

VIRGINIA BOARD OF BAR EXAMINERS  
Norfolk, Virginia – February 25, 2020

***GREEN BOOKLET - Write your answer to Question 6 in the GREEN Answer Booklet 6***

6. On October 1, 2016, Erin, her mom and her brother went to Bill's Gourmet Burger Bar ("Burger Bar") in Franklin County, Virginia, for Erin's 16<sup>th</sup> birthday celebration dinner. Just minutes after getting home and an hour after consuming her "Diablo Burger," Erin began to feel sick and had symptoms of a gastrointestinal illness. She went to the hospital the following day and tested positive for escherichia coli (*E. coli*). Erin was very ill and remained in the hospital for 10 days, and missed one month of high school and the last month of her volleyball season.

On October 1, 2019, Erin filed a Complaint against Burger Bar in the Circuit Court of Franklin County, Virginia, seeking \$500,000 in compensatory damages on theories of liability including negligence, breach of implied warranty, and strict liability for serving "unwholesome food" that caused her to have "food poisoning."

In response to the Complaint, Burger Bar filed a Special Plea arguing that Erin's claim was barred by the applicable statute of limitations. Burger Bar contemporaneously filed an Answer to the Complaint, specifically pleading the statute of limitations as an affirmative defense. The Circuit Court denied Burger Bar's Special Plea and defense of the statute of limitations, ruling that the lawsuit had been timely filed.

During discovery, Burger Bar took the depositions of Erin, her mom and her brother. Erin's mom and brother admitted that they also ordered burgers for dinner on October 1, 2016, and that neither of them had any symptoms or sickness. In Erin's deposition, she admitted that 1) she was not aware of any other persons that got sick from eating at Burger Bar, 2) she volunteered the weekend before her birthday (3 and 4 days before), helping clean animal crates at the local animal shelter, and 3) she felt sick "almost immediately" after finishing her burger at Burger Bar. Burger Bar also took the deposition of its expert, Dr. Cornwell, a board-certified infectious disease physician. Dr. Cornwell testified that 1) the incubation period for *E. coli* is 3-4 days and under no circumstances could an exposure to it result in symptoms within one hour of ingestion of a contaminated food product, and 2) the likely exposure to *E. coli* occurred somewhere other than Burger Bar and most likely at the animal shelter. Erin took the deposition of Bill, the owner and general manager of Burger Bar. Bill testified that no complaints were made regarding any illnesses by customers in the one year before and one year after October 1, 2016.

Before trial, Burger Bar filed a Motion for Summary Judgment arguing that based upon the deposition testimony of Erin, mom, brother, Bill, and Dr. Cornwell, as referenced above, Erin failed to prove a breach of duty or warranty by Burger Bar or that the food she ingested at Burger Bar proximately caused her illness from *E. coli*. Erin filed a timely brief in opposition to the Motion. In a Memorandum Opinion, the Circuit Court denied the Motion for Summary Judgment.

As a result of Bill's (Burger Bar) deposition testimony, Erin filed a Motion *in Limine* seeking to exclude evidence that no complaints were made regarding illnesses by customers at Burger Bar in the year before or after Erin's alleged food poisoning. Burger Bar objected to and timely filed a brief in opposition to Erin's Motion *in Limine*. In a Memorandum Opinion, the Circuit Court sustained Erin's

Motion, excluded the evidence and instructed counsel for Burger Bar to refrain from mentioning or soliciting testimony regarding such evidence before the jury.

At trial, the jury returned a verdict for Erin in the amount of \$200,000. Burger Bar timely filed a Notice of Appeal with the Clerk of the Circuit Court.

- (a) **To which Court will the appeal lie, and is it an appeal as a matter of right? Explain fully.**
- (b) **Was the Circuit Court correct in denying Burger Bar's Special Plea and defense of the statute of limitations? Explain fully.**
- (c) **Was the Circuit Court correct in denying Burger Bar's Motion for Summary Judgment? Explain fully.**
- (d) **Did Burger Bar properly preserve for appeal its objection to the Circuit Court's exclusion of evidence that was the subject of Erin's Motion *in Limine*? Explain fully.**

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***PURPLE BOOKLET - Write your answer to Question 7 in the PURPLE Answer Booklet 7***

7. Bob Buyer graduated from college in Maine in December 2018 and secured his first full-time job in Virginia Beach, Virginia. In early 2019, he found what he thought would be a great starter home in an established neighborhood and made an offer to purchase it, which was accepted by Sam Seller. Sam's father, Fred, had lived in the home for twenty-five years before his death. Sam was selling the house as the Administrator of Fred's estate. Sam told Bob that he was sad to sell the home because he was Fred's only child and had grown up in the home.

The Purchase and Sale Agreement, executed by Bob and Sam, included the following provisions:

Paragraph 11. Seller shall convey title to the Property at Closing by general warranty deed with English Covenants of Title.

Paragraph 12. Seller makes no warranties of any kind except as specifically set forth in the Purchase and Sale Agreement. Seller warrants that all electric, plumbing, heating and air conditioning systems will be in good working order at Closing.

Paragraph 13. Closing will be held at the office of Buyer's attorney on or before February 15, 2019.

Bob conducted a walk-through inspection on the morning of Closing and found the property in satisfactory condition. Sam signed the deed and Closing was held in the afternoon on February 15, 2019.

Bob moved into the house in June. When Bob turned the air conditioner on, it made a loud banging sound, promptly turned off and then failed to work at all. As outside temperatures reached 98

degrees, Bob was miserable. To make matters worse, several days after Bob moved in, a woman appearing at the front door told him that based upon a DNA test she had recently taken, she is Fred's daughter and Sam's sister, and that she has a right to a partial interest in the house.

Bob brought an action against Sam seeking damages for the broken air conditioner and for the sister's claim of partial ownership. Bob based this action on the general warranty deed and the English Covenants of Title in Paragraph 11 and on the warranty in Paragraph 12 of the Purchase and Sale Agreement.

- (a) **Is Bob likely to prevail against Sam for breach of the general warranty deed and the English Covenants of Title with respect to (i) the sister's claim of an interest in the house, and (ii) the faulty air conditioner? Explain fully.**
- (b) **Is Bob likely to prevail against Sam for breach of the warranty under Paragraph 12 of the Purchase and Sale Agreement? Explain fully.**

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***GOLD BOOKLET - Write your answer to Question 8 in the GOLD Answer Booklet 8***

8. Art instructed his employee, Ethan, to deliver one of the company cars to Bart's Body Shop for Bart to repair a minor dent in the front fender. He told Ethan, "Just tell Bart to smooth it out as best he can. I don't want to pay to have it painted."

It was just before lunchtime when Ethan left to drive the car to Bart's. On the way, Ethan stopped at a Speedy Burger restaurant to buy something for lunch. In navigating the drive-through lane at Speedy Burger, Ethan scraped and dented the side of the car against the microphone stand, damaging both the driver-side door of the car and Speedy Burger's microphone stand.

When he arrived at Bart's after he had eaten his lunch, Ethan told Bart, "Art wants you to fix the dents." Bart had previously done repairs for Art and recognized Ethan as Art's employee, so he took Ethan at his word. Bart prepared a work order itemizing the work to be done as follows: "(i) knock out dent in front fender, repaint if necessary: \$100 + \$250 for painting if needed; (ii) repair damage to driver-side door and repaint area: \$1,250." The work order also stated, "These amounts are estimates only. Customer authorizes Bart's Body Shop to proceed with the described work as long as the cost does not exceed the estimates by 25%. Customer also agrees that Bart's Body Shop is not responsible for losses or damage to the vehicle while the vehicle is in Bart's possession."

Ethan signed the work order without objection and took the customer copy back to Art's office, where he laid it on Art's desk. Art was speaking to a supplier on the phone at the time, so he nodded to Ethan as if to signify acknowledgement of the work order. When he finished his telephone conversation, Art briefly glanced at the work order without paying much attention to the details and placed it in his outbox with other documents to be filed.

A week later, when Art went to pick up the car, Bart presented the invoice, with a copy of the work order, in the amount of \$1,800, which was 12.5% over the total estimate. Bart explained truthfully that the over-estimate charges were justified because it had been necessary to paint the front fender since the paint had chipped and cracked during the repair of the dent and that the door panel had required extra sanding and preparation.

Art objected, saying he knew nothing about why the door panel had to be repaired. He said he would pay only \$100, the cost of knocking out the front fender dent, which was all he had authorized Ethan to direct Bart to do. Also, when Art checked the glove compartment, he found that an expensive digital camera he had left in there was missing. It was later established that one of Bart's employees who worked on the car and was no longer employed had stolen the camera.

- (a) **In a suit by Bart's Body Shop to recover the entire \$1,800, what defenses, if any, might Art assert, and what is the likely outcome? Explain fully.**
- (b) **In a suit by Art to recover the value of the stolen camera from Bart's Body Shop, what defenses, if any, might Bart assert and what is the likely outcome? Explain fully.**
- (c) **In a suit by Speedy Burger against Art and Ethan to recover for the damage to the microphone stand, what defenses, if any, might Art assert, and what is the likely outcome? Explain fully.**
- (d) **If Art is found liable to Speedy Burger, does Art have any right of recovery from Ethan? Explain fully.**

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***ORANGE BOOKLET - Write your answer to Question 9 in the ORANGE Answer Booklet 9***

9. On May 1, 2017, Susan and Walter Wilson (the "Wilson's"), visited a new residential real estate development called Powhite Park in Sussex County, Virginia. While at the site, the Wilsons met with Terry, the sales agent for Powhite Park Development Company (the "Development Company"). The Wilsons informed Terry that they are naturalists and birdwatchers and that they wanted to purchase a home on a lot with a natural woodland environment.

Terry showed the Wilsons Lot 8 on a cul-de-sac shown on a plat map as being on the edge of "Phase I" of the development plan of Powhite Park. The plat map showed, behind Lot 8, a tract of open, wooded land owned by the Development Company and described on the plat as "conservation area." Terry informed the Wilsons that the designation "conservation area" meant that the Development Company had no intention of developing it.

Two weeks later, the Wilsons returned to discuss with Terry the signing of a contract to purchase Lot 8, and the Wilsons again stressed the importance to them that the land behind Lot 8 remain in its natural condition. Terry again assured them that the Development Company definitely had decided not to develop the "conservation area" in any manner. Based on this assurance, the Wilsons signed a contract on June 1, 2017, to purchase Lot 8 and for the Development Company to build them a residence, all for a

purchase price of \$650,000. Neither the contract nor the deed that conveyed Lot 8 to the Wilsons said anything about the “conservation area.” Powhite Park completed construction of the Wilsons’ home. The Wilsons closed on the purchase on April 15, 2018, and moved into their new home the next day.

In fact, the Development Company had intended all along to construct more residences in the “conservation area” behind Lot 8. A separate plat map, not shown to the Wilsons, was called “Phase II” and included lots in the “conservation area” behind Lot 8.

At a homeowner’s association meeting on June 1, 2018, the Development Company’s Director of Sales, Manny Otter, displaying the Phase II plat, informed those present, including the Wilsons, that the Development Company was ready to begin development of Phase II. Despite objections from the Wilsons and several neighbors, Manny informed everyone that the development was a “done deal” and that the attendees were welcome to purchase the Phase II lots if they wished to preserve the natural buffer behind their homes.

On May 15, 2019, the Wilsons filed suit in the Circuit Court of Sussex County, Virginia, asserting that the Development Company’s conduct conferred upon them equitable rights with respect to the “conservation area” behind Lot 8. The suit contained three counts: (1) breach of contract, (2) fraud, and (3) a request for a permanent injunction to prevent the Development Company from developing the area behind their home. They also seek an award of attorney’s fees.

You may assume that the Development Company committed fraud in this case.

- (a) **Have the Wilsons timely filed suit? Explain fully.**
- (b) **Do the Wilsons have an interest in the lots behind their home that would entitle them to prevent Powhite Park from developing the lots, and, if so, what is that interest, and should the Court:**
  - 1. **grant an injunction and/or**
  - 2. **award damages for breach of contract? Explain fully.**
- (c) **Can the Court properly award the Wilsons attorney’s fees if they prevail in their suit? Explain fully.**

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***Proceed to the Multiple Choice Questions in the Multiple Choice Blue Booklet.***