured from the corporation an assignment to him of the accounts receivable and a delivery to him of the entire inventory in full satisfaction of his claim against the corporation. Thereafter Appleton resigned his position with the corporation as director, president and general manager. Old Idea Implement Company and the Remington State Bank, upon learning that Appleton had acquired the assets of the corporation, commenced a suit in equity against Appleton and Rockville Farm Machinery Company, Inc. charging that the transfer of the assets to Appleton was fraudulent and praying that the transfer be set aside and that the assets be impounded by the Court for the benefit of all the creditors. The bill of complaint contained an averment of all the foregoing facts. Appleton filed a demurrer to the bill of complaint.

How should the Court rule on the demurrer?

10. Dick and Sally Sleuth were married in Norfolk, Virginia, in 1977, shortly before Dick left on his overseas tour of duty with the Navy. While Dick was gone, Sally grew very lonesome and began seeing other men, which conduct continued throughout Dick's absence. When Dick returned home he heard rumors of Sally's infidelity, which rumors were finally confirmed by a private investigator hired by Dick. He confronted Sally with his evidence and she admitted that while he was away she had an affair with Bo Brummel, a local Norfolk hustler. Enraged, Dick left the house claiming that he would sue Sally for a divorce on the grounds of adultery, and thereafter he moved to another apartment in the Norfolk area.

Shortly after the parties' separation, Dick began having different feelings about Sally's conduct, and due to his desire to keep the marriage together, he moved back in with Sally and forgave her of her affair with Bo Brummel.

About two weeks after Dick had moved back in with Sally, he received word from his private investigator that Sally not only had an affair with Bo Brummel, but had also had affairs with at least two other men in the area. Upon receiving this news, Dick vowed that he and Sally were through and promptly moved out of their apartment. Shortly thereafter, Dick hired Perry Mason, a local attorney, to file a bill of complaint praying that he be granted a divorce a vinculo matrimonii on the grounds of Sally's adultery.

Assuming that Dick can prove the other acts of adultery alleged, what defenses, if any, does Sally have?