7-29-1986

Virginia Bar Exam, July 1986, Section 1

VIRGINIA BOARD OF BAR EXAMINERS
Roanoke, Virginia - July 29, 1986

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1. Phil Plaintiff was severely injured in an automobile crash in the City of Clifton Forge, Virginia, when the vehicle in which he was a passenger was struck from the rear by an old car driven by Dave Defendant. At the scene of the accident Phil detected the odor of alcohol about the person of Dave and mentioned the fact to the investigating officer, who asked Dave if he had been drinking. Dave, who was unsteady on his feet, told the officer he refused to answer that question until he had talked to his sister, who was his attorney. Phil was told after the accident by some of Dave's co-workers that Dave had automobile liability insurance, but his policy may have lapsed for failure to pay the premium which was due a week before the accident.

Subsequently Phil filed a civil action against Dave in the Circuit Court for $200,000, demanding both compensatory and punitive damages.

After filing his Motion for Judgment, Phil's attorney also properly filed and served upon Dave a request for Dave to admit:

(1) That he had in fact been drinking alcohol prior to the time of the accident, and

(2) That his vehicle was currently insured by a policy issued through an insurance company licensed to do business in Virginia.

Dave, after denying liability responded to the request to admit as follows:

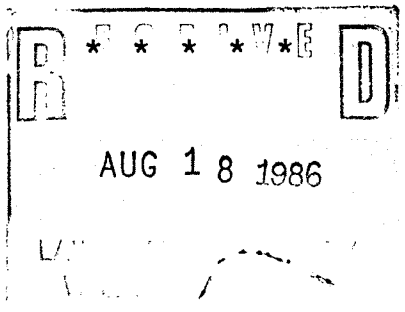
(1) That the question whether he was drinking prior to the crash was a jury question, and he refused to admit or deny it.

(2) That he objected to the question whether he had insurance on the grounds that this information would be inadmissible at the trial.

At a pretrial conference, Phil's attorney asked the Court to rule on the sufficiency of defendant's responses to the Requests for Admission.

(a) How should the Court rule on the sufficiency of the response to the request to admit that Dave had been drinking prior to the crash?

(b) How should the Court rule on the objection to the request to admit that Dave had insurance on his car?



2. In February 1984, Mary Avery and Tom Avery, her husband, were driving through Nickelsville, Virginia, when their car was struck head-on by an 18 wheel tractor-trailer truck. Mary was thrown clear of the car and was uninjured; however, Tom was severely injured.

In November, 1984, Tom filed an action at law against Fred Farley, the owner and driver of the tractor-trailer, in the Circuit Court of Scott County, Virginia, seeking compensation for the injuries he received, and for punitive damages. In the month of September 1985, before the case came to trial, both Tom and Fred died as a result of the injuries sustained in the accident.

Mary qualified as Executrix of Tom's estate, and then consults you about the pending suit filed by Tom.

(a) What must be done to revive the law suit and by whom?

(b) When the case is revived, may damages be recovered for Tom's pain and suffering resulting from the accident, if warranted by the proof?

(c) When the case is revived, may punitive damages be recovered, if warranted by the proof?

(d) What other elements of damage, if any, may be recovered, if warranted by the proof?

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3. John Gantry, who was charged with first degree murder alleged to have been committed in the City of Salem, Virginia, had a long criminal record in the Roanoke Valley, which, along with the revolting details of the pending murder charge, had been extensively publicized in the local and regional media.

His attorney filed the appropriate motion for a change of venue citing the volume of publicity, the graphic gory details concerning the killing, and the details of John's criminal record. Even though the Commonwealth's Attorney did not deny that there had been extensive publicity, the court overruled the motion.

A large panel of veniremen was summoned for the trial, and after five days a jury was selected.

John's attorney was denied permission by the Judge to question on voir dire each potential juror out of the presence of the other potential jurors. John's attorney then filed a motion that the jury be sequestered for the trial, which the court overruled.

During the trial John relied upon an alibi defense, and in his testimony denied the prosecution's evidence which consisted of proof of a homocide during the commission of a burglary.

During cross-examination, the Commonwealth's Attorney asked John if he had ever been convicted of a felony, and if so the number of times. The court sustained an objection to the question. In rebuttal, the court refused to allow the Commonwealth's Attorney to introduce court records of John's five previous felony convictions.

John was convicted of first degree murder and sentenced to 90 years in prison.

(a) Was John entitled to a change of venue:

(b) Did the court err in refusing to allow John's attorney to question on voir dire each potential juror out of the presence of the others?

(c) Does John have the right to have the jury sequestered?

(d) Did the court err in refusing to permit the Commonwealth's Attorney to question John about prior felonies, and to present evidence of them?

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4. Paul Plainer, a Maryland resident who operates a lumberyard in Maryland, entered into a contract with William Woods, a Virginia resident, under which Woods sold Plainer 50 train carloads of logs. The contract provided that the logs were to be cut by Woods from Blackacre in King and Queen County, Virginia, and were to be delivered to Plainer between October 1 and December 1, 1985. On September 15, 1985, the standing timber on Blackacre was destroyed by a forest fire, as the result of which Woods was unable to fulfill his contract with Plainer. On January 16, 1986, Plainer filed a complaint against Woods in the United States District Court for the Eastern District of Virginia in which he alleged a breach of contract by Woods and sought damages in the amount of $22,500. Woods filed an answer denying liability to Plainer on the ground that the timber on Blackacre had been destroyed by fire which was started by lighting and that, under the contract, if performance was rendered impossible by an act of God, Woods was not liable.

Woods immediately conducted the following discovery:

(1) He filed a request for Plainer to admit that a copy of the contract, which was attached to the request, was genuine and that it had been executed by Plainer. The copy of the contract contained a provision relieving Woods from performance if such was made impossible by an act of God. Plainer did not respond to the request within the time required by the Federal Rules of Civil Procedure;

(2) After proper notice to Plainer's attorney, he took the deposition of Smokey Warden, the fire warden of the district in which Blackacre was located. Smokey testified that he actually saw lightning strike a tree in Blackacre which started the fire, that he and his crew fought the fire for six days before it was contained, and that the timber on Blackacre was completely destroyed by the fire; and

(3) He filed an interrogatory to Plainer asking for the identification of all persons having knowledge of how the fire was started. Plainer, who answered the interrogatory before the deposition of Warden was taken, stated that he knew of no one who had such knowledge.

Woods thereupon filed a motion asking that summary judgment be entered in his favor. The motion was supported by a copy of the request for admissions filed by Woods and an affidavit by Woods representing that Plainer had not responded to it within the time required by the rules, a transcript of the deposition of Warden which had been filed with the court, and the interrogatory to Plainer and Plainer's answer thereto which had been filed with the court.

Plainer's lawyer asks you, a recent law school graduate who has just passed the bar examination, whether he has a basis upon which he can successfully oppose Woods' motion for summary judgment. What would you tell him?

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5. On January 2, 1986, Wyatt Kern filed a bill in chancery against Durbin McMullin in the Circuit Court of the City of Hampton seeking to enjoin McMullin from removing the sailboat "MAC'S FOLLY" from its moorings at the Hampton Yacht Club and to require McMullin to deliver the boat to him without delay. In his bill Kern alleged that McMullin had agreed in writing to sell him the sailboat for $35,000, that Kern had paid McMullin $10,000 as a down payment and that the balance was due on delivery of the boat. He also alleged that McMullin had agreed orally to deliver the boat to Kern before Christmas Day of 1985 but that despite this agreement, the repeated requests by Kern for delivery of the boat and a tender by Kern of the balance of the purchase price, McMullin had failed to make delivery, giving one excuse after another. Finally, Kern alleged that McMullin had become irritated with him and on one occasion told him that if Kern would not be patient then he just might take the boat to Annapolis and sell it. In his answer, McMullin asserted that the written agreement was silent as to delivery, that although he had agreed orally to deliver the boat to Kern as soon as it was ready, he had not agreed on any specific date; that he had some repair work to do on the boat and was delayed in getting a replacement winch; and that the short delay would not prejudice Kern as he had no plans to take the boat anywhere. The matter was heard before the Court on February 18, 1986, at which time the parties testified in the manner set out in their pleadings. The Court, believing that McMullin, was acting in good faith, entered a final order denying the injunction and dismissing the complaint.

On May 1st, Kern encountered his friend, Hatcher Montague, who asked Kern whether he had gotten an injunction against McMullin. When Kern told Montague of the Court's action, Montague told Kern that he had happened to be in Annapolis on the 25th of April and by chance had encountered at a party a young man named Jim Smith who was telling everyone how pleased he was to have bought the sailboat "MAC'S FOLLY" from Durbin McMullin of Hampton and that he expected to take delivery of the boat on or about May 15th, the date on which McMullin had promised to bring the boat to Annapolis. Smith revealed that he had agreed to pay McMullin $43,000 for "MAC'S FOLLY".

Kern immediately advised his counsel of the foregoing. Was there any action which could be taken in the Circuit Court proceedings to prevent McMullin from taking the boat to Annapolis?

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6. In early November of 1985, John Gray, a duly licensed building contractor doing business in the City of Bristol, Virginia went to the local office of Star Insurance Company as the undisclosed agent of James Blue, another highly reputable, duly licensed contractor doing business in Bristol, and asked whether the Company would execute a performance bond for $200,000, assuring the proper construction of a warehouse by Gray for Dixie Trucking Corporation. After studying the plans and specifications shown by Gray, and on his payment of a binder fee of $100, Star Insurance Company delivered to Gray a letter committing the insurance company to issue a performance bond for the warehouse job to Gray upon presentation, within sixty days, of a completed application showing Gray to have a net worth in excess of $1,000,000, and payment of the balance of the premium.

On December 15, 1985, James Blue, came into the office of Star Insurance Company, presented the completed application form for the warehouse job showing Blue to have a net worth of $1,250,000, tendered the premium and asked the company to issue to him the performance bond on the same warehouse job described to the insurance company by John Gray. Blue explained that he had sent Gray to Star Insurance as his agent in November, a fact which Gray acknowledged, but no disclosure of the agency had been made. He explained that the job was exactly the same as it had been when Gray described it in November. Star Insurance Company comes to your office and tells you that since November 1985 it had issued more performance bonds than it regarded as prudent.

Must the insurance company issue a performance bond to James Blue?

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7. On May 15, 1985, Holcum Page, the owner of a farm in Culpeper County, Virginia, entered into an oral contract with William Wheat, a corn broker, by which he agreed to sell to Wheat his entire crop of growing corn for a price of $750. Under the terms of the agreement, Wheat agreed to harvest the corn when it was fully matured. When the corn had matured and was ready to be cut and removed, Wheat tendered to Page the agreed purchase price and demanded that he be permitted to go upon the farm to cut and remove the corn. At that time corn prices had risen and the crop was worth $1,000. Page refused payment of the tendered purchase price and would not permit Wheat to cut and remove the corn. In an action by Wheat to recover, $450, the loss of his total profit if he had the corn to sell, Page filed as his only defense a plea of Statute of Frauds.

Is Wheat entitled to recover?

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8. In 1980 Walter Freemason purchased a parcel of land in New Kent County, Virginia and built a home on it. The property fronted 200 feet on Route 999 (which ran in an east-west direction at this point) and extended southwardly between parallel lines a distance of 200 feet. In his deed Freemason was also granted an easement thirty feet wide which ran along the western line of his property in a north-south direction and then continued

southwardly through the property of Trumpet Enterprises (Trumpet) for approximately 400 feet to Route 607 (which ran roughly parallel to Route 999). The easement was granted to Freemason for use as a private roadway to provide him access to Route 607 from Route 999.

On February 20, 1986, the Board of Supervisors of New Kent County closed a portion of Route 607 and relocated the roadway southward. The effect of this change was to separate Route 607 from Mr. Freemason's private roadway, leaving the easement a mere cul-de-sac which did not connect with any public roadway. At the same time the County opened Route 333 which intersected both Route 999 and Route 607 and provided Freemason and others with an alternative but longer access to Route 607.

On March 5th, after notification that the County Board of Supervisors had realigned Route 607, Trumpet constructed a fence along its northern property line. The fence crossed Freemason's easement and precluded its use by Freemason.

On March 25, 1986, Freemason filed a bill in equity in the Circuit Court for New Kent County praying for an injunction restraining Trumpet from interfering with his use of the private roadway or in the alternative, for damages equal to the fair market value of the easement which for all practical purposes had been appropriated by Trumpet for its own use.

Trumpet responded that Route 607 had been lawfully relocated by the Board of Supervisors, that Freemason had an alternate route from Route 999 to Route 607, that Freemason no longer had any right to access through its property and that Trumpet could put its land to any lawful use.

Assuming that the action taken by the County Board of Supervisors was lawful, was Trumpet entitled to erect his fence across the private roadway?

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9. Bob Borrower, recently discharged from military service, sought to borrow $10,000 to start a business. First Bank of Manassas agreed to make the loan provided Borrower could get his Uncle Simon to endorse the note as an accommodation maker, which he did. The note provided that it would be due in full on November 15, 1986. Six months later Borrower needed additional capital and sought $20,000 more from First Bank. First Bank required Simon's endorsement as before and, in addition, required Borrower to assign 1000 shares of stock in National Telephone Company which Borrower had recently inherited from his grandfather. Borrower delivered the $20,000 note endorsed by Simon and himself and the stock together with an appropriate instrument which provided that the stock was to be held as security for both the original loan of $10,000 and the new loan of $20,000. The second note provided that it would be due in full on June 15, 1986. On receiving these papers First Bank issued its cashier's check to Borrower for $20,000.

By June 15, 1986, Borrower's business had failed and First Bank demanded that he pay the $20,000 loan. When Borrower refused the Bank made the same demand on Simon and Simon promptly made the payment. Simon then wrote First Bank a letter advising that the stock it held as security for both

notes was traded on the New York Stock Exchange and was worth $60,000. He asked that First Bank transfer a portion of the stock sufficient for Simon to recoup his payment of the $20,000. When the Bank refused Simon's request Simon comes to your law office to ask whether he can proceed by a suit in equity to compel First Bank to make the transfer of $20,000 worth of stock of National Telephone Company. How do you respond?

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10. Sonny and Cheri Probono were married in Madison, Virginia at Cheri's family home in 1968. After the wedding they went to West Virginia, where Sonny worked in a coal mine. They had no children, and Cheri on several occasions expressed her desire to get a job to pass the time and bring in a little extra money. Whenever she talked about getting a job, Sonny would state that he made plenty of money for both of them and that no wife of his would ever work.

On October 11, 1979, Cheri and her friend Patsy left a church circle meeting early and arrived at the Probono home to find Sonny in a compromising position with a clerk from the local five and dime. A terrible scene ensued. Finally, Sonny threw his clothes into a suitcase and stormed out vowing to go somewhere where Cheri could never find him.

Cheri returned to her family's home in Madison in November 1979 and filed for a divorce a vinculo on adultery grounds in the Circuit Court of Madison County on July 6, 1980. An order of publication was properly entered under Section 20-104 of the Code of Virginia, but Sonny did not appear. On her testimony corroborated by that of Patsy, Cheri was granted a divorce and was awarded $100 per month in alimony. Since she did not know Sonny's whereabouts, Cheri could not collect any of the alimony which she had been awarded.

In 1984 Cheri heard from a friend that Sonny had settled in Richmond, and she immediately brought suit against him in the proper court in Richmond for the alimony which he had not paid and the interest that had accrued thereon.

Sonny filed pleadings which raised three jurisdictional issues:

(1) The Circuit Court of Madison County had no jurisdiction to grant Cheri a divorce because she had not lived in Virginia for one year before bringing the suit;

(2) The Circuit Court of Madison County had no jurisdiction to grant Cheri a divorce because Sonny was not living in Virginia when the suit was filed and the alleged grounds for divorce did not occur in Virginia;

(3) The Circuit Court of Madison County had no jurisdiction to award Cheri alimony.

(a) How should the Richmond court rule on each of Sonny's contentions?

(b) Were the divorce decree and the award of alimony valid?

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