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Virginia Bar Exam, July 1987, Section 1

VIRGINIA BOARD OF BAR EXAMINERS
Roanoke, Virginia - July 28, 1987

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1. On the night of April 3, 1986, Ronnie Roadrunner was severely injured when he drove his automobile into the side of a moving freight train at a railroad crossing in Chesterfield County, Virginia. On July 8, 1986, Roadrunner filed an action against the Choo-Choo Railroad Company, the owner and operator of the train, in the Circuit Court of Chesterfield County for damages in which he alleged, among other things, that he did not see the sign placed at the crossing by the railroad company to warn a motorist of the crossing because the reflectors on that sign had fallen off. After the parties were at issue, Roadrunner's lawyer, Marvin Bally, served the following interrogatories on the Choo-Choo Railroad Company:

> No. 1. State whether any changes have been made by defendant subsequent to the accident in the design of the signs it installed at the crossing with particular reference to the manner of attaching reflectors to the signs.
>
> No. 2. If the answer to No. 1 is in the affirmative, set forth the details concerning any such changes.
>
> No. 3. State the name and address of each member of the crew of defendant's train that was involved in the accident.

The Choo-Choo Railroad Company had, in fact, made changes in the design of its signs and in the manner of attaching the reflectors to those signs. Larry Loco, Choo-Choo's lawyer, advised the railroad that in his opinion it is not required to answer interrogatory number 1 and interrogatory number 2, but that it must answer to interrogatory number 3.

(a) In view of Loco's advice to Choo-Choo, does Choo-Choo need to serve a response of any kind to interrogatories numbers 1 and 2? If so, (1) what should be served, (2) when should it be served and (3) by whom should it be signed?

(b) When should the answer to interrogatory number 3 be served and by whom should it be signed?

(c) Assuming that Roadrunner, through his attorney, properly proceeds to obtain a ruling from the Court concerning his right to the information sought by interrogatories numbers 1 and 2, should the Court require Choo-Choo to answer them?

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2. Frankie Falon was tried by a jury in the Circuit Court of the City of Danville, Virginia on May 7, 1986, for the crime of the armed robbery of Valerie Victim on March 3, 1986. Falon was represented by Solomen Shrewd who, in his opening statement, told the jury that the evidence would show that Ms. Victim had been indicted in 1985 for perjury and that the jury should keep that in mind while listening to her testimony.

During the trial Falon did not take the stand to testify on his own behalf. The trial court offered to give the following instruction:

> Failure of the defendant to testify creates no presumption against him and in considering his innocence or guilt, his failure to testify is not a circumstance which the jury is entitled to consider

Shrewd rejected the trial court's offer to give that instruction because he thought it would serve only to magnify the defendant's failure to testify and to raise adverse inferences in the minds of the jurors. Thus, the trial court did not give that instruction.

The jury convicted Falon of the crime with which he was charged and fixed his punishment at 10 years in the penitentiary. The trial court entered a final order sentencing Falon on that verdict

The Supreme Court of Virginia granted Falon a writ of error limited to the following claim by Falon:

> The trial court erred in failing to instruct the jury that the failure of the defendant to testify creates no presumption against the defendant and should not be considered by the jury in considering his guilt or innocence.

Falon argued that the trial court had the absolute duty to give such an instruction to the jury, that he (the defendant) had the absolute right to have such an instruction given to the jury, and that such right could not be waived by his attorney, Solomen Shrewd. Falon's argument was based upon the provision of Va. Code Ann. § 19.2-268 which provides:

> In any case of felony or misdeamanor, the accused may be sworn and examined in his own behalf, and if so sworn and examined, he shall be deemed to have waived his privilege of not giving evidence against himself, and shall be subject to cross-examination as any other witness; but his failure to testify shall create no presumption against him, nor be the subject of any comment before the court or jury by the prosecuting attorney.

(a) Did the trial court err in failing to give the instruction?

(b) Was it ethically proper for Shrewd to tell the jury in his opening statement that Ms. Victim had been indicted for perjury?

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3. John Doe instituted an action against Trucking Company in the United States District Court for the Eastern District of Virginia in which he sought damages in the amount of $750,000 for injuries sustained when he was struck by a truck owned by Trucking Company and operated by David Driver. Doe alleged that his injuries were caused by the negligence of Driver who, at the time and place of the accident, was an employee of Trucking Company acting within the scope of his employment. Trucking Company filed an answer denying the allegations of the complaint.

Assume that the District Court had jurisdiction of the action on the basis of diversity of citizenship. Assume further that before trial Trucking Company, in an answer to a request for admission served by Doe, admitted that Driver was an employee of Trucking Company. The case was tried before the Court without a jury.

During the presentation of Doe's case, he introduced evidence establishing a prima facie case of negligence on the part of Driver which was a proximate cause of the accident and damages sustained by him. However, he failed to introduce evidence to establish that Driver was acting within the scope of his employment at the time of the accident. Doe then rested.

Larry Lawyer, attorney for Trucking Company, knew that Driver was acting within the scope of his employment at the time of the accident and that this fact would be established if he called Driver as a witness. He also knew that Driver would give testimony that would tend to indicate that Driver was not negligent or, at the least, that Doe was guilty of contributory negligence. After Doe rested his case, Lawyer moved the Court under Rule 41(b) of the Federal Rules of Civil Procedure to dismiss the action on the ground that upon the facts and the law Doe had failed to show a right to relief because he failed to establish that Driver was acting within the scope of his employment by Trucking Company at the time of the accident. The Court declined to render any judgment until the close of all evidence.

(a) Did the trial court err by declining to render any judgment on Trucking Company's motion to dismiss at the conclusion of Doe's case?

(b) If, upon the trial court's refusal to render any judgment upon Trucking company's motion, Trucking Company refused to put on any evidence and rested its case, could Trucking Company appeal a judgment entered for Doe by the trial court on the ground that Doe's evidence was insufficient to support the judgment?

(c) If, upon the trial court's refusal to render any judgment upon Trucking company's motion, Trucking Company put on evidence during the presentation of which the fact was established that Driver was acting within the scope of his employment, could Trucking Company successfully assert on appeal that the trial court erred by refusing to grant its motion to dismiss at the conclusion of Doe's case?

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4. Charles Contractor and Orville Owner entered into a contract pursuant to which Contractor agreed to complete construction of an office building for Owner on or before September 30, 1986. Contractor agreed to pay damages to Owner in the amount of $1,000 a day for each day completion was delayed beyond September 30, 1986, except that Contractor would "not be responsible for delays in the completion of the building caused by Owner." The Building was not completed until November 1, 1986 and Owner held back $31,000 from his final payment to Contractor.

Contractor filed an action in the appropriate Circuit Court in Virginia in which he sought judgment against Owner for $31,000, claiming that Owner had caused the 31 day delay by not furnishing until September 1 certain materials that he was obligated under the terms of the contract to furnish by August 1. During the trial, Contractor introduced evidence that Owner had failed to order the materials soon enough for them to be delivered in time for Contractor to complete construction by September 30, 1986, and that had the materials been delivered by August 1, the building would have been completed on time. Owner's evidence was that he had ordered the materials in plenty of time for them to be delivered by August 1, but that the manufacturer of the materials had been delayed in the manufacture of such materials because of a breakdown in his machinery.

The trial court instructed the jury that "unless you believe from a preponderance of the evidence that Owner negligently failed to deliver material to Contractor in time for him to complete construction prior to September 30, 1986, you shall return your verdict for Owner." Contractor's attorney objected to the instruction on the ground "that it was contrary to the law and the evidence." The jury returned a verdict for Owner upon which the trial court entered judgment. Contractor's petition for appeal was granted by the Supreme Court of Virginia. Among the assignments of error contained in Contractor's petition was that the trial court erred in granting the instruction referred to above.

(a) On appeal, Contractor's attorney argued that the trial court erred in giving the instruction because it improperly conditioned Owner's responsibility for the delay upon a finding of negligence whereas, under the provisions of the contract, Owner was responsible for delays caused by him even if he had not been negligent. Will the Supreme Court of Virginia consider this argument?

(b) Assume that the Supreme Court of Virginia had not previously decided a case involving the contract language in question. As the attorney for Contractor, do you have an obligation to advise that Court of a recent decision of the Supreme Court of West Virginia, which you found during the research for your brief and which Owner did not cite in his brief, in which it was held that a contract with language identical to the one in question did not relieve a contractor of his obligation to complete a building by the specified completion date in the absence of negligence on the part of the owner?

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5. Mason & Burger, a prominent Roanoke law firm widely known for its criminal defense work, represents Mary Smith. Ms. Smith was the inhouse accountant for Scrooge & Marley, a partnership involved in a number of highly sophisticated real estate investments. Scrooge & Marley recently discharged Ms. Smith and brought a suit against her in equity alleging that she embezzled $750,000 in partnership funds and invested those funds in real estate now held by her and her parents, Mr. and Mrs. Smith. The bill of complaint prayed that the Smiths be required to make an accounting of money embezzled; that they be restrained from disposing of any assets during the litigation; that this real property be declared held in trust for the partnership; and that the Smiths be required to convey the property to the partnership.

No responsive pleadings have yet been filed but Ms. Smith strenuously denies that she embezzled any funds from Scrooge & Marley. She has also made it clear that, because of accounting issues involved, the evidence supporting this denial will be complex, will require a number of witnesses, and will be sharply disputed. Credibility of witnesses will be a decisive element of the trial. If at all possible Mr. Mason wishes to try the case to a jury; the plaintiffs are equally determined to avoid a jury.

Mr. Mason asks you for a reasoned answer, based on the foregoing information, to both of the following questions:

(a) Upon what basis and by what pleadings, if any, is Ms. Smith entitled to a jury as a matter of right in a court of equity?

(b) Upon what basis and upon what pleadings, if any, may a court of equity in its discretion allow a jury in these proceedings?

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6. Jack and Jill Johnson moved to Roanoke in the spring of 1987 and found a house that suited them. They seek your advice regarding their purchase of the property.

The property is owned by Herbert and Helen Smith who had their attorney prepare a land sales contract providing that the Johnsons would pay the Smiths a lump sum of $20,000 upon taking possession of the property and thereafter make all payments subsequently due under a purchase money note made by the Smiths at the time they purchased the property in 1978 which is secured by a deed of trust on the property. It further provided that the Johnsons would hold the Smiths harmless from any liability under the note and deed of trust and the Smiths would execute and deliver a general warranty deed conveying title to the property to the Johnsons when the remaining balance of $65,000 under the note had been paid in full and the deed of trust released.

Herbert Smith told the Johnsons that the land sales contract essentially allowed them to obtain a loan for $65,000 at an interest rate well below the rate currently being charged by lenders as well as save on closing costs because the contract need not be recorded.

Mr. Smith gave the Johnsons copies of the note, deed of trust, and the deed by which the Smiths had acquired title to the property. The Johnsons both signed the contract and gave Mr. Smith a check for $1,000 as "earnest money" on the contract.

In reviewing the contract documents, you find that the deed conveys the property to Herbert Smith and Helen Smith, husband and wife, as tenants by the entirety with right of survivorship. You find that the deed of trust contains a covenant whereby the Lender "may declare the note due and payable upon any transfer of all or any part of the property or interest therein without Lender's prior written consent," as well as the following notice in the margin in capital letters: "THE DEBT SECURED HEREBY IS SUBJECT TO CALL IN FULL OR THE TERMS THEREOF BEING MODIFIED IN THE EVENT OF SALE OR CONVEYANCE OF THE PROPERTY CONVEYED."

How would you advise the Johnsons on the following:

(a) What risks, if any, are they exposed to because of the covenant contained in the deed of trust?

(b) What risks, if any, would they be exposed to if the land sales contract is not recorded?

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7. In June 1986 Roncevertes stole a watch and $500 in cash from his friend Cyrano's apartment. Both Roncevertes and Cyrano lived in the same apartment building on Main Street in Salem, Virginia.

He used $250 of the stolen funds to pay his landlord rent for the month of July. Roncevertes used the other $250 to purchase a used car from Renault. Roncevertes sold the watch to Ramona.

Several weeks later, Roncevertes, after undergoing a crise de conscience, confessed his theft to Cyrano.

Cyrano now consults you as to the possibilities of recovering

(a) the $250 paid to the landlord

(b) the $250 paid to Renault

(c) the car

(d) the watch.

How should you respond?

* * * * *

8. Bernice Biker, a resident of Elkton, Virginia, persuaded Ichabob Gold to sign her note for $3,000 made payable to Motorcycle Mania and dated June 1, 1983. Armed with this added signature and little else, Bernice purchased a new motorcycle and rode off into the sunset. Motorcycle Mania sold Biker's note to the Nickel and Dime Savings Bank which was unable to find Biker to collect. Thereupon, the bank called upon Ichabob who paid the note plus interest in the total amount of $3,280. On February 14, 1984, the Bank marked Biker's note "Paid" and delivered it to Ichabob without any formal assignment or other writing.

In April of 1987, Biker returned to Elkton seeking employment in a new industry which was being located there. Ichabob learned of Biker's presence in Elkton and promptly sued her for the sum of $3,280 plus interest from the date Ichabob paid the Bank.

Biker interposed a plea of the statute of limitations, asserting that the note was extinguished when the Bank marked it "Paid" and that the only right of action Ichabob had was based on an implied or oral agreement of indemnity. The trial court sustained Biker's plea, ruling that the three year statute governing unwritten contracts applied and that Ichabob could not recover.

If Ichabob appealed this decision of the trial court, how should the Supreme Court rule?

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9. The divorce depositions submitted to the Virginia circuit court judge revealed the following evidence:

Kay and David, after a long engagement, were married on June 4, 1975. They cohabited together and had what David thought was a satisfactory sexual relationship until their separation on May 11, 1987. David suspected that their good friend and attorney, Arnold, was having an affair with his wife. On May 10, 1987, after receiving information Kay and Arnold had been seen together at a bar, David followed Arnold by car but lost him in traffic. Later that evening David saw Arnold's car parked next to his wife's car outside Room 159 at the local Ramada Inn. David returned to the motel early the next morning with witnesses and spoke to Kay outside the room, but did not see Arnold at the motel although his car had not been moved since the previous evening. Kay refused to allow David to search her motel room.

A witness, Janet, testified that she had seen Kay and Arnold go into Arnold's beachfront apartment at the lunch hour almost every day from the first of April until the end of May, 1987. Janet, who had secretly admired Arnold for several years, always paid particular attention to anyone entering or leaving Arnold's apartment.

Kay positively denied that she had sexual relations with Arnold. She protested that Arnold only gave her legal advice and prepared gourmet meals for her.

Arnold was called as a witness and refused to testify, asserting the attorney-client privilege.

(a) Assuming the above facts were proven, should the Judge grant a divorce to David on the grounds of adultery?

(b) What would the decision be if Arnold had testified that he told David on April 5, 1987, that he, Arnold, had sexual intercourse with Kay on April 1st?

* * * * *

10. The Town Council of South Boston, Virginia, in an effort to revitalize its downtown business district, voted, over spirited opposition from the Taxpayers League, to beautify the area by installing antique natural gas lamp posts, trees and flower boxes along Main Street, and paving the sidewalks with colonial bricks.

The work was done by the Town's regular maintenance workers, with the help of a retired brick mason. The cost of labor, sand, cement and gravel was $3,000.

The paving brick for the sidewalks was purchased from Southside Building Products Company (Southside), and was manufactured at their kiln in Clarksville. The bricks were delivered at a total cost of $2,000.

Shortly after the dedication of the new project, the bricks in the sidewalks started to crack, and many completely disintegrated. Suzy Slagle tripped and fell on the defective bricks and sprained her ankle. The Town settled with her for $500 in compensation for her injury. The Town then retained a consultant at a cost of $1,000, who advised that the bricks had to be taken up and the sidewalks rebuilt. This work was done at a cost of $9,000.

After an acrimonious meeting of Council, the Town Manager was ordered to investigate and take appropriate legal action. Subsequently suit was filed on behalf of the Town against Southside for damages. Testimony at the trial revealed that the clay used in the bricks was of inferior quality which caused them to crack and disintegrate.

Southside defended on the basis that the contract of sale with South Boston was silent as to quality, and that no guarantees were made.

(a) Under these facts, is South Boston entitled to recover?

(b) If so, how much?

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