

August 21, 2018 (2:59pm)

✖✖ After each bar exam, the Virginia Board of Bar Examiners invite the Deans [or the Deans' designees] of all Law Schools located in Virginia, to meet with the Board. Representatives from some of the law schools in Virginia collaborate to prepare suggested answers which we think should be acceptable to the Virginia Board of Bar Examiners. These answers also include cites to some of the case and statutory law for reference even though the VBBE may not expect such specificity in applicants' answers on the exam. jrz

### Summary of suggested answers to the essay part of the July 2018 Virginia Bar Exam

Prepared by the following *attendees*, who were at the post exam meeting with the VBBE: J. R. Zepkin & William H. Shaw, III of William & Mary Law School, Emmeline P. Reeves of University of Richmond Law School, Benjamin V. Madison III of Regent University Law School, & C. Reid Flinn of Washington & Lee Law School (also adjunct faculty at William & Mary Law School and University of Richmond Law School).

The following, while not attending the meeting, provided us great help with suggested answers in each's particular area[s] of specialty: C. Elizabeth Belmont, Samuel W. Calhoun, Robert T. Danforth and Jonathan Shapiro of Washington & Lee Law School & James J. Duane, Lynne Marie Kohm, Michael H. Hernandez, Kathleen A. McKee, Craig A. Stern, and S. Ernie Walton of Regent University Law School.

1. [07.18] [Criminal Law/Procedure] In order to satisfy outstanding child support arrearages that they both owed, Jerry and Bob decided to rob Phil. Jerry and Bob knew that Phil often carried substantial amounts of money after he cashed his paycheck on the first day of every month, which was the next day. Jerry and Bob planned to threaten Phil and take his money, but they agreed they would not hurt him.

The following evening, Jerry and Bob followed Phil from the restaurant where he worked to a bank in Castlewood, Virginia. After Phil cashed his paycheck at the bank, Jerry and Bob approached him on the street. Jerry was armed with a pistol, but Bob did not have a weapon, so he put his hand in his pocket and acted like he was pointing a gun at Phil. Jerry told Phil to give him all of his money. Jerry then shot Phil and killed him. Jerry took all of the money out of Phil's pockets, and he and Bob fled.

Jerry and Bob went to Bob's house, where they evenly split Phil's money. Bob told Jerry that he would have never agreed to rob Phil if he knew Jerry planned to kill him. Jerry then explained that he killed Phil on an impulse, and asked Bob to forgive him. Bob told Jerry that he never wanted to see him again, and Jerry left Bob's house.

One week later, Jerry tried to buy drugs from Mickey in Honaker, Virginia. Jerry used some of Phil's money to fund the purchase. When the drug deal did not go smoothly, Jerry shot and killed Mickey using the same pistol he used to kill Phil. Later, Jerry was apprehended by the police and questioned about the murder of Mickey. Jerry told the police that he only tried to buy drugs from Mickey because he had a lot of money from robbing Phil. He then admitted that he and Bob robbed Phil outside of the bank in Castlewood, and that he accidentally killed Phil during the robbery.

Because Castlewood and Honaker are both located in Russell County, Virginia, Jerry and Bob were charged with several criminal offenses in the Russell County Circuit Court. Bob was charged with robbery, conspiracy to commit robbery, and two counts of felony murder based on the deaths of Phil and Mickey. At Bob's trial, Jerry testified about the plan to rob Phil. Jerry explained that he killed Phil and that Bob only participated in the robbery. Jerry also explained the events leading to Mickey's death.

At the conclusion of Bob's trial, a jury convicted him of each of the charged offenses. Bob moved to set aside his felony murder and conspiracy convictions due to insufficient evidence. He also argued that he could not be convicted of both robbery and conspiracy to commit robbery. The circuit court denied Bob's motions.

- (a) Did the circuit court err by denying Bob's motion to set aside his felony murder convictions? Explain fully.
- (b) Did the circuit court err by denying Bob's motion to set aside his conspiracy conviction? Explain fully.

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- (a) The court did not err in refusing to set aside the felony murder conviction in which Phil was a victim but did err in failing to set aside the felony murder conviction in which Mickey was a victim.

Bob agreed to rob Phil and was a full participant in that robbery. He helped plan it and helped effectuate it by approaching Phil while pretending to have a weapon, demanding Phil's money and taking it. The fact that Bob and Jerry agreed that Phil would not be hurt, and that Jerry unilaterally decided to shoot Phil, will not bar Bob's felony murder conviction. Velez-Suarez v. Commonwealth 64 Va. App. 269 (2015)

Felony murder is one which is contrary to the intention of the party, which occurs during the commission of a separate felony. It is also true that robbery is an inherently dangerous enterprise, and it was foreseeable that Phil would be harmed in that enterprise. The killing took place at the same time as the underlying felony (robbery). Thus, criminal liability is proper.

As to Mickey, however, Bob is not guilty. He played no role in the crime at all and does not even seem to be aware that a drug deal with Mickey was planned. The fact that money robbed from the first victim was used, as well as the same pistol and even the same actor (Jerry), does not give rise to any criminal liability for Bob.

Bob is also a principal in the second degree to the felony murder of Phil (but not of Mickey) because he assisted and encouraged Jerry and is liable even if he did not share with Jerry an intent to kill Phil. Rollston v. Commonwealth 11 Va. App. 535 (1991)

- (b) The court did not err in refusing to set aside Bob's conspiracy conviction in the case in which Phil was a victim. Though Bob was convicted of the crime which was the object of the conspiracy, a conspiracy conviction is nevertheless proper because it is a different crime, the essence of which is the agreement to do an unlawful act. Bob was guilty of conspiracy the minute he agreed with Jerry to rob Phil (there is no "overt act" requirement in Virginia). Conviction of the underlying crime of robbery raises no double jeopardy problem under the *Blockburger* test since each crime contains an element which the other does not.

Further, even though the substantive crime which was the subject of the conspiracy was completed, the conspiracy did not merge into the substantive crime and preclude a conspiracy conviction, because both charges were tried together. Merger prohibits only successive prosecutions for the substantive crime and the conspiracy to commit it. Va. Code §18.2-23.1; Boyd v. Commonwealth 236 Va. 346 (1988)

As to Mickey, however, the court did err. Bob had no agreement to kill Mickey and was unaware that the drug purchase was even planned.

2. [07.18] [Wills] John died in 2016 in Halifax County, where he had lived his entire life. He was survived by his wife, Martha, and their adult son, Steve. John and Martha also had a daughter, Dana, who died in 2010. As a teenager, Dana was always in trouble at school and was arrested several times for various offenses. Before she graduated from high school, she left the family home and went to live with her godparents, who legally adopted her when she was thirteen. Dana later had a son, Sam, who was 12 years old at the time of his mother's death. Sam continued to live with his godparents after Dana's death because his father refused to acknowledge him. Sam also became very close to John and Martha after Dana's death. He visited them often and even had a room in their home.

John properly executed a will in 2008 which, in pertinent part, included the following provisions:

*Article I: I name my son, Steve, as executor.*

*Article II: I give all my tangible personal property to the individuals named in the written statement disposing of my tangible personal property, incorporated herein by this reference.*

*Article III: I devise the home in Halifax County which I inherited from my parents, to my wife, Martha, in fee simple.*

*Article IV: All the rest and residue of my estate, I give, devise and bequeath to my wife, Martha, for and during her natural life or until she remarries. On Martha's death or remarriage, the remainder of my estate shall go to my heirs at law.*

John's will did not mention either Dana or Sam, but in 2009, John signed a written statement that referred to Article II in his will and provided as follows:

1. *All of John's jewelry, including his several Rolex watches, was to be distributed to Sam;*
2. *John's gun collection was to go to his brother, Bob; and*
3. *John's automobiles were to be distributed to his children.*

Steve recorded John's will shortly after his death in 2016, but didn't take any steps to qualify as executor at that time.

After John's death, Martha executed a deed to the home in Halifax County which stated "at my death, I transfer and convey my interest in the described property to Sam, as my designated beneficiary, if he survives me." The deed was properly recorded in the Clerk's Office of the Circuit Court of Halifax County and never revoked. Martha never remarried and died in January 2017.

In June 2017, Steve finally went to the courthouse in Halifax County to qualify himself as executor of John's estate. He needs to know the answers to the following questions:

- (a) Who is the owner of the home in Halifax County? Explain fully.
- (b) To whom should John's personal property be distributed? Explain fully.
- (c) Who is entitled to the remainder of John's estate? Explain fully.

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- (a) Sam is the owner of the home. Article III of John's 2008 will, which the facts stipulate was validly executed, devised the home to Martha. Martha therefore took title in fee simple.

Martha then executed a transfer on death deed [Va. Code § 64.2-621 *et seq.*] to Sam in accordance with the statutory requirements: the deed stated that transfer to the designated beneficiary was to occur at the transferor's death; the deed was recorded before the transferor's death in the circuit court where the property was located; and the deed was never revoked. Sam therefore takes the home.

- (b) John's personal property should be distributed as follows: [i] jewelry to Sam; [ii] gun collection to Bob; and [iii] automobiles to Steve.

John's 2009 written statement was a "gift list" or "legal list" which was incorporated by reference into John's 2008 will. Va. Code § 64.2-400 provides that, "If a will refers to a written statement or list to dispose of items of tangible personal property not otherwise specifically bequeathed, the statement or list shall be given effect to the extent that it describes items of tangible personal property and their intended recipients with reasonable certainty and is signed by the testator although it does not satisfy the requirements for a will."

Here, John's will expressly referred to the written statement, stated John's intent to incorporate the statement, was signed by John, and clearly described the jewelry, guns, and automobiles and the recipients of each. Because the written statement disposed only of tangible personalty, it did not need to be executed after the execution of the will.

John's jewelry should therefore be distributed to Sam, and John's gun collection should be distributed to Bob.

The statement specified that John's automobiles be distributed to his children. John had two children: Steve and Dana. Although Dana predeceased John, the anti-lapse statute does not protect her son Sam, because Dana's adoption prior to attaining the age of majority terminated her status as John's descendant. Steve therefore takes the automobiles.

- (c) Article IV of John's validly executed 2008 will provided that, "On Martha's death or remarriage, the remainder of my estate shall go to my heirs at law." Martha did not remarry, but she did die in January 2017,

so the remainder then passed to John's heirs.

John's surviving heirs are Steve and Sam. As explained in part (b) above, Dana's adoption cut off her rights, so Sam would not take through her. Steve therefore has a vested remainder in the residue. [Note that at the time Steve qualified as Executor, Martha was already dead, so Steve was already the outright owner of all the assets that passed under the residue of the estate.]

3. [07.18] [Corporations & Real Estate] Together Riles Plumlee and Izzy Jones renovate and sell older buildings in the City of Manassas, Virginia. In January of 2017, Riles acquired in his name only the property at 101 Madison Street, consisting of a parcel of land and an abandoned building, with the intention of renovating the building with Izzy and then selling the entire property (the "Project").

As they had done previously on other properties, Riles handled the finances and Izzy hired the contractors and oversaw their work on the Project. Despite extensive work on the building's roof, the Project's roof leaked when it rained.

Concerned about the leaking roof, Riles and Izzy decided that they should try to "decrease liability" on the Project, so they formed a Virginia corporation, Madison Corporation ("MadCorp"). Riles and Izzy are identified as the sole directors, stockholders, and officers of MadCorp.

MadCorp maintained customary corporate records (including articles of incorporation, bylaws, and meeting minutes). However, Riles used his personal checking account as the exclusive deposit and payment account for the Project, just like he had done on other properties that Riles and Izzy had worked on previously. MadCorp had no bank account of its own and had no access to Riles' personal checking account.

Riles aggressively marketed the Project for sale, and while in the course of doing so, Riles deeded the project to MadCorp, which had no other assets.

Not long thereafter, MadCorp, as seller, entered into a contract to sell the Project to Doctors in Your Neighborhood, Inc. ("Doctors"), a Virginia corporation, as buyer. The contract of sale contained, among other things, MadCorp's express warranty of good workmanship, as well as the statement that "the foregoing warranty shall be deemed merged into the deed at closing, and shall not survive closing." At closing, MadCorp delivered to Doctors a quitclaim deed for the Project, which did not reference any provision of the parties' contract of sale and which contained only customary language about transfer of title. The sale proceeds were deposited into Riles' personal checking account.

Within two months after closing, Doctors discovered that multiple roof leaks have damaged the building. Doctors' calls and demands to MadCorp went unanswered, so Doctors has initiated a legal action against MadCorp asserting a claim for breach of express warranty of workmanship, and also seeking to recover damages from Riles and Izzy personally, in the Circuit Court for the City of Manassas, in order to be compensated for the damage caused by the roof leaks.

- (a) Is Doctors' express warranty claim against MadCorp viable as a matter of law? Explain fully.
- (b) Is Doctors likely to prevail against Riles and Izzy personally, and if so, on what theory? Explain fully.

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- (a) Yes, Doctors' express warranty claim is viable against MadCorp as a matter of law.

Under the doctrine of merger, the land sale contract merges with the deed at closing, and the seller is no longer liable for breach of contract provisions pertaining to title. However, contract terms collateral to title do not merge into the deed. The Supreme Court of Virginia has held that the doctrine of merger is inapplicable to contract provisions unrelated to title even where the parties have expressly agreed in the land sale contract that representations and warranties shall be merged into the deed. Davis v. Tazewell Place Associates 254 Va. 257 (1997); Abi-Najm v. Concord Condominium, LLC, 280 Va. 350 (2010); Beck v. Smith, 260 Va. 452 (2000).

Here, Doctors claims that MadCorp has breached the express warranty of workmanship. That provision pertains to physical condition of the property and is unrelated to title. Because the contract term at issue does not concern the validity or nature of title, the provision survives closing, despite the parties' express agreement that "the foregoing warranty shall be deemed merged into the deed at closing, and shall not survive

closing.”

- (b) Doctors is likely to prevail against Riles and Izzy personally based on the theory of piercing the corporate veil.

Generally, shareholders are not personally liable for debts of the corporation. Where, however, shareholders have controlled or used the corporation to evade a personal obligation or perpetrate a fraud or crime, to commit an injustice or to gain an unfair advantage, the court may pierce the corporate veil and hold shareholders liable for the debts of the corporation. In Virginia, piercing is an extraordinary remedy rarely applied; however, piercing the corporate veil is justified when the unity of interest is such that the separate personalities of the corporation and the individual no longer exist and to adhere to that separateness would work an injustice.

Here, the shareholders clearly formed the corporation to avoid personal liability for problems with the roof of the building. Additionally, there was a clear unity of interest and ownership between the shareholders and the corporation. Although they followed customary corporate formalities by having articles of incorporation and bylaws and keeping meeting minutes, the shareholders commingled funds and deliberately failed to capitalize the corporation. Riles used his personal checking account as the exclusive deposit and payment account for the Project, and MadCorp had no bank account of its own and had no access to Riles' personal checking account. Also, MadCorp had no assets other than the Project, and upon sale of the Project, the proceeds were deposited into Riles' personal checking account. These facts demonstrate undercapitalization and failure to maintain separate assets.

Because of the egregious facts in this situation, Doctors will likely be successful in its effort to pierce the corporate veil and hold the shareholders personally liable on this debt.

[This subpart is based on *Klaiber v. Freemason Assoc., Inc.*, 266 Va. 491 (2003).]

4. [07.18] [Federal Civil Procedure & Va. Civil Procedure] Kilauea Lava Candles, Inc. (“KLC”), is incorporated in and has its principal place of business in Hilo, Hawaii. KLC specializes in the production of outdoor “lava candles.” The lava gel, when lit, produces a gentle, bubbling, orange-red glow. In June of 2016, Pele, a resident of Fincastle, Virginia, purchased a KLC lava candle at a small surf shop in San Diego, California, where she was visiting her sister. Pele returned to Virginia and used the lava candle without incident several times. On September 5, 2016, the lava candle unexpectedly exploded and burning gel landed on Pele, causing her multiple serious burns.

On January 5, 2018, Pele filed a personal injury action in the United States District Court for the Western District of Virginia, Roanoke Division, against KLC as the designer and manufacturer of the lava candle alleging negligence, strict liability and breach of implied warranty. Pele brought the case based on diversity of citizenship, seeking \$2 million in damages. In her Complaint, Pele specifically alleged personal jurisdiction over KLC by stating that “KLC designed, manufactured and sold the specific lava candle that exploded and injured the plaintiff” and that “KLC deliberately placed its products, including lava candles, into the stream of commerce and could reasonably expect its products would end up in Virginia and possibly cause harm in Virginia.”

On January 22, 2018, KLC filed an Answer to the Complaint, admitting that its principal place of business was Hilo, and denying paragraph by paragraph the allegations in the Complaint including the specific personal jurisdictional allegations listed above. KLC also included a paragraph in its Answer that stated, “KLC affirmatively denies that the Court has personal jurisdiction over KLC in this matter.” On February 2, 2018, KLC then filed a Motion to Dismiss the suit because the U.S. District Court in Virginia lacked specific and general personal jurisdiction over KLC. In support of the motion, KLC submitted the affidavit of its president and owner stating that:

1. KLC is a small company with 12 employees.
2. KLC has an informational website for those seeking information regarding its products but does not target sales in Virginia. Items cannot be purchased on the website directly.
3. Since KLC started in 2008, it has sold 5 products to Virginia residents who called and ordered products after seeing them on the website. The gross receipts for those products totaled \$200.

4. 90% of KLC's gross receipts come from its store located in Hilo, Hawaii.

On February 16, 2018, Pele filed a response to the motion. She argued that the Court should deny the motion because KLC had failed to timely assert the defense of lack of personal jurisdiction and thereby has waived any such defense.

In determining whether to grant the Motion to Dismiss, how should the U.S. District Court rule on the following:

- (a) Pele's claim that KLC has waived any jurisdictional defenses? Explain fully.
- (b) Pele's allegation that the Court has jurisdiction over KLC? Explain fully.

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- (a) The Court should reject Pele's claim that defendant KLC waived its personal jurisdiction defense and, thus, deny the motion to dismiss on that ground. Under Federal Rule of Civil Procedure 12, a defendant can preserve any of the highly waivable Rule 12 defenses—Rule 12(b)(2) (personal jurisdiction), Rule 12(b)(3) (venue), Rule 12(b)(4) (insufficient process), and Rule 12(b)(5) (insufficient service of process—by raising any such defenses in its first defensive filing within 21 days of service on the defendant. The defendant can choose to file a motion as his first defensive filing, or he can choose instead to file an answer. The key is that, whichever of the two is the first defensive filing, he includes the highly waivable defense in that filing. Here, KLC filed an answer within 17 days of service—within the 21-day requirement. KLC's answer not only denied Pele's allegation of personal jurisdiction over KLC in Virginia, but also raised lack of personal jurisdiction as an affirmative defense. Because KLC preserved the personal jurisdiction defense in its first defensive filing, it did not waive the defense. The later-filed motion could proceed to bring on for resolution the question of personal jurisdiction, as happened here. Federal Rule of Civil Procedure 12, therefore, rejects the classic general appearance doctrine. Under that doctrine, personal jurisdiction had to be raised by the defendant's appearing by special appearance solely to challenge jurisdiction and by filing a motion to dismiss based on personal jurisdiction, not an answer. As noted, Rule 12 allows the defendant the option of an answer or a motion as the means by which to preserve the personal jurisdiction defense, so long as the defense is included in the first defensive filing.
- (b) The Court should agree with KLC's assertion that the United States District Court in Virginia lacks personal jurisdiction over KLC and, thus, should grant KLC's motion to dismiss on that ground.

The analysis here requires the Court to first analyze whether the Virginia Long Arm Statute has been satisfied and then, independent of that, whether the Court can exercise personal jurisdiction without offending principles of Due Process. To have personal jurisdiction, the Court would have to conclude that both the Virginia Long Arm statute was satisfied and that principles of Due Process would not be infringed by its exercising jurisdiction. For the reasons that follow, neither the Virginia Long Arm statute nor principles of Due Process permit the Court to exercise jurisdiction over KLC.

Long Arm: Virginia has an enumerated Long Arm statute and, thus, one or more of the grounds in the Long Arm statute must be satisfied for a court in Virginia to exercise personal jurisdiction over a nonresident. Here, the two most likely candidates to argue are:

- (i) Causing tortious injury in this Commonwealth by an act or omission outside this Commonwealth if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this Commonwealth;
- (ii) Causing injury in this Commonwealth to any person by breach of warranty expressly or impliedly made in the sale of goods outside this Commonwealth when he might reasonably have expected such person to use, consume, or be affected by the goods in this Commonwealth, provided that he also regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this Commonwealth. . . . Va Code § 8.01-328.1.

Pele could argue that the lava lamp was defectively designed (in Hawaii where it was made), a product-liability tort if established, and that such tortious act or omission caused injury in Virginia when the candle exploded and injured Pele in Virginia. Moreover, a product or "good" sold in commerce sold by a merchant of goods of the kind (both KLC and the surf shop in California) would carry an implied warranty of

merchantability that Pele could argue was breached. The problem with satisfying these two provisions of Virginia's Long Arm is that they are the two that add additional requirements—i.e., that the defendant regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the Commonwealth.

Here, the facts state that KLC's Internet site does not target Virginia and that it is not possible to order the candles over the website. Further, the facts state the five candles were bought by Virginia residents over the approximately ten years since KLC started. The gross receipts for these five candles was \$200 and 90% of KLC's business is in Hawaii. These facts confirm that the plaintiff cannot satisfy the requirement in the two provisions of the Long Arm statute quoted above, requiring substantial business, revenues, and/or persistent conduct in Virginia.

Virginia's Long Arm has a provision for satisfying the Long Arm by "use of a computer or computer network" in Virginia. However, the prefatory language to the Long Arm states that the Statute will be satisfied by acts or omissions that "arise from" the activities listed. Because the Internet could not, and was not used, to order the candle here, that provision could not be used to satisfy the Virginia Long Arm.

Due Process: Pele argued that Virginia had both general jurisdiction and specific jurisdiction over KLC. The argument is erroneous for the following reasons. General jurisdiction has increasingly been reserved to instances in which a company is "at home" in a state. The Supreme Court has indicated that the primary ways that a company would be at home in a state is by incorporating there or having its principal place of business in the State. Here, KLC is incorporated and has its principal place of business in Hawaii. Lacking incorporation or having one's principal place of business in a state, even substantial conduct and sales in a state—unrelated to the claim in question—have been insufficient to establish general jurisdiction. Therefore, the Court here lacks general jurisdiction over KLC.

A court will have specific personal jurisdiction if, under the *International Shoe* minimum contacts analysis, the defendant has sufficient minimum contacts with the forum state and the claim in question arises from those minimum contacts. To satisfy specific jurisdiction, the defendant would have to be able to reasonably anticipate, based on its conduct prior to suit, being sued in the forum. Pele argues that KLC manufactured the lava lamps and deliberately placed them in the stream of commerce, aware that they could end up in Virginia. In stream-of-commerce cases, however, the Supreme Court has refused to find specific jurisdiction from a manufacturer's simply placing a product in commerce. Instead, the defendant must have other purposeful conduct directed at the forum that would make it reasonable for the defendant to have anticipated being sued there on a claim related to products. This case resembles the World-Wide Volkswagen v. Woodsen 444 U.S. 286 (1980) case in which the plaintiff bought a car from the defendant car dealer in the New York area and drove the car to Oklahoma where she had an accident. The Court held that simply placing the car in the stream of commerce, even though cars are mobile and one could foresee it could make its way from New York to Oklahoma, was not sufficient to demonstrate the minimum contacts with the forum state necessary to satisfy Due Process.

Because Virginia's Long Arm Statute is not satisfied, and because the U.S. District Court has neither general nor specific jurisdiction, the Court should grant the motion to dismiss as to personal jurisdiction.

**5.** [07.18] [UCC - Sales] On May 1, 2016, Ed entered into a sales contract for and purchased a new \$225,000 farm tractor ("Tractor") from Deere Tractors ("Deere"), a Virginia dealership. The Tractor was manufactured by RVA Machinery.

Beginning on June 1, 2016, Ed began experiencing problems with the Tractor, including a loose gearshift lever, heater and GPS malfunctions, fast idling, excessive oil consumption, and overheating. These were all problems that he could not have reasonably discovered before he bought the Tractor and which he reasonably expected the dealership could remedy. From the time of purchase until September 30, 2016, Ed returned the Tractor to the dealership at least six times for repairs. The dealership responded to all the complaints with efforts to repair the Tractor. Some problems were cured, while others recurred after temporary repairs. The overall effect was that defects and malfunctions persisted, Ed was deprived of the use of the Tractor for significant periods of time, and he incurred rental expenses for another vehicle while the Tractor was at the dealership undergoing repairs.

On October 1, 2016, after having driven the Tractor 1,000 miles, Ed wrote to Deere demanding that Deere pick up the Tractor and give him a full refund of the purchase price, along with interest and expenses incurred while the Tractor

had been in the shop or, in the alternative, a replacement with a new, comparable Tractor. Deereman decided not to respond, waiting instead for Ed to actually tender his Tractor back to the dealership.

While waiting for a response, Ed continued to drive the Tractor because he needed it to work his farm and lacked a sufficient substitute. Within a week after he began hearing a front-end noise in late October, Ed bought another tractor and left the one purchased from Deereman parked in his barn, intending not to use it until Deereman came to pick it up. As of that time, he had driven the Tractor an additional 300 miles.

Deereman has not responded to Ed. He now wishes to file suit against Deereman to revoke his acceptance of the Tractor and obtain a refund of the purchase price. He also wishes to sue both Deereman and RVA Machinery for breach of warranty to recover damages he incurred as a result of the defects in the Tractor, as well as punitive damages.

- (a) Is Ed entitled to seek the alternative relief of revocation of his acceptance of the Tractor and compensatory damages in the same lawsuit? Explain fully.
- (b) As against Deereman, is Ed entitled to revocation of his acceptance of the Tractor and a return of the purchase price? Explain fully.
- (c) As against Deereman and RVA Machinery, is Ed entitled to recover damages incurred as a result of the defects in the Tractor and, if so, what is the measure of those damages? Explain fully.
- (d) As against Deereman and RVA Machinery, is Ed entitled to recover punitive damages? Explain fully.

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Note: This question is based on the facts of *Gasque v. Mooers Motor Car Co., Inc.*, 227 Va. 154, (1984)]

- (a) Yes. A buyer of goods is entitled to the cumulative relief of revocation of acceptance and money damages. [Off. Cmt. 1 to Va. Code §8.2-608: The buyer is no longer required to elect between revocation of acceptance and recovery of damages for breach. Both are now available to him.] See parts (b) and (c) below for a discussion of the merits of Ed's claims for revocation and damages.
- (b) Probably no, since Ed wrongfully continued to use the Tractor after giving notice of revocation. Normally, a buyer is entitled to revoke acceptance if the nonconformity substantially impairs the value of the goods, acceptance was reasonably induced by the difficulty of discovering the nonconformity before acceptance or by the seller's assurances to cure, and the buyer gives notice of revocation within a reasonable time after discovering the nonconformity and before any substantial change not caused by existing defects [Va. Code §8.2-608].

The facts state that the defects deprived Ed of the use of the Tractor for significant amounts of time, thus showing substantial impairment. The facts also state that Ed's acceptance of the Tractor was reasonably induced by the difficulty of discovery. Deereman's continuing efforts to cure extended Ed's time to revoke, and the facts state that Ed notified Deereman of his decision to revoke.

However, Ed's continued use of the Tractor after notice of revocation was wrongful [Va. Code §8.-608(3) and Va. Code §8.2-602(2)(a)]. Ed drove the Tractor 300 miles after giving notice of revocation: an additional 30% of mileage. Significant and avoidable use of the goods after notice of revocation is an exercise of ownership, which deprives the buyer of the power to revoke.

Arguably, the use may have been commercially reasonable (the governing standard from *Gasque*) since Ed only drove the tractor 300 miles and needed the Tractor to work his farm. Ed could then assert that paying a reasonable rental fee would offset the argument that he exceeded his authority as a bailee.

- (c) Yes. Ed is entitled to recover damages on a theory of breach of the implied warranty of merchantability [Va. Code §8.2-314]. The Tractor was sold by a merchant of goods of the kind, and the warranty was not modified or disclaimed. The Tractor was unfit for the ordinary purpose of a new vehicle because of its multiple serious defects.



Having accepted, Ed is entitled to expectation damages representing the difference between the value of the Tractor as warranted and as accepted, plus incidental and consequential damages [Va. Code §8.2-714]. The cost of rentals (as well as any repairs and supplies/parts) would be incidental damages, but the facts do not indicate any consequential damages [Va. Code §8.2-715]. Having accepted, Ed lost his right to “cover” damages (the difference between the cost of the Tractor and the replacement vehicle) [Va. Code §8.2-712].

Ed may also recover damages from RVA Machinery Industries as well as Deere, even though he had no contract with RVA Machinery. Lack of privity is not a defense to a breach of warranty by the manufacturer since Ed was a person whom the manufacturer or seller might reasonably have expected to use, consume, or be affected by the goods [Va. Code §8.2-318].

Note that this answer assumes reasonable notice of breach under Va. Code §8.2-607(3)(a), which is prerequisite to any Code remedy.

- (d) No. The facts indicate merely a breach of warranty, not willful or wanton conduct, or such recklessness as evinces a conscious disregard for the safety of others, which is the normal test for whether punitive damages are permitted.

**§ 8.2-314. Implied warranty: Merchantability; usage of trade.**

(1) Unless excluded or modified (§ 8.2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.

(2) Goods to be merchantable must be at least such as

(a) pass without objection in the trade under the contract description; and

(b) in the case of fungible goods, are of fair average quality within the description; and

(c) are fit for the ordinary purposes for which such goods are used; and

(d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and

(e) are adequately contained, packaged, and labeled as the agreement may require; and

(f) conform to the promises or affirmations of fact made on the container or label if any.

(3) Unless excluded or modified (§ 8.2-316) other implied warranties may arise from course of dealing or usage of trade. 1964, c. 219.

**§ 8.2-318. When lack of privity no defense in action against manufacturer or seller of goods.**

Lack of privity between plaintiff and defendant shall be no defense in any action brought against the manufacturer or seller of goods to recover damages for breach of warranty, express or implied, or for negligence, although the plaintiff did not purchase the goods from the defendant, if the plaintiff was a person whom the manufacturer or seller might reasonably have expected to use, consume, or be affected by the goods; however, this section shall not be construed to affect any litigation pending on June 29, 1962.

Code 1950, § 8-654.3; 1962, c. 476; 1964, c. 219.

**§ 8.2-602. Manner and effect of rightful rejection.**

(1) Rejection of goods must be within a reasonable time after their delivery or tender. It is ineffective unless the buyer seasonably notifies the seller.

(2) Subject to the provisions of the two following sections on rejected goods (§§ 8.2-603 and 8.2-604),

(a) after rejection any exercise of ownership by the buyer with respect to any commercial unit is wrongful as against the seller; and

(b) if the buyer has before rejection taken physical possession of goods in which he does not have a security interest under the provisions of this title (subsection (3) of § 8.2-711), he is under a duty after rejection to hold them with reasonable care at the seller's disposition for a time sufficient to permit the seller to remove them; but

(c) the buyer has no further obligations with regard to goods rightfully rejected.

(3) The seller's rights with respect to goods wrongfully rejected are governed by the provisions of this title on seller's remedies in general (§ 8.2-703).

1964, c. 219.

**§ 8.2-607. Effect of acceptance; notice of breach; burden of establishing breach after acceptance; notice of claim or litigation to person answerable over.**

(1) The buyer must pay at the contract rate for any goods accepted.

(2) Acceptance of goods by the buyer precludes rejection of the goods accepted and if made with knowledge of a nonconformity cannot be revoked because of it unless the acceptance was on the reasonable assumption that the nonconformity would be seasonably cured but acceptance does not of itself impair any other remedy provided by this title for nonconformity.

(3) Where a tender has been accepted

(a) the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy; and

(b) if the claim is one for infringement or the like (subsection (3) of § 8.2-312) and the buyer is sued as a result of such a breach he must so notify the seller within a reasonable time after he receives notice of the litigation or be barred from any remedy over for liability established by the litigation.

(4) The burden is on the buyer to establish any breach with respect to the goods accepted.

(5) Where the buyer is sued for breach of a warranty or other obligation for which his seller is answerable over

(a) he may give his seller written notice of the litigation. If the notice states that the seller may come in and defend and that if the seller does not do so he will be bound in any action against him by his buyer by any determination of fact common to the two litigations, then unless the seller after reasonable receipt of the notice does come in and defend he is so bound.

(b) if the claim is one for infringement or the like (subsection (3) of § 8.2-312) the original seller may demand in writing that his buyer turn over to him control of the litigation including settlement or else be barred from any remedy over and if he also agrees to bear all expense and to satisfy any adverse judgment, then unless the buyer after reasonable receipt of the demand does turn over control the buyer is so barred.

(6) The provisions of subsections (3), (4) and (5) apply to any obligation of a buyer to hold the seller harmless against infringement or the like (subsection (3) of § 8.2-312).

1964, c. 219.

#### **§ 8.2-608. Revocation of acceptance in whole or in part.**

(1) The buyer may revoke his acceptance of a lot or commercial unit whose non-conformity substantially impairs its value to him if he has accepted it

(a) on the reasonable assumption that its nonconformity would be cured and it has not been seasonably cured; or

(b) without discovery of such nonconformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances.

(2) Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by their own defects. It is not effective until the buyer notifies the seller of it.

(3) A buyer who so revokes has the same rights and duties with regard to the goods involved as if he had rejected them.

1964, c. 219.

#### **Comment 1 to §8.2-608**

##### **OFFICIAL COMMENT**

PURPOSES OF CHANGES: To make it clear that:

1. Although the prior basic policy is continued, the buyer is no longer required to elect between revocation of acceptance and recovery of damages for breach. Both are now available to him. The non-alternative character of the two remedies is stressed by the terms used in the present section. The section no longer speaks of "rescission," a term capable of ambiguous application either to transfer of title to the goods or to the contract of sale and susceptible also of confusion with cancellation for cause of an executed or executory portion of the contract. The remedy under this section is instead referred to simply as "revocation of acceptance" of goods tendered under a contract for sale and involves no suggestion of "election" of any sort.

#### **§ 8.2-712. "Cover"; buyer's procurement of substitute goods.**

(1) After a breach within the preceding section [§ 8.2-711] the buyer may "cover" by making in good faith and without unreasonable delay any reasonable purchase of or contract to purchase goods in substitution for those due from the seller.

(2) The buyer may recover from the seller as damages the difference between the cost of cover and the contract price together with any incidental or consequential damages as hereinafter defined (§ 8.2-715), but less expenses saved in consequence of the seller's breach.

(3) Failure of the buyer to effect cover within this section does not bar him from any other remedy.

1964, c. 219.

#### **§ 8.2-715. Buyer's incidental and consequential damages.**

(1) Incidental damages resulting from the seller's breach include expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach.

(2) Consequential damages resulting from the seller's breach include

- (a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and  
 (b) injury to person or property proximately resulting from any breach of warranty.  
 1964, c. 219.

6. [07.18] [Va. Civil Procedure] On November 15, 2015, Lucy Lane was operating a motor vehicle on the Fairfax County Parkway when it was struck from behind by a vehicle driven by Debbie Jones. In Lucy's vehicle at the time was her daughter, Patty, who coincidentally turned sixteen years of age on the day of the collision. Both Lucy and Patty suffered physical injuries.

Lucy retained attorney Allen to represent herself and Patty. Lucy authorized Allen to file suit for both of them and provided him with a copy of the insurance information card for the vehicle driven by Debbie, which Debbie had produced to Lucy following the collision. This insurance card identified the owner of the vehicle as Otto, who is Debbie's neighbor. Debbie had borrowed Otto's car to run an errand while her car was in the shop.

On November 7, 2017, Allen initiated two civil cases by filing two separate Complaints against Otto in the Circuit Court of Fairfax County, Virginia, alleging that the defendant's negligent driving was the proximate cause of the collision and the resulting injuries to Lucy and Patty, respectively, and seeking compensatory damages. The first Complaint sought damages for Lucy's injuries alone, and the style of that action was "Lucy v. Otto." The second Complaint sought damages for Patty's injuries alone.

Otto was served with both Complaints on May 25, 2018. Otto immediately informed Allen that he was not the driver and that his neighbor, Debbie, was driving the vehicle at the time of the collision. On June 1, 2018, Allen filed motions to amend each Complaint, seeking to substitute Debbie as defendant, in place of Otto; this was done without notice to Debbie or Otto. On June 11, 2018, the Court entered an order in each action allowing leave to amend, and both Amended Complaints were served later that same day on Debbie.

Debbie filed a Plea in Bar in each case, asserting that the Plaintiff's claim was barred by the applicable statute of limitations. Debbie also argued that the order allowing the Amended Complaint in each case was improper.

In response, Allen claims that the "mix-up" with the defendant's name was harmless, pointing to § 8.01-6 of the Virginia Code which states:

*A misnomer in any pleading may, on the motion of any party, and on affidavit of the right name, be amended by inserting the right name. An amendment changing the party against whom a claim is asserted, whether to correct a misnomer or otherwise, relates back to the date of the original pleading if (i) the claim asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth in the original pleading, (ii) within the limitations period prescribed for commencing the action against the party to be brought in by the amendment, that party or its agent received notice of the institution of the action, (iii) that party will not be prejudiced in maintaining a defense on the merits, and (iv) that party knew or should have known that but for a mistake concerning the identity of the proper party, the action would have been brought against that party.*

- (a) How should the lawsuit seeking damages for Patty's injuries have been brought and why? Explain fully.
- (b) Was the incorrect naming of the defendant in the original Complaints a misnomer or a misjoinder? Explain fully.
- (c) Without considering Va. Code § 8.01-6 for this subpart only, what is the bar date of the applicable period in each of the two cases pending against Debbie in the Circuit Court and why? Explain fully.
- (d) What is the effect, if any, of Va. Code § 8.01-6 in Lucy's lawsuit against Debbie? Explain fully.

✖✖

- (a) The action for Patty should have been brought as: *Patty Lane, a minor, who sues by*

*her next friend, Lucy Lane, Plaintiff v. Debbie Jones, Defendant.* Since Patty is a minor [age of majority is 18 in Virginia. Va. Code §§1-203 & 1-204] under Va. Code §8.01-8, a minor must sue by next friend]

- (b) It was not a misnomer. A misnomer is a mistake in name, not person. Here the wrong person was sued. This was a misjoinder of parties. Otto was an incorrect party.
- (c) (i) As to Lucy's cause of action for personal injury, under Va. Code §8.01-243(A), the statute of limitations is two years, starting on the date the cause of action accrued, per Va. Code §8.01-230. The crash & injury date of November 15<sup>th</sup>, 2015 is when the personal injury action accrued. Suit was filed on November 7, 2017, within the period of limitation, but against the wrong party. The general rule is that the date of filing suit, *against the correct party*, tolls the running of the s/l, not the service on the defendant. Rule of Court 3:2(a).
- (ii) As to Patty's cause of action for personal injury, again, the s/l is two years but because Patty's an infant, under Va. Code §8.01-229-A[1], if a person who's entitled to bring a cause of action, is, at the time the c/a accrues, an infant, the s/l does not begin to run until the age of majority [18] is reached. Then the two year clock would begin to run. Thus the s/l would not bar the claim until two years after Patty turned 18.
- (d) The facts did involve a change of party and Va. Code §8.01-6 is engaged. Discussion should include each of the *elements* under the code section, that must be shown for the "filing date" of the amended complaint to relate back to the initial filing.
- (i) The cause of action asserted in the amended complaint did arise out of the conduct, transaction, or occurrence set forth in the initial pleading.
- (ii) The facts do not reveal that before the two year period, Patty was aware of the pendency of the action;
- (iii) Nothing in the facts suggests that Patty will be prejudiced in maintaining a defense;
- (iv) Patty should have been aware that there was a cause of action against her for the injuries brought about by the crash.

Because element (ii) of Va. Code §8.01-6 is not shown, the filing of the amended complaint against Debbie Jones by Lucy Lane, will not relate back to the initial filing and the statute of limitation will have run out on November 15<sup>th</sup>, 2017. The s/l was not tolled until the amended complaint was filed on June 11, 2018 at which time it was too late.

Attendees thinking: Discussion was not expected about the failure to have a new summons attached to the amended complaint to be served on Debbie Jones. Rule of Court 3:5 See: Lifestar v. Vegosen 267 Va. 720 (2004)

7. [07.18] [Va. Civil Procedure & Creditors Rights] Daniel, an investor and speculator, owned three parcels of real estate in Virginia, each of which had been independently appraised at a value of at least \$125,000. Parcel 1 was owned by Daniel and his wife, Andrea, as tenants by the entireties. Parcels 2 and 3 were owned by Daniel individually.

After a long period of successful speculation, Daniel, who invested as an individual, made several bad decisions and found himself with no assets other than the three parcels and was forced to rely on Andrea's salary as a physical therapist for living expenses.

For several years, the Bank of Virginia (Bank) had furnished Daniel an unsecured loan of \$400,000, which had been mutually satisfactory. Recently, Daniel had been unable to pay Bank in a timely manner and

is in default. In June 2018, Bank demanded that Daniel pay at least one-half of his \$400,000 balance immediately or give Bank a deed of trust on all three parcels as security for the debt.

On July 1, 2018, Daniel and Andrea conveyed Parcel 1 to Andrea for the sum of \$1,000. Upon learning of this, Bank filed suit on July 2, 2018, to recover the full amount of the loan from Daniel.

On July 5, 2018, Daniel gave his father a Deed of Trust on Parcel 2 to secure a \$50,000 unpaid loan that his father had made to Daniel in 2015.

Also on July 5, Daniel conveyed Parcel 3 to his friend Frank in exchange for a promissory note for \$100,000, payable in a lump sum five years later. In the note, Daniel retained the right to repurchase the parcel at any time for the same amount.

Bank, upon learning of these transactions, amended the Complaint against Daniel and asked the Court to set aside the deed to Andrea for Parcel 1, the Deed of Trust on Parcel 2 to Daniel's father, and the deed to Frank for Parcel 3. In his Answer, Daniel denied that Bank had the right to have these conveyances set aside.

What argument(s) should Bank and Daniel make in support of their positions as to each of the conveyances, and how should the Court rule on each? Explain fully.

✖✖

Daniel owes the bank \$400,000.00 and his only assets were his indivisible interest in Parcel 1, owned by Daniel and his wife as tenants by the entirety and Parcels 2 & 3, owned by just him. The total value of Parcels 2 & 3 were \$250,000.00. It's clear that his debts were far greater than his assets, even if you count Parcel 1's value and thus Daniel is insolvent and subject to Va. Code §55-81.

Some arguments that should be made and the court should rule, as follows:

1. As to Parcel 1:

- (i) If the parties were not married and holding Parcel 1 as T/E, this clearly would qualify as both a fraudulent conveyance under Va. Code §55-80 or a voluntary conveyance under §55-81 and under either, subject to being set aside. Even counting the value of Parcel 1 as to Dan's assets, would leave him insolvent for purposes of Va. Code §55-81. alternatively
- (ii) Daniel can argue that the bank couldn't reach the property while it was held as T/E and thus the two tenants conveying the entire interest to the Wife, did not harm the bank in anyway and that Daniel could not have committed any fraud against the bank because it was not harmed. Ruling: This is a pretty good argument.

2. As to Parcel 2:

- (i) An insolvent debtor may generally make a transfer of his assets to a *bona fide creditor* on account of an existing indebtedness. Bank of Commerce v. Rosemary and Thyme 281 Va. 781 [1978]
- (ii) Arguably, the conveyance of a D/T lien in favor of his Dad to secure an existing \$50,000.00 loan would be okay, so long as there had in fact been a bona fide loan outstanding. Daniel did retain title and the balance of his equity would be subject to being reached by other creditors. Ruling: Transaction stands.
- (iii) If the \$50,000.00 *loan* to his Dad is a sham, then the transaction is fraudulent and subject to being set aside under Va. Code §55-80 and the fact that the *loan* was a sham should satisfy the *clear and convincing* burden of proof for fraud claims.
- (iv) Also, if the \$50,000.00 *loan* to his Dad is a sham, the transaction would be covered by Va. Code §55-81 as a conveyance by a grantor who at the time was

insolvent, which was not “upon consideration deemed valuable at law...” and subject to be set aside.

3. As to Parcel 3:

(i) The conveyance of Parcel 3 in exchange for a promissory note for \$100,000.00 with the right to buy back the property at any time, is very suspicious. It does not appear that Daniel’s friend, Frank, is a bona fide creditor and the transaction was for less than the value of the property. Two arguments:

(a) The transaction is likely fraudulent and would fall under Va. Code §55-80. While there are valid questions about the *bona fides* involved, and but it’s important to remember that proof of fraud requires *clear and convincing evidence*, on these facts, it’s likely that the transaction should be set aside as fraudulent.

(b) The conveyance was for less than full consideration, since it was for \$100,000.00 when the property was valued at \$125,000.00. The facts do not reveal that the friend, Frank, had any resources to pay the promissory note back, which when considered with Daniel’s right to buy the property back at any time for the same amount, amounted to the transaction failing to be “upon consideration deemed valuable in law” and under Va. Code §55-81, it was a voluntary conveyance and subject to being set aside. Ruling: court should set it aside.

**§ 55-80. Void fraudulent acts; bona fide purchasers not affected**

Every gift, conveyance, assignment or transfer of, or charge upon, any estate, real or personal, every suit commenced or decree, judgment or execution suffered or obtained and every bond or other writing given with intent to delay, hinder or defraud creditors, purchasers or other persons of or from what they are or may be lawfully entitled to shall, as to such creditors, purchasers or other persons, their representatives or assigns, be void. This section shall not affect the title of a purchaser for valuable consideration, unless it appear that he had notice of the fraudulent intent of his immediate grantor or of the fraud rendering void the title of such grantor. History: Code 1919, § 5184.

**§ 55-81. Voluntary gifts, etc., void as to prior creditors**

Every gift, conveyance, assignment, transfer or charge which is not upon consideration deemed valuable in law, or which is upon consideration of marriage, by an insolvent transferor, or by a transferor who is thereby rendered insolvent, shall be void as to creditors whose debts shall have been contracted at the time it was made, but shall not, on that account merely, be void as to creditors whose debts shall have been contracted or as to purchasers who shall have purchased after it was made. Even though it is decreed to be void as to a prior creditor, because voluntary or upon consideration of marriage, it shall not, for that cause, be decreed to be void as to subsequent creditors or purchasers.

History: Code 1919, § 5185; 1988, c. 512.

8. [07.18] [Professional Responsibility & Va. Civil Procedure] Larry Lawyer filed a Complaint on behalf of his friend and client Edward in the Hampton Circuit Court against Golden Years Nursing Home (“Nursing Home”). Edward was executor of his mother’s estate. Edward’s mother, Mary, had entered Nursing Home and died after only three months there. Edward believes her death resulted from negligence by Nursing Home staff.

The litigation was unusually contentious from the beginning. Larry filed objections to every request for production of documents and every interrogatory filed by Nursing Home. Among the documents Nursing Home sought from the estate was the contract Mary signed with Nursing Home when she became a resident there. Nursing Home asserted that the contract provided for binding arbitration, but had apparently been unable to find the contract in its own records.

During the trial in the action, Larry stated in opening remarks that without a contract providing for arbitration, arbitration could not be compelled and that no such contract could be located. Edward then testified that he remembered reading the contract, but he did not remember seeing an arbitration provision in it. On cross-examination, Edward said that he had actually located the contract in question several weeks ago and had given it to Larry. Edward further testified that he and Larry had reviewed some provisions of the contract just before the trial. When the judge asked Larry if Edward's testimony were true, Larry refused to answer.

The judge then advised the parties that she would consider whether sanctions should be imposed against Larry for failing to produce the contract promptly after it had been located, lying to the Court in opening remarks that the contract could not be located, and for his repeated pretrial motions that the judge considered frivolous.

The Court further advised that it would consider awarding the Nursing Home reasonable attorney's fees and costs as sanctions, and that Larry could be liable to pay those sums.

Nursing Home filed a memorandum addressing the issues to be heard at the sanctions hearing. Larry then filed a memorandum addressing the sanctions issues and responding to the arguments advanced by Nursing Home in its memorandum. He asserted that the Court had no jurisdiction to consider sanctions *sua sponte* and accused the Court of having been "discriminatory and irrational" in ordering the sanctions hearing and having demonstrated "less legal ability than that possessed by the laziest first year law student." At the sanctions hearing, Larry stated that throughout the course of the action the judge had demonstrated a lack of common sense so absurd that her Court was something worthy of the Keystone Cops.

Following the sanctions hearing, the Court entered an order (i) holding Larry in contempt for the language used in his memorandum and at the hearing, (ii) revoking his privilege to practice law in the Hampton Circuit Court, and (iii) reporting the matter to the Virginia State Bar with the recommendation that it consider revoking Larry's license to practice law in the Commonwealth.

In the letter transmitting that order, the judge advised that she would strike the plaintiff's evidence and grant judgment to Nursing Home, and asked Nursing Home's attorney to draft an order to that effect. Larry immediately filed a motion for a nonsuit.

- (a) What Rules of Professional Conduct has Larry violated by his actions? Explain fully. Limit your discussion to three violations.
- (b) How should the Court rule on Larry's motion for a nonsuit? Explain fully.
- (c) Did the Court have the authority to award sanctions against Larry? Explain fully.
- (d) Did the Court have authority to carry out each of the specifications in its order? Explain fully.

xx

- (a) (i) Larry asserted he could not locate the contract when he, in fact, had the contract in his possession.

### **Rule 3.1 - Meritorious Claims And Contentions**

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case

be established.

**Rule 3.3 – Candor Toward The Tribunal**

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal;

.....

(ii) Larry filed frivolous motions beyond discovery abuses.

**Rule 3.1 - Meritorious Claims And Contentions**

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

(iii) Larry lied to the court in his opening statement about a material fact (that the contract could not be located, when he had it in his possession)

**Rule 3.3 – Candor Toward The Tribunal**

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal;

(iv) Larry obstructed the opponent’s access to material evidence by concealing his possession of the contract.

**Rule 3.4 – Fairness To Opposing Party And Counsel**

A lawyer shall not:

(a) Obstruct another party's access to evidence or alter, destroy or conceal a document or other material having potential evidentiary value for the purpose of obstructing a party's access to evidence. A lawyer shall not counsel or assist another person to do any such act.

(v) Larry propounded burdensome and frivolous discovery and frustrated discovery by his opponent with frivolous objections, and further filed frivolous motions.

**Rule 3.4 – Fairness To Opposing Party And Counsel**

A lawyer shall not:

(e) Make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party.

.....

(vi) Larry violated portions of Rules, 3.1, 3.3 and Rule 3.4.

**Rule 8.4 – Misconduct**

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

.....

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation which reflects adversely on the lawyer’s fitness to practice law;

.....



- (vi) Larry’s conduct at trial, in particular his lie to the court in his opening statement , involved dishonesty which reflected adversely on his fitness to practice law.

**Rule 8.4 – Misconduct**

It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation which reflects adversely on the lawyer’s fitness to practice law;

Attendees thinking: As to the extracts from the Rules of Professional Conduct [RPC] that are inserted above, persons taking the exam are not expected to cite, *verbatim*, these rules, but should be able to state generally what’s prohibited and apply this to the facts.

- (b) Under Va. Code §8.01-380, there are three situations, anyone of which, will cut off a plaintiff’s right to take a nonsuit. They are:

**§ 8.01-380. Dismissal of action by nonsuit; fees and costs.**

A. A party shall not be allowed to suffer a nonsuit as to any cause of action or claim, or any other party to the proceeding, unless he does so before [1] a motion to strike the evidence has been sustained or [2] before the jury retires from the bar or [3] before the action has been submitted to the court for decision.

- [1] A motion to strike has been sustained. One can argue:

- [i] That the judge writing she “would strike the plaintiff’s evidence and grant summary judgement” along with the court’s direction to counsel to prepare an order in accordance with the letter, was tantamount to sustaining the motion to strike the plaintiff’s evidence and to cut off the right of the plaintiff to nonsuit; or alternatively

- [ii] “Sustained” is a critical part of [1] and this is illustrated in the case of Berryman, Admin. v. Moody 205 Va. 516 (1964). The judge in Berryman, when ruling on a MS was explaining the court’s thinking, before announcing the court’s actual ruling, but it was very obvious the court was about to sustain the motion. The plaintiff interrupted the court and moved for a nonsuit. The trial judge held the motion was too late because it was obvious as to what the ruling was going to be. The SCV reversed on the basis that the trial judge had not sustained the motion to strike the evidence when the nonsuit motion was made and thus it was timely.

Here the while the judge had actually indicated the court’s ruling, she contemplated the entry of an order to this effect, but did not immediately enter such order, directing counsel for the defendant nursing home to prepare an order. Thus the MS had not been sustained at the time of the NS motion.

Attendees comment: Clouding this, as to ¶[1] is that under the problem’s facts, it does not appear that a motion to strike was made by either side and this, arguably, should have eliminated [1] from the need to be discussed.

- [2] The jury retired from the bar. This ground is not applicable since the facts do not

suggest was a jury.

- [3] The action is submitted to the court for a decision.

In Bio-Medical Applications of Va., Inc. v. Coston 272 Va. 489 [2006], the SCV noted that "...the third [referred to the 3<sup>rd</sup> ground under the code section] contemplates a case in which the action is in the hands of the court for final disposition, either on a dispositive motion or upon the merits."

On the problem's facts, what the court took under consideration, leading to the judges letter & order was the issue of sanctions and attorneys fees, not the merits of the case or a dispositive motion. Thus the action had not been submitted to the court for a decision and the nonsuit motion was timely... BUT

On similar facts in Khanna v. Dominion Bank of Northern Virginia, N.A. 237 Va. 242 (1989), the SCV held that there was no issue of submitted to the court for a decision because, the judge had already made and announced a decision. A litigant can not take a nonsuit to an action that has been finally decided on the merits by the judge & the case is over. Thus the nonsuit motion was too late.

Attendees thinking - It's not clear to us what BBE's the preferred analysis is. We do feel it very likely that a well written answer that recognizes the three instances, anyone of which cuts off a parties right to take a nonsuit, and applies the code section to the facts, will get significant credit, even if the preferred conclusion is not reached. It's very possible that the Khanna holding was not expected to be discussed and application of the problem's facts to the three grounds that cut off the right to take a nonsuit would be fine...

- (c) Sanctions could be imposed for failure to produce the document that was in the plaintiff's possession. Rule 4:12(d) authorizes the imposition of any of the sanctions listed in paragraphs (A), (B) and (C) of Rule 4:12(b)(2), such as dismissing the action.

✖✖ Prior to April of 2018, it would have been required that the court have entered an order directing the production of the document before the court was authorized to impose sanctions. The Rule was amended in April 2018 to eliminate this requirement. The position of the VBBE for many years has been that where there's a legislative or rule change that's effective within about a year from the date of the exam, an answer under either the new or prior version would be acceptable, of course assuming the answer was well written.

Virginia Code §8.01-271.1 does not exclude discovery motions or other pleadings related to discovery from the scope of those for which the court can award sanctions. The facts of the question indicate that the trial court was considering sanctions not only for the failure to produce the contract but also for "his repeated pretrial motions that the judge considered frivolous." The Supreme Court of Virginia, in Williamsburg Peking Corp. v. Kong, 270 Va. 350 (2005), did not object to sanctions being awarded under Va. Code §8.01-271.1 for discovery motions that were characterized as "inordinately voluminous" and "redundant."

As to the court's awarding sanction on its own motion issue, the code section not only authorizes the court to do so, it mandates ".....**or upon its own initiative, shall impose**"....

In addition to the discovery violations, the court may impose sanctions pursuant to Va.

Code §8.01-271.1 for his “frivolous” pretrial motions, which would constitute harassment of the defendant and unnecessarily delay of the proceedings, as well as for his intemperate and insulting language addressed to and about the court in his sanctions memorandum and his oral statements at the sanctions hearing. Taboada v. Daly Seven, Inc., 272 Va. 211 (2006)..

#### **Rule 4:12**

.....

#### **(b) Failure to Comply With Order.**

**(1)** Sanctions by Court in County or City Where Deposition Is Taken. If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the county or city in which the deposition is being taken, the failure may be considered a contempt of that court.

**(2)** Sanctions by Court in Which Action Is Pending. If a party or an officer, director, or managing agent of a party or a person designated under Rule 4:5(b) (6) or 4:6(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this Rule or Rule 4:10, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

**(A)** An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

**(B)** An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

**(C)** An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

**(D)** In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

**(E)** Where a party has failed to comply with an order under Rule 4:10(a) requiring him to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that he is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

**(c)** .....

**(d) Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Requests for Production or Inspection.** -- If a party or an officer, director, or managing agent of a party or a person designated under Rule 4:5(b) (6) or 4:6(a) to testify on behalf of a party fails (1) to appear before the officer who is to take his deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 4:8, after proper service of the interrogatories, or (3) to serve a written response to a request for production or inspection submitted under Rule 4:9, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may -- without prior entry of a Rule 4:12(b) order to compel regarding this failure -- impose any of the sanctions listed in paragraphs (A), (B), and (C) of subdivision (b)(2) of this Rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising

him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 4:1(c).

A motion under subdivision (d) of this Rule must be accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action.

**§ 8.01-271.1. Signing of pleadings, motions, and other papers; oral motions; sanctions.**

.....

The signature of an attorney or party constitutes a certificate by him that (i) he has read the **pleading, motion, or other paper**, (ii) to the best of his knowledge, information and belief, formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and (iii) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, written motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant.

An **oral motion** made by an attorney or party in any court of the Commonwealth constitutes a representation by him that (i) to the best of his knowledge, information and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and (ii) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

If a pleading, motion, or other paper is signed or made in violation of this rule, the court, upon motion **or upon its own initiative, shall impose** upon the person who signed the paper or made the motion, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper or making of the motion, including a reasonable attorney's fee.

1987, cc. 259, 682; 1998, c. 596; 2008, cc. 136, 845; 2018, c. 59.

- (d) The same insulting language would constitute contempt of the court, sanctionable under Va. Code §18.2-456, (1) and(3). Parham v. Commonwealth, 60 Va. App. 450 (2012), and may be punished summarily.

As a method of punishment for a sanctions violation, the Court may prohibit Larry from practicing before it. E.g. Taboada v. Daly Seven, Inc., 272 Va. 211 (2006)(Va. Code 8.01-271.1 violation), Robinson v. Commonwealth, 41 Va. App. 137 (2003) (indirect contempt of court)

Having observed and been a target of Larry's violations of the disciplinary rules, the Court has both the power and the duty to report Larry actions to the Virginia State Bar. Parham v. Commonwealth 60 Va. App. 450 (2012), Canons of Judicial Conduct, Canon 3D(2).

**§ 18.2-456. Cases in which courts and judges may punish summarily for contempt.**

The courts and judges may issue attachments for contempt, and punish them summarily, only in the cases following:

(1) Misbehavior in the presence of the court, or so near thereto as to obstruct or interrupt the administration of justice;

.....

(3) Vile, contemptuous or insulting language addressed to or published of a judge for or in respect of any act or proceeding had, or to be had, in such court, or like language used in his presence and intended for his hearing for or in respect of such act or proceeding;

(4) Misbehavior of an officer of the court in his official character;

.....

Code 1950, § 18.1-292; 1960, c. 358; 1975, cc. 14, 15.

**Canon 3. A Judge Shall Perform The Duties of Judicial Office Impartially and Diligently**

.....

**D. Disciplinary Responsibilities. --**

(1) .....

(2) A judge who receives reliable information indicating a substantial likelihood that a lawyer has committed a violation of the Code of Professional Responsibility should take appropriate action. A judge having knowledge that

a lawyer has committed a violation of the Code of Professional Responsibility that raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects should inform the Virginia State Bar.

9. [07.18] [Domestic Relations] Freddie and Marta grew up together in Annapolis, Maryland. They attended school together and in eighth grade, Freddie's mom died. His dad, George, moved Freddie and his two sisters to Roanoke, Virginia, to be near his extended family.

By senior year, Freddie was looking forward to playing lacrosse in college. Marta, however, had become addicted to pain pills after a minor car accident. Marta came to Roanoke to be Freddie's date at his senior prom. Marta called Freddie two months later and told him she was pregnant with his child. Marta graduated from high school and then moved to Roanoke to give birth to their son, Blake, and to live with Freddie and his family. Freddie and Marta never married.

Freddie put off his college plans and tried to help Marta with their new son. Six months after Blake was born, Freddie and Marta began struggling in their parenting duties and Marta decided to move back to Annapolis to be near her parents. She still struggled with drug addiction. Before moving away, Marta handwrote a note to Freddie stating, "I am not cut out to be a mom. I need to go home. I know you and George can take better care of Blake without me." Freddie and George told Marta that they would take care of Blake and would allow her to visit any time she could.

Freddie and George continued to take care of Blake without any help from Marta. She visited five times a year for weekends, on Blake's birthday, and on holidays. She did not provide any financial support to Freddie for Blake and subsequently had another child of her own by another man. By the time Blake went to kindergarten, he saw his mother only two times per year. Freddie and George provided for Blake's physical, emotional and financial needs. Meanwhile, Marta recovered from her drug addiction and raised her other child in Annapolis with substantial help and support from her family, who lived nearby.

Blake enjoyed living near his aunts and cousins in Roanoke, all of whom were close in age. Freddie improved his parenting skills with George's help. Freddie trusted his dad with all the duties of parenting and drafted a handwritten note granting George, who was 55 at the time, joint legal and physical custody of Blake, and gave a copy to Blake's school. At the end of Blake's kindergarten year, Freddie died in a motorcycle accident.

George told Marta about Freddie's passing. She came to Roanoke and attended Freddie's funeral and then picked up Blake from school the next day, presenting the original birth certificate listing her as Blake's mother. The school released Blake to her, but did not notify George until they had already left the building. Marta then called George and told him that she was taking Blake back to Annapolis to live with her and her family. George was angry and told Marta he would file for custody and get Blake back.

The next day, George filed a petition for custody in Roanoke and Marta filed a petition for custody in Annapolis.

Both Virginia and Maryland have adopted the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA").

- (a) Explain the UCCJEA and how it should apply to this case.
- (b) Which state should be considered the "home state" for purposes of jurisdiction? Explain fully.
- (c) How is a court likely to rule on the custody petitions in this case? Explain fully.

✖✖

- (a) The UCCJEA vests exclusive jurisdiction for child custody litigation in the courts of a child's home state (the state where the child has lived with a parent or person filling the role of a parent for 6 consecutive months prior to the commencement of the first custody proceeding). The UCCJEA also establishes a process for determining what court has jurisdiction in the event that another state might be a more appropriate forum (due to termination of connections with the former home state, or no home state), and institutes uniform procedures to enforce child-custody orders across state lines.

Both Virginia and Maryland have adopted the UCCJEA, but since Virginia is the home state, Virginia courts have jurisdiction and Virginia law will control.

- (b) Virginia should be considered the home state because there has been no prior proceeding in a different state, the child was born in Virginia, has lived in Virginia his entire life (and thus more than the 6 months immediately preceding the filing) with a parent (Freddie) or a person acting as a parent (George). It is also important to note that Blake has not been absent from Virginia and has not been in Maryland for more than 6 months, so Maryland has not acquired jurisdiction simply because Blake is now present in that state.
- (c) While Virginia courts are required by statute to "give due regard to the primacy of the parent-child relationship," third persons with a legitimate interest may be awarded custody upon a showing by clear and convincing evidence that the best interest of the child warrants it [Va. Code §20-124.2(B)]. George, as a grandfather who has also co-parented Blake, and to whom Freddie relinquished custody of Blake, is certainly a person with a legitimate interest and thus has standing to seek custody.

Once he establishes standing, to succeed on his claim as a third party, George must prove by clear and convincing evidence circumstances that rebut the legal presumption in favor of natural parents. *Bailes v. Sours*, 231 Va. 96 (1986), set out five factors which rebut that presumption: [1] parental unfitness; [2] a previous order of

divestiture; [3] voluntary relinquishment; [4] abandonment; [5] and a finding of special facts and circumstances constituting an extraordinary reason for taking a child from its parent.

In this case, George has essentially co-parented Blake for Blake's entire life, Freddie relinquished custody to George, and even though Marta lives only four hours away she sees Blake only twice per year and doesn't support him financially at all. Moreover, as indicated by the note she left when she abandoned Blake to Freddie and George, Marta also voluntarily relinquished custody of Blake to George.

Once the presumption is rebutted, the parties are before the court on an equal footing, and the court must then consider what arrangement will be in the best interests of the child under Va. Code §20-124.3's multi fact analysis, with no presumption in favor of either.

The Va. Code §20-124.3 analysis tilts in George's favor:

Blake is old enough to have formed serious attachments to George and his life in Roanoke (age and physical and mental condition of the child);

At 55, George is certainly not too old to care for Blake. In contrast, while Marta has had another child, she has struggled with drug addiction until recently and does not care for the other child on her own either (age and physical and mental condition of each party); George has a close relationship with Blake and has essentially raised him, while Marta has hardly been in the picture (relationship existing between each parent and each child);

Blake has a close relationship with his extended Roanoke area family, and no relationship with his Maryland extended family (the needs of the child, including important relationships of the child);

George has been playing and will continue to play the role of father to Blake, while Marta has been an absentee parent who showed disregard for Blake's needs by summarily removing him from his familiar home and school life (role that each party has played and will play in the upbringing and care of the child);

There is no indication that George has thwarted any efforts by Marta to remain involved in Blake's life. On the other hand, Marta just removed Blake from his school and home environment and removed him to another state without notifying George until she had already absconded with Blake (propensity of each party to actively support the child's contact and relationship with the other party); and

Marta has not maintained a close relationship with Blake, and did nothing to try to work out custody upon Freddie's untimely death (ability of each parent to maintain a close and continuing relationship with the child, and cooperate in and resolve disputes regarding the child)

(The other two factors – preference of the child and family abuse – do not apply here.)