

VIRGINIA BOARD OF BAR EXAMINERS

Norfolk, Virginia - February 21, 1995

Answer Questions 1 and 2 in Answer Booklet D

1. Acting on his New Year's resolution to improve his health and physical condition, Otto Flapjack visited the New & Not-so-New Exercise Equipment Store, Inc. (hereinafter referred to as the "Store") in Warrenton, Virginia on January 8, 1994. Otto, who had celebrated his 40th birthday two days earlier, had never used any fitness or exercise equipment. Indeed, he had never belonged to a health club and the last "exercise equipment" he had used were the "monkey bars" when he was in fifth grade.

After browsing about the store without any assistance for fifteen minutes, Otto decided to purchase a used stationary bicycle, figuring that he could always get a new one in the future if he found that he enjoyed exercising. As he talked with the cashier about his resolve to get in shape, Otto also decided to accept the Store's invitation for a no-obligation 30 day trial of a new rowing machine, the Rowboat 175. The Store's invitation, such as it was, consisted simply of a banner hanging above the showroom floor, stating:

ROWBOAT 175
Free 30 Day Trial

Remember, Rowboats are the best!

Signed statement required.

With money he had received as a birthday gift, Otto paid cash for the bicycle and signed the following statement: "I promise to return the Rowboat 175 within 30 days, unless I decide to purchase it within that time period at the list price then in effect."

Otto received no documentation other than the cash register receipt for the bicycle (which stated only the bicycle's price, the sales tax amount, and the grand total as well as the words "Thank You") and a photocopy of his signed statement about the rowing machine. Because Otto was driving his Mazda Miata, he elected to use the Store's free delivery and installation service, even though he was informed that he would have to wait almost one week for delivery.

The Store promptly removed both the used stationary bicycle and the Rowboat 175 from the sales floor and stored them appropriately, pending their delivery to Otto's home in Marshall, Virginia.

On the following Thursday, the used bicycle and Rowboat 175 were delivered and installed properly in Otto's basement. When Otto and his wife, Helga, began to use the

equipment that evening, they noticed that hanging from the bicycle's handlebar was a price tag with the words "No Warranty" on the back. Both items of equipment made considerable noise while in use, but neither Otto nor Helga heard this over the blare of the television which was located in the same room.

On January 22, 1994, both Otto and Helga suffered injuries almost simultaneously while using the equipment -- Otto while rowing the Rowboat 175 and Helga while riding on the stationary bicycle.

Otto and Helga timely filed separate Motions for Judgment against the Store in the Circuit Court of Fauquier County, Virginia, seeking to recover money damages for their injuries. The Store filed a grounds of defense in each case, denying liability. Thereafter, the parties filed cross-motions for summary judgment in each case based upon the above, agreed-upon facts.

The Circuit Court judge informs you, as her law clerk, that she has completed her own analysis of the tort claims and defenses involved but would like you to prepare a bench memorandum discussing any warranty claims and defenses. Prepare the memorandum.

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2. Dan Dealer and his date, Ida Innocent, had just finished dinner in a fast food restaurant in Newport News, Virginia, and were preparing to see a movie across town. Dan left the restaurant to start the car while Ida went to the restroom. When Dan arrived at his car, he was confronted by Jesse James and his sixteen-year-old brother, Billy, who were angry about the quality of some drugs Dan had sold them earlier. Before the James brothers could hurt him, Dan escaped. When Ida emerged from the restaurant, she was seriously wounded by a shot fired by Jesse, but intended for Dan. Dan and the James brothers had known each other since their elementary school days and had always been adversaries. Ida, however, was new to the area and had never seen the James brothers before the attack.

The entire altercation was seen by Priscilla Putnam as she was entering the rear door of the go-go bar across the back alley. Priscilla was employed there as a dancer on the 6:00 p.m. to midnight shift.

Jesse was charged with malicious wounding and at his preliminary hearing in the Newport News General District Court, the charges were certified to the grand jury which returned a true bill against him. Billy was also charged with malicious wounding by a petition properly filed in the Newport News Juvenile and Domestic Relations District Court. Upon the Commonwealth's motion, a transfer hearing was held and the Court transferred Billy's case to the Newport News Circuit Court for trial. Thereafter, both defendants were scheduled to be tried jointly in the Circuit Court. Both Jesse and Billy demanded jury trials. Before trial, Billy filed a motion objecting to the joint trial. This motion was denied, and the charges against both brothers proceeded to a joint trial.

At trial, Priscilla was called to testify for the Commonwealth. Counsel for Jesse attempted to establish on cross-examination that Priscilla had made an agreement with the

Commonwealth's Attorney for leniency on prostitution charges pending against her in exchange for her testimony against the James brothers. The Commonwealth's Attorney objected to this line of defense questioning and the trial judge sustained the objection.

At the conclusion of the trial, the jury convicted both Jesse and Billy of malicious wounding. After the jury's finding of guilt, the Commonwealth's Attorney moved the court, pursuant to the bifurcated trial procedure for felonies, to submit the matter of sentencing to the jury. Over Billy's objection the judge granted the Commonwealth's motion and the jury, following additional evidence and argument on the issue of punishment, fixed punishment for both brothers at 20 years in the state penitentiary. After the jury had been discharged but before sentences were pronounced by the judge, Jesse's attorney moved the court to order a presentence report. The Commonwealth's Attorney objected.

- (a) On what basis can Jesse be convicted of maliciously wounding Ida when his real intent was to shoot Dan, not Ida?
- (b) Can Billy be convicted of the malicious wounding when it was Jesse who fired the shot which wounded Ida?
- (c) How should counsel for Jesse preserve for appeal the issue of the court's refusal to allow him to examine Priscilla on the agreement for her testimony?
- (d) How should the court rule on the motion for a presentence report?
- (e) Was the judge's order requiring a joint trial over Billy's objection proper?
- (f) Was the court correct in allowing the jury to sentence Billy?

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Answer Questions 3 and 4 in Answer Booklet E

3. Alex Ames, Bob Bates and Charles Carr formed Good Eats, Inc., a Virginia stock corporation, in January 1990 for the purpose of operating a fast food restaurant in the City of Roanoke, Virginia. They each signed a subscription agreement, for which they each received 100 shares of the common stock of Good Eats, Inc. Ames paid his subscription with \$10,000 cash. Bates gave the corporation a \$10,000 promissory note for his subscription, and Carr proposed to provide services as manager and chief cook at reduced wages for two years to offset his \$10,000. Ames and Bates were investors, but were not involved in operation of the business.

Charles Carr negotiated a lease of property and restaurant equipment from Downtown Developers, Inc., in a space where the landlord had taken possession of restaurant equipment for unpaid rent of a prior fast food restaurant that had ceased operation. The printed form lease named Good Eats, Inc. as lessee in the first paragraph and was signed on the line designated for the lessee by Charles Carr, without reference to Good Eats, Inc.

The restaurant opened on March 1, 1990, and was an immediate success. It had no tables or booths and all the customers were served on ten stools at a counter. The restaurant operated 24 hours a day, 7 days a week and there were usually people waiting to occupy an empty stool and order homemade chili, hot dogs and hamburgers.

The restaurant was so successful that Carr paid himself a substantial salary as manager beginning in the first month of business and lesser salaries to Ames, Bates and himself as officers and directors of the corporation. Bates' promissory note to the corporation remained unpaid and Carr never provided the services called for in his stock subscription agreement. In January 1993, Ames, Bates and Carr, emboldened by their success, decided to expand by opening a gourmet restaurant in an adjoining space. Again, they leased the space from Downtown Developers, Inc., with Good Eats, Inc. as the lessee and the lease signed by Charles Carr as lessee without reference to Good Eats, Inc. Good Eats, Inc. then borrowed \$100,000 from Big Lick National Bank, which required no collateral. The gourmet restaurant was a flop. Good Eats, Inc. was unable to pay its suppliers, its landlord, or Big Lick National Bank. Good Eats, Inc. failed to file its annual report with the Virginia State Corporation Commission, and failed to pay its annual franchise taxes to the State of Virginia. Consequently, on September 1, 1994, Good Eats, Inc.'s corporate existence was terminated by the Commonwealth of Virginia. Good Eats, Inc. has closed both restaurants and has no cash or trade receivables. It is indebted to suppliers for an amount in excess of \$100,000.

Big Lick National Bank has filed a motion for judgment in the Circuit Court of the City of Roanoke, Virginia, against Good Eats, Inc., Alex Ames, Bob Bates and Charles Carr individually, seeking payment of its loan, interest, and attorneys' fees. Downtown Developers, Inc., has filed a motion for judgment in the Circuit Court of the City of Roanoke, Virginia, against Good Eats, Inc. and Ames, Bates and Carr individually, seeking payment of unpaid rent. No other creditor is seeking judgment at this time.

In the action brought by Big Lick National Bank, what is the liability of (a) Good Eats, Inc., (b) Ames, (c) Bates, (d) Carr?

In the action brought by Downtown Developers, Inc., what is the liability of (a) Good Eats, Inc., (b) Ames, (c) Bates, (d) Carr?

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4. Matilda McClure, a childless widow, and a resident of Staunton, Virginia, established a testamentary trust and directed her Trustee, from the income of her immense personal estate, which she placed in trust for the purpose, to maintain in perpetuity her house as a home for indigent widows and maiden ladies, who should be maintained and supported from the proceeds of the trust fund, as a memorial to herself and her late beloved husband, Colonel H. Fred McClure, U.S. Army, Retired.

The Trustee was given broad fiduciary powers, including the right to select his successor. The Trustee, and his successor, was made the sole judge of who should be admitted to the home; however, Matilda requested that preference be given to residents of

the city of Staunton, and to the daughters of Veterans of the Spanish-American War. She directed the Trustee to limit the number of occupants of the home to such number as the proceeds from said trust fund would comfortably support and maintain.

Matilda's nephew, Edgar, to whom she had left the sum of \$100.00, filed a bill of complaint in the Circuit Court wherein he alleged that Matilda had not established a valid trust, but that it was a personal benevolence and was thus void. He also argued that the identity of the beneficiaries was indefinite and uncertain, which voided the proposed trust. He alleged that the property sought to be placed in trust should therefore pass to Matilda's heirs and distributees under the residuary clause of her will.

Is this a valid trust?

[DO NOT DISCUSS THE RULE AGAINST PERPETUITIES.]

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Proceed to questions in Booklet F