7-30-1985

Virginia Bar Exam, July 1985, Section 1

VIRGINIA BOARD OF BAR EXAMINERS
Roanoke, Virginia - July 30, 1985

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1. On March 30, 1985, Prunella Plaintiff filed a motion for judgment in the Circuit Court of Caroline County against Dover Deliveries, Inc. for $50,000 in which she alleged: "(1) that on April 1, 1983, while driving her vehicle on Route I-95 in Caroline county, Virginia, the plaintiff sustained serious personal injuries when a vehicle owned by Dover Deliveries, Inc. and driven by Dan Dixon went out of control and struck her vehicle; (2) that Dan Dixon was under a duty to drive at a lawful rate of speed and to keep the defendant's vehicle under proper control at all times; (3) that the sole proximate cause of the accident was the negligence of Dan Dixon who drove at an excessive and unlawful rate of speed and failed to keep the Dover vehicle under proper control; and (4) as a result of the accident the plaintiff sustained personal injuries and property damage for which the plaintiff seeks judgment against the defendant in the amount of $50,000."

The motion for judgment was served on the registered agent for Dover Deliveries, Inc. on April 6, 1985 and on April 26, 1985 counsel for Dover Deliveries, Inc. filed a demurrer in the following style:

> "NOW COMES Dover Deliveries, Inc., a Virginia corporation, by counsel, and submits its demurrer to Plaintiff's motion for judgment, respectfully asserting as grounds therefor:
>
> 1. The motion for judgment fails to state a cause of action against the defendant; and
>
> 2. The motion for judgment is insufficient in law."

As a new associate in the firm representing Prunella Plaintiff, you are asked the following:

(a) Is the motion for judgment subject to a demurrer?

(b) Regardless of your answer to (a), has Dover Deliveries filed an adequate demurrer?

How do you respond?

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2. Paula Plaintiff, a passenger in an automobile driven by Defendant Driver, a resident of Prince William County, was injured when Driver slammed his brakes to avoid striking a bicyclist. The accident occurred in Stafford County. Paula filed a motion for judgment against Driver alleging that he was negligent in the operation of his vehicle and that such negligence was the

proximate cause of her injury. At a trial before a jury in the Circuit Court of Stafford County, Paula testified that she had been dozing just prior to the incident and was unable to give any testimony bearing on Driver's negligence. She did offer evidence as to her injuries. Her lawyer, Sam Smith, called Driver as an adverse witness who testified that it was dark, that he was driving at a reasonable speed, that he was keeping a proper lookout and simply didn't see the unlighted bicycle, which had no reflector, until it was "immediately" in front of his automobile.

At he conclusion of Plaintiff's evidence counsel for Driver made a motion to strike the evidence on the ground that Plaintiff had failed to show any actionable negligence against the defendant. After the motion was made and argued, the trial judge addressed the attorneys by saying: "The court is inclined to grant the motion to strike unless Mr. Smith can show me where the evidence contains any inkling of negligence on the part of the defendant." At this point Mr. Smith said, "Your honor, on behalf of the plaintiff, I take a nonsuit." The trial court ruled that a nonsuit could not then be taken. The motion to strike the plaintiff's evidence was promptly sustained and the trial court entered judgment for the defendant.

(a) Was the trial court correct in its rulings?

(b) If the trial court had granted the nonsuit, could Paula bring her action against Driver in the Circuit Court of Prince William County?

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3. George Greed was tried and convicted in the Circuit Court of Nansemond County on a charge of stealing a motor vehicle from a used car dealership. The jury fixed his punishment at four years in the penitentiary. At George's trial Sam Slick, George's cousin, was called as a witness for the prosecution. Sam testified that George brought the car by his house one night and told Sam that he had stolen it, and the two of them drove to Virginia Beach. When the car broke down on a lonely road, Sam said that he and George took the tires and radio from the car and left the "remains" in the woods. On cross examination by counsel for George, Sam admitted that he was testifying as part of a plea bargain Sam had made with the Commonwealth. On objection by the Commonwealth Attorney, the trial judge ruled that defense counsel could not inquire as to the details of the plea agreement because this would improperly influence the jury in the sentencing of George if he were found guilty. In fact, Sam and the Commonwealth had agreed to a thirty-day-in-jail suspended sentence in exchange for Sam's testifying against George.

At the conclusion of the evidence counsel for George asked for a cautionary accomplice instruction concerning the credibility of Sam which was refused by the trial court. On appeal, counsel for George Greed contended that the trial court should have (a) allowed him to cross-examine Sam Slick on the details of Sam's plea bargain agreement, and (b) given the cautionary accomplice instruction. How should the appellate court rule on each of George's contentions?

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4. On March 1, 1985, John Benson, a resident of Fairfax County, filed a motion for judgment in the Circuit Court of Fairfax County seeking $35,000 in damages for personal injuries against Johnson's Hardware, Inc., a Delaware corporation, with its principal place of business in Fairfax County, and against Zilch Manufacturing Co., an Indiana corporation, with its principal place of business in Muncie, Indiana. Benson alleged that he had purchased a portable stove from Johnson's which had been manufactured by Zilch in Muncie. The stove had exploded when Benson attempted to light it notwithstanding the fact that Benson had carefully followed the written instructions attached to the stove. Johnson had never carried Zilch stoves prior to this incident and had made no representations to Benson concerning the particular stove purchased by Benson. On March 12, 1985, Johnson filed a demurrer to Benson's motion for judgment and on March 14, 1985, Zilch filed grounds of defense.

(a) Could Benson have filed his action against Johnson's and Zilch in the United States District Court for the Eastern District of Virginia?

(b) Before filing its grounds of defense in the Circuit Court could Zilch have removed the case to the United States District Court for the Eastern District of Virginia?

(c) If, on June 3, 1985, the Circuit Court sustains the demurrer and enters judgment for Johnson's, may Zilch remove the case to the United States District Court for the Eastern District of Virginia after having filed its grounds of defense in the state court?

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5. Barry Builder and Fred Farmer entered into a contract under which Builder agreed to build a chicken coop for Farmer behind his home in the suburbs of the City of Roanoke, Virginia, to house 200 chickens which Farmer intended to buy. The chicken coop, which Builder had designed, was apparently unique because chickens housed in the two chicken coops Builder had previously constructed layed almost twice as many eggs than similar chickens housed in ordinary coops.

Though the building and zoning laws applicable to Farmer's property permitted such construction and use, his neighbors became upset more than somewhat when they learned of his intentions. Yielding to the pressure from his neighbors, Farmer asked Builder to release him from his obligation under the contract. Builder refused because he needed the job to keep his especially skilled work force busy and because he wanted to enhance his reputation as Southwest Virginia's premier chicken coop contractor. Farmer, however, stuck to his guns and refused to let Builder construct the chicken coop.

Builder thereupon asked you, his lawyer, whether he could compel Farmer to perform the contract - that is, to allow Builder to build the chicken coop. Builder told you that money damages could not adequately compensate him because if he could not build the chicken coop, he would have to lay off his uniquely qualified work force and might never be able to rehire them.

Further, he would lose several other contracts with people who had made their contracts with Builder contingent upon his successful completion of the Farmer job.

How would you advise Builder with respect to his chances of obtaining a decree of specific performance against Farmer?

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6. Sam Seller, who was unmarried, entered into a contract with Perry Purchaser under which Seller agreed to sell to Purchaser "all of my right, title and interest in Greenacre with the usual warranties of title" for $25,000. Seller then prepared a deed which provided that "Sam Seller, grantor, does hereby quit claim all his right, title and interest in Greenacre to Perry Purchaser".

Purchaser refused to accept the deed, contending that he was entitled to a general warranty deed from Seller. Seller, on the other hand, contended that all he agreed to provide under the contract was a quit claim deed. When Purchaser continued to refuse to accept the quit claim deed and to pay Seller, Seller had the quit claim deed recorded in the Clerk's Office of Augusta County, Virginia in which Greenacre was located. Seller then filed a motion for judgment against Purchaser in the Circuit Court of Augusta County, where Purchaser resided, in which it was alleged that Purchaser had breached the contract and in which Seller sought to recover the contract price of $25,000.

Purchaser then filed a bill of complaint against Seller to enjoin him from prosecuting his action at law against Purchaser and to require Seller to specifically perform the contract by conveying Greenacre to Purchaser by general warranty deed.

Should the equity court enjoin Seller from prosecuting the action at law?

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7. Ignatz, Inc. owned a tract of land abutting White Creek, a relatively small nonnavigable stream located in Augusta County, Virginia, upon which its manufacturing plant was located. In 1982, Ignatz began withdrawing large quantities of water from White Creek for use in its manufacturing process and at the same time began discharging pollutants into the stream. Paul Peterson, the president and sole stockholder of Ignatz, Inc., owned individually a 200 acre tract of land known as Whiteacre which also abutted White Creek and which was adjacent to and downstream from the Ignatz property and plant. Peterson resided in the mansion located on Whiteacre.

In June, 1984, Peterson sold his stock in Ignatz, Inc. to a group of investors, sold Whiteacre to Fred Farmer, and retired to Florida. In September, 1984, Farmer bought 100 head of beef cattle which he placed on Whiteacre. At the time Farmer bought Whiteacre, White Creek appeared to have sufficient water flowing in it to water his cattle and Farmer was unaware of the pollutants in the stream.

Shortly after acquiring the cattle, the water level of White Creek dropped so significantly that there was insufficient flow for him to water his cattle. He then learned that the level of water in White Creek in June, 1984 was sufficient for his cattle only because of an extremely unusual rainfall upstream in April and May of that year. He also learned that the normal flow of White Creek through his property would be sufficient to water his cattle if Ignatz were not withdrawing such large quantities of water from the creek. Finally, he learned that the water in White Creek contained pollutants from the Ignatz plant which would injure his cattle.

Farmer immediately demanded that Ignatz stop withdrawing water from White Creek so that its natural flow through Whiteacre would be restored and that it stop discharging the pollutants in the stream. Ignatz rejected Farmer's demands.

Does Farmer have the right to require Ignatz (a) to stop withdrawing water from White Creek so that its natural flow through Whiteacre would be restored and (b) to stop discharging pollutants in the stream?

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8. Paul desired to purchase Blackacre which is located in Prince William County, Virginia from Tom to use as the site for a Pitch & Putt golf course. Because Tom operated such a golf course at another location, Paul was concerned that Tom would not sell Blackacre to him. Paul made an arrangement with Al pursuant to which Al would attempt to buy Blackacre from Tom in Al's name. Paul would furnish to Al the cash with which to pay Tom, and Al would convey Blackacre to Paul after it had been conveyed to him (Al) by Tom.

Al thereupon entered into a contract with Tom to purchase Blackacre for $50,000, the arrangement between Paul and Al being unknown to Tom. Before the deal between Al and Tom was closed, Paul located another tract of land suitable for the Pitch & Putt golf course which he could buy for $35,000 and thus told Al not to go through with the purchase of Blackacre. When Al breached the contract which he had with Tom, Tom sold Blackacre to Mary for $40,000, the best price he could get after making reasonable efforts to get a higher price.

Tom then commenced an action against Al in the Circuit Court of Prince William County, Virginia to recover $10,000. Before the action was tried, Tom learned of the arrangement between Paul and Al.

(a) Could Tom then take a non-suit in his action against Al and then proceed in a new action against Paul?

(b) Could Tom elect to proceed only against Al?

(c) Assume for the purposes of this sub-part (c) that Tom, before learning of the arrangement between Paul and Al, obtained judgment against Al for $10,000 after which Al was declared bankrupt. If Tom <u>then</u> learned of the arrangement between Paul and Al, could he (Tom) proceed against Paul for his damages?

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9. On January 19, 1984 Dave Debtor borrowed $20,000 from Tinker Mountain National Bank (Bank). Dave defaulted in his payments on the note and, on June 30, 1984, you obtained a judgment in the Circuit Court of Botetourt County, Virginia against Dave on the Bank's behalf in the amount of $19,000 plus interest, attorney's fees and costs. You caused the judgment to be docketed that day in the Botetourt County Circuit Court Clerk's Office.

Your search of the Botetourt County land records reveals that Dave and Dawn, his ex-wife, are the record owners of real estate acquired by them as tenants by the entirety with the right of survivorship. You have found a final decree of divorce between Dave and Dawn entered in January of 1981.

Dave's loan application and financial statement given to the Bank in January, 1984 revealed that he owned no real estate as of that date. Your client advises you that Dave and Dawn sold this property in 1981 to Dave's brother, John Debtor, for $20,000 cash. John and his family have resided on this property since the date of the delivery of the deed. As of the date of your title examination, the deed from Dave and Dawn to John has not been recorded.

In July 1984, learning of his brother's difficulty with the Bank, John told the Bank that Dave and Dawn had delivered the deed to the property to John in February of 1981, and that in order to safeguard his investment, John had immediately put the deed in his safe deposit box. John produced the original deed as well as receipts showing that he had paid the real estate taxes on the property since 1981.

After this meeting, and sensing that the Bank might have an eye on his property, John recorded his deed. Your updated title search reveals the recordation of this deed and further reveals that three days prior to recordation of the deed, a judgment was docketed against John in the amount of $24,000 by New Hope Hospital.

1. Does the Bank's judgment lien attach to the property?

2. Assuming the property is sold, who will receive the sales proceeds, and in what priority will the proceeds be distributed?

3. Assuming the property is sold, does John have a claim against Dave?

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10. Reginald and Luci, long time residents of Virginia, were married for thirty-two years. Reginald, a bandleader at the "Tropicana," suddenly announced that he was "bored" with life and would be leaving Luci for Conchita, a young flamenco dancer. He promptly left the parties' marital abode and set up housekeeping with his lover with whom he engages in adulterous conduct. Since their two children by that time were 28 and 22 years old, and leading lives of their own, Luci was very lonely and bereft of the warm family surroundings she had come to know and love.

Reginald, being an entertainer, had a substantial income but negligible net worth; Luci had no income and owned little property. From his $250,000 annual income, Reginald voluntarily maintained Luci in their rented marital home and paid her periodic support in the same amount he had provided her in the years before he left.

Six months after Reginald left their home, Luci, to salve her hurt, became intimate friends with and engaged in an adulterous liaison with a widower neighbor, Fred. Later, when she admitted the liaison to Reginald, he reacted angrily and stopped paying her monthly support.

Distraught and convinced she lacks the means to support herself, she has come to you for help. She confesses her adultery with Fred, but avers that it was only an emotional reaction to Reginald's desertion of her, that she was never unfaithful to Reginald before, and that the relationship with Fred has ended.

She inquires of you, whether her brief period of infidelity would necessarily deprive her of spousal support. How would you advise her?

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