

Summary of suggested answers & annotations to the essay part of the February 2015 Virginia Bar Exam.
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✖✖ After each bar exam, 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 references to some of the case and statutory law for reference even though the BBE may not expect such specificity in applicants' answers on the exam. jrj

1. [Va. Civil Procedure] While driving through a residential neighborhood in Bristol, Virginia, after dark, the driver of a car made a wrong turn onto a dead-end street. When the driver pulled into the driveway of a house located at the end of the street in order to turn around, Bob, the owner of the house, saw the lights of the car and opened his front door to see who had pulled into his driveway. When he did so, his prize winning Persian cat, Mr. Charlie, darted out of the door and into the driveway. The driver ran over and killed Mr. Charlie as he was backing out of the driveway. Bob clearly saw the driver of the car and the car's license plate number as it was pulling away from his house. Bob identified the driver as Jerry, and later confirmed that the car that killed Mr. Charlie was registered to him.

Bob was devastated by Mr. Charlie's death. He was very emotionally attached to his cat, and he earned significant income from Mr. Charlie's appearance in television commercials advertising a popular brand of cat food. At the time of his death, Mr. Charlie was scheduled to shoot a new cat food commercial later in the year.

Bob estimated that Mr. Charlie was worth at least \$2,500, and he sued Jerry in the General District Court of the City of Bristol to recover that amount. Jerry filed a motion to dismiss the action on the ground that the General District Court lacked subject matter jurisdiction to hear the case. Jerry also requested a trial by jury. The General District Court denied Jerry's motion to dismiss and his request for a jury trial. In the bench trial that followed, Jerry testified that someone else was driving his car on the night in question and that he did not kill Mr. Charlie. The General District Court entered a judgment in favor of Jerry at the conclusion of the trial.

Not satisfied with the General District Court's decision, Bob appealed his case to the Circuit Court of the City of Bristol. Before the Circuit Court heard his case, Bob learned that Jerry had been intoxicated on the night Mr. Charlie was killed. Bob was unaware of that fact when he presented his case in the General District Court, and he planned to put on evidence in the Circuit Court establishing Jerry's intoxication on the night of the incident to show that his driving was impaired when he killed Mr. Charlie.

Jerry timely filed a motion to dismiss Bob's appeal to the Circuit Court arguing that the Circuit Court lacked subject matter jurisdiction over the case. The Circuit Court denied Jerry's motion. Jerry then filed a motion in limine to prohibit Bob from putting on evidence establishing his intoxication. Jerry argued that Bob was precluded from introducing evidence concerning his intoxication in the Circuit Court trial because that evidence had not been part of the case below. The Circuit Court denied Jerry's motion in limine. Jerry did not request a jury trial in the Circuit Court, and the Circuit Court entered a judgment in his favor at the conclusion of a bench trial.

- a) Did the General District Court err by denying Jerry's motion to dismiss Bob's case and his request for a jury trial? Explain fully.
- b) Did the Circuit Court err by denying Jerry's motion to dismiss Bob's case and the motion in limine? Explain fully.

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- a) The GDC did not err in denying Jerry's motion to dismiss the case and for a jury trial.
 - i) Under §16.1-77(1) exclusive subject matter jurisdiction is granted to the GDC for claims from \$0 up to and including \$4500.00 exclusive of interest.
 - ii) There is no statutory authority for a jury in the GDC. Only the circuit courts are authorized to conduct jury trials.

- b) The CC did not err by denying Jerry's motion to dismiss Bob's case and the motion in limine.
- i) Under §17.1-513, the CC's are granted subject matter jurisdiction in civil cases where amount sued for is \$100.00 or more except when the subject matter is assigned to some other tribunal. The GA assigned exclusive original civil jurisdiction to the GDC for amounts up to and including \$4500.00, but under §17.1-513, the CC is given subject matter jurisdiction to hear appeals from the GDC. Thus the CC has subject matter civil jurisdiction amounts over \$4500.00 with no ceiling.
 - ii) Under §16.1-106, appeals from the GDC to the CC are tried *de novo* and evidence not offered in the GDC may, subject to the rules of evidence, be admitted in the CC trial.

2. [Partnership] Alice, who worked for many years as General Manager of Many Motors, a profitable automobile dealership in Salem, Virginia, was offered the opportunity to purchase the dealership. Alice was interested, but did not have the necessary funds. She contacted her childhood friend, Donna, a successful and wealthy hospital executive, for advice on how to go about raising the capital. Donna suggested that they purchase Many Motors together. Alice agreed.

Alice and Donna orally agreed that Donna would put up the money necessary to make the purchase, that Alice would manage the day-to-day operation of the business, that Donna would arrange the finances, and that, although Donna would not actively work at the dealership, they would share the profits equally.

After consummating the deal with the prior owner of the dealership, Donna applied for a business license, listing the entity as a partnership named New Many Motors, LTD ("New Many"), whose partners were Alice and Donna. Donna also opened a line of credit and a business account at Happy Valley Bank in the name of New Many, and they started doing business under the new name.

Kay, who had recently inherited a substantial amount of money from her mother, went to New Many to buy a new car. She had known Alice for many years, and she knew that Donna and Alice were partners in New Many. In conversation with Alice, Kay said she was looking for ways to invest her inheritance. Alice said she was about to draw \$50,000 from a credit line at Happy Valley Bank to finance her inventory but that, if Kay were interested, she would offer her a favorable rate of interest and borrow the money from her rather than from the bank. Kay agreed, so she wrote a check in the amount of \$50,000 payable to Alice. In turn, Alice gave Kay a promissory note payable in one year bearing interest at the rate of 10%. Alice signed the note, "New Many Motors, LTD, by Alice." Alice deposited the check in New Many's business account at Happy Valley Bank and eventually used the money to finance inventory.

A month later, Donna and Alice retained a lawyer to prepare a written partnership agreement, which contained the terms to which they originally had agreed. The written agreement was not filed with the State Corporation Commission.

A year later, the sale of automobiles began to decline precipitously. Donna sent Alice a letter that stated, "This is to advise you that I hereby terminate and withdraw from our partnership in New Many Motors, LTD."

Alice acknowledged Donna's letter, and Alice continued to work for three months, winding up the business. Neither Alice nor Donna told Happy Valley Bank about Donna's decision to terminate the partnership. During those three months, Alice drew \$25,000 from the Happy Valley Bank line of credit in the name of New Many to cover the expenses of winding up the business. Alice then closed the doors and left town. Her whereabouts are unknown.

The promissory note to Kay is unpaid and past due. The \$25,000 loan from Happy Valley Bank is due and unpaid. Both creditors demand that Donna pay the amounts due each. Donna has refused.

As to Kay's demand for payment of the promissory note, Donna asserted she is not liable because (i) she was not a partner at the time Kay made the loan inasmuch as there was then no written partnership agreement between Donna and Alice; (ii) in her agreement with Alice, Donna did not agree to share the losses; (iii) she did not sign the promissory note or authorize Alice to sign it; and (iv) she was, in any event, a limited partner and therefore not liable.

As to Happy Valley Bank's demand for payment of the loan, Donna asserted that she is not liable because she had terminated the partnership before Alice drew the \$25,000 from the Happy Valley Bank line of credit.

In whose favor would a court be likely to resolve each of Donna's assertions? Explain fully.

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- (i) The court should rule against Donna on her assertion that she was not a partner because there was then no written partnership agreement. A written partnership agreement is not required to create a partnership. A partnership is an association of two or more people to run a business for profit as co-owners. If the parties do, in fact, run a business for profit as co-owners, then they are in a partnership. Additionally, profit-sharing triggers a presumption of partnership. Here, Donna and Alice agreed to share profits from the business, and nothing in the facts suggests that their relationship was anything other than a partnership.
- (ii) The court should also rule against Donna on her assertion that she is not liable because she did not agree to share losses in the agreement. Agreement to share losses is not a prerequisite to forming a partnership. As discussed above, Donna and Alice were in a partnership, and, accordingly, they will share losses equally. But they do not need to explicitly agree to do so.
- (iii) Donna is incorrect in her assertion that she is not liable to Kay because she did not sign the note or authorize Alice to sign it. A partner in a partnership is personally liable for the debts of the business. Thus, the issue is whether the loan is a debt of the business. As a partner, Alice had authority to bind the partnership. Each partner is an agent of the partnership for the purpose of its business. Here, Alice entered into the loan agreement with Kay to further the partnership business - to finance the purchase of inventory. Thus, the partnership is bound on the obligation, and, as a partner, Donna is personally liable.
- (iv) Donna is incorrect in her assertion that she was a limited partner. In order to create a limited partnership in Virginia, the partners must file a certificate of limited partnership with the SCC and pay the required filing fee. Simply using a business name with the designation "LTD" is not sufficient to establish a limited partnership. Here, Donna and Alice made no such filing with the state, and accordingly, their entity did not qualify as a limited partnership.

Finally, Donna is correct that she is not liable for the debt to Happy Valley Bank because she had dissociated from the partnership before Alice drew the loan. Donna and Alice's partnership was a partnership at will because they did not agree to a term. Donna's letter to Alice constituted a dissociation by express will, and because the partnership was at will, Donna's dissociation by express will triggered a dissolution of the partnership. Upon dissolution, the partnership does not immediately terminate. Rather the partnership enters a winding up phase. During winding up, a partnership is bound by partner's act if that act is appropriate for winding up the partnership business. Here, Alice borrowed the \$25,000 from Happy Valley to cover the expenses "of winding up the business." Thus, Alice's act in borrowing the money was appropriate for winding up and the partnership would be liable for the debt. However, Donna was no longer a partner at that point. Although dissociated partners can have lingering liability after their dissociation where the partnership does not dissolve and wind up, the Virginia code does not provide for such lingering liability if the partnership dissolves.

Editors' note: It's believed that credit may be given to applicants who reach the opposite conclusion as to Donna's liability to Happy Valley Bank.

3. [Agency & Va. Civil Procedure] Jane wanted to construct a new office building for her engineering firm in Richmond, Virginia. She asked her friend, Ralph, a real estate agent, to help her find an appropriate parcel to purchase. Jane had known Ralph since her childhood, and he had represented her in several past real estate transactions. There was no written agreement between them.

Several times during 2012, Jane and Ralph visited a property owned by Sam and expressed an interest in purchasing it. Sam was present during two of those visits. Jane introduced Ralph as her real estate broker, and the three of them engaged in conversations about the property and the fact that access to the parcel was over a common driveway shared with the owner of the adjoining property. Jane did not then voice any concern about that fact.

On January 24, 2013, Ralph met with Jane and discussed the wording of an offer on Sam's property. They agreed on the \$300,000 price she was willing to offer, and Jane told Ralph that the deal would have to be contingent on her obtaining a bank loan secured by a bond issued by the Richmond Economic Development Authority. Jane objected to the common driveway on the property and told Ralph that the offer would also have to be contingent on Sam's conveying to her the sole right to the use of the driveway. Ralph said he would go back to his office, type the terms and contingencies onto a standard form real estate contract, and return with it later in the day for her signature.

Back at his office, Ralph found a message that Sam had received a competing offer that he was about to accept. He phoned Jane and told her she needed to act quickly if she wanted the property. She said that he should go ahead, type up the offer, sign her name to it, and present it to Sam. He typed in the price and the financing contingency; however, in the rush of the moment, he omitted the contingency about the driveway. He signed Jane's name and presented the written offer, which Sam immediately accepted. The closing was to occur on April 15, 2013.

Jane met with her banker, who approved a \$300,000 loan on the condition that the Development Authority would issue its bond to finance it. On April 1, however, the Richmond Economic Development Authority refused to issue the bond, and Jane's bank withdrew its approval of the loan. The Development Authority's refusal came as a surprise to the parties because it almost always routinely issued such bonds once the financing bank approved the loan. Without the Development Authority bond, Jane could not finance the purchase. She immediately notified Sam that she was "cancelling" the contract. Sam said he would not accept a cancellation and that he intended to "hold Jane to the deal."

Jane abandoned plans to build a new building and instead, in May 2013, spent about \$50,000 to remodel her existing offices. In the meantime, Sam was unable to sell the property to anyone else, including the party who had made the earlier competing offer.

In December 2014, Sam filed suit against Jane for specific performance of the contract. Jane asserted the following defenses: (i) that Ralph had no authority to sign the offer on her behalf because there was no written agreement conferring such authority on him; (ii) that, in any event, Ralph had no authority to present an offer without the driveway contingency; (iii) that the suit was barred by laches; and (iv) that the refusal of the Economic Development Authority to issue the bond excused her from the contract.

a) How should the Court rule on each of Jane's defenses? Explain fully.

b) Is the Court likely to grant Sam's prayer for specific performance? Explain fully.

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- (a)(i) The court should rule against Jane on her defense that Ralph had no authority to sign the offer on her behalf because there was no written agreement conferring such authority on him. Virginia does not require written authorization of an agent, even when the underlying contract falls within a statute of frauds.
- (a)(ii) The court should also rule against Jane on her defense that Ralph had no authority to present an offer without the driveway contingency. A principal is bound by a contract entered into by her agent if the agent acted with either actual or apparent authority. Jane is correct that Ralph did not have actual authority to present the offer without the driveway contingency as Jane specifically instructed Ralph to include that provision in the offer. However, Ralph acted with apparent authority. Apparent authority is based on the principal's holding out of the agent and the third party's reasonable belief that the agent is authorized. Here, Sam knew that Ralph was Jane's agent - she introduced him to Sam as her real estate broker - and he had no reason to know that Jane wanted the driveway contingency. During a visit to the property, they discussed the common driveway and Jane did not voice any concern about that fact. Thus, Jane is bound on the contract based on Ralph's apparent authority. Morris v. Mosley 227 Va. 517 (1984)
- (a)(iii) Applicant should discuss laches, covering that [i] it applies to only equitable claims, which this was; [ii] it's a discretionary call by the trial judge; [iii] The judge should consider: (a) how much time has lapsed; (b) the effect of the lapse of time on the other party's ability to defend the claim; (c) any loss of evidence or testimony due to the delay; (d) the circumstances of the particular case.

The facts do not show any prejudice to Jane b/c of how long Sam waited to file suit. Although she spent \$50K renovating her old office building, Sam told her from the outset, in April, 2013, that he planned to hold her to the deal and he also tried to find another buyer during that 20 month period before he filed suit. On the facts, thinking is that laches probably would not bar the claim.

Alternative Response: If the applicant's analysis followed the "equity follows the law" premise, arguing that in trying an equitable claim, if there's an applicable statute of limitation, i.e. contract, the court will apply the statute of limitation to the issue of the timeliness of the claim and that would mean a 5 year statute of limitation for a written contract, under Va. Code §8.01-246, some credit [don't know how much] will be given.

This alternative response resolves around two Virginia cases: Marriott v. Harris 235 Va. 199 (1988) & Belcher v. Kirkwood 238 Va. 430 (1989).

- (a)(iv) The court should rule in favor of Jane on her defense that the refusal of the Economic Development Authority to issue the bond excused her from the contract. The facts clearly state that the offer included Jane's financing contingency - that Jane obtain a bank loan secured by a bond issued by the Richmond Economic Development Authority. Because the Development Authority refused to issue the bond and the bank withdrew its approval of the loan, the contractual condition was not satisfied and Jane's performance is excused.
- (b) (b) The court will likely deny Sam's prayer for specific performance because Jane's performance is excused by failure of the condition. Where money damages are inadequate, a court may grant the equitable remedy of specifically enforcing a contract. A court may grant specific performance in equity if: 1) there is a valid contract between the parties that is itself not inequitable, 2) specific performance is a practical form of relief in the circumstances, 3) there are mutual performance

4. [Va. Civil Procedure] In December 2013, Sophia and Romeo became engaged to be married in Charlottesville, Virginia, where Romeo got down on one knee and asked Sophia to marry him. When she said "yes," he presented Sophia with a \$50,000 diamond and sapphire engagement ring. Sophia was thrilled and particularly impressed when Romeo showed her an expert's written appraisal report, supporting the \$50,000 valuation for the ring. Romeo also pointed out that inside of the ring's band were the initials of Romeo's great-grandfather, who had been Vice President of the United States in the 19th century, evidencing the importance of the heirloom, which had been in Romeo's family for generations. Several months later, Sophia terminated her engagement to Romeo and moved out of Romeo's house in Fairfax, Virginia, where the two had cohabitated for more than six months. Since then, Sophia has made it clear on several occasions that she does not intend to marry Romeo, "ever." Although Romeo has demanded return of the engagement ring on several occasions, Sophia has refused without explanation. Romeo wants to sue Sophia in the Circuit Court of Fairfax County, Virginia, to get the diamond and sapphire engagement ring back. He is not sure what form of action he can bring to achieve that result. Romeo is vaguely aware of a Virginia law sometimes called the Heart Balm Act. That law states:

Notwithstanding any other provision of law to the contrary, no civil action shall lie or be maintained in the Commonwealth for alienation of affection, breach of promise to marry, or criminal conversation upon which a cause of action arose or occurred on or after June 28, 1968. Va. Code Ann. § 8.01-220 (A).

Romeo realizes that there is nothing in writing between him and Sophia, and wonders whether the following Virginia law will prevent him from maintaining a suit against Sophia:

Unless a promise, contract, agreement, representation, assurance, or ratification, or some memorandum or note thereof, is in writing and signed by the party to be charged or his agent, no action shall be brought in any of the following cases:

* ** 5. Upon any agreement made upon consideration of marriage. Va. Code Ann. § 11-2(5).

Romeo consults you as his attorney and asks your advice on the following questions:

- a) What is the most appropriate Virginia cause of action for Romeo to utilize to recover the ring and can he prove the necessary elements to make a prima facie case? Explain fully.
- b) How would the Court be likely to rule if Sophia asserts the Heart Balm Act as a defense to Romeo's suit? Explain fully.
- c) What is the legal term or name most commonly used to identify § 11-2 of the Code of Virginia, and what is Romeo's best argument to avoid its bar on these facts? Explain fully.
- d) If Romeo does not prevail on his suit in the Circuit Court, to what court, if any, can he file an appeal and what must he do to perfect such an appeal? Explain fully.

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- (a) The most appropriate form of action is a Detinue action which is a law action to recover specific personal property that the plaintiff can identify and can establish a value for. Elements are:
- i. P must have a property right in the thing sought.
 - ii. P must have a right to immediate possession.
 - iii. Property must be capable of identification
 - iv. Property must have some value.
 - v. D must have had possession sometime prior to institution of suit.

Burkes P & P ¶126 pg 241

Issue seems to be (i) & (ii). Applicant should discuss whether Romeo has a property right in the ring, having given it to Sophia and whether, on Sophia's termination of the engagement, does Romeo have a right to immediate possession.

- (b) [Thinking is that the preferred conclusion is that Romeo would be successful, but that some credit would be given for a good analysis that concluded Romeo would not be successful.
- (c) The statute is Virginia's Statute of Frauds. "Sophia estopped to argue that its not in writing b/c she accepted the gift. See Clark v. Atkins, 188 Va. 668 (1949).
- (d) Appeals will go by Petition to the Supreme Court of Virginia since this is a civil action, not a domestic relations case.

To perfect the appeal, Romeo must:

1. File a Notice of Appeal in the Circuit Court Clerk's Office within 30 days of entry of the Circuit Court's final order;
2. Post a bond for costs in the Supreme Court of Virginia;
3. Have any transcript or statement of incidents of trial made part of the record by filing the transcript within 60 days of entry of the final order or the statement in 55 days from entry of the final order with notice to counsel of record of presenting it to the judge for certification; and
4. File his Petition for Appeal within 3 months from entry of the Circuit Court's final order.

In the past this has appeared to be sufficient steps in the appeal process to satisfy the question.

5. [Federal Civil Procedure & UCC Sales] Madison Furniture Company ("Madison"), a Virginia corporation headquartered in Front Royal, Virginia, manufactures custom commercial furniture for restaurants and hotels, including chain and franchise operations. Madison receives large orders based on customers' projected requirements. Because each order is typically too large for a customer to accept in its entirety at one time, Madison warehouses the furniture pending the customer's delivery instructions.

Plumlee Brothers Restaurant Group, Inc. ("Plumlee"), a Delaware corporation with its principal place of business in Atlanta, Georgia, is a customer with which Madison has done business for more than 15 years. On February 12, 2013, Madison received the following email from Plumlee's head buyer: "We are launching a color remodel nationwide throughout our 100 diners and will require more or less the usual number of new chairs per diner. Your chair model # 417Y, color scheme in royal blue and white vinyl fabric per your catalog illustration, and our usual trademark script "P" inlaid on chair backs." Based on past orders of 45 chairs per Plumlee diner, Madison understood the email to be an order for 4,500 specially designed chairs and immediately undertook to manufacture the chairs to Plumlee's detailed specifications.

In keeping with its customary practice, Madison stored all of the chairs in its Front Royal warehouse pending receipt of delivery instructions from Plumlee and sent Plumlee an invoice for the entire 4,500 lot at the price listed in Madison's catalog. To date, Plumlee has directed delivery of and paid for only 1,000 chairs. Madison repeatedly has requested delivery instructions from Plumlee for the 3,500 chairs remaining in the warehouse and payment of the invoice balance of \$175,000, which remains unpaid.

On November 3, 2014, its patience exhausted, Madison filed and served a complaint against Plumlee for breach of contract in the Circuit Court of Warren County, Virginia, to recover the outstanding balance.

On November 27, 2014, Plumlee filed a notice of removal of the complaint to the United States District Court, with requisite copies served on Madison and the Circuit Court. At the same time, Plumlee filed and served an answer to Madison's complaint. In the answer, Plumlee asserted the following defenses:

- (i) that no contract between Plumlee and Madison was formed because there is nothing to indicate a meeting of the minds or an intention to be bound;
- (ii) that, if there was a contract, its enforcement is barred by the statute of frauds because there is no writing signed by Plumlee;
- (iii) that the only existing writing is an e-mail that is insufficient because it does not contain all material terms regarding price, delivery, and time of payment; and
- (iv) that there is nothing else about the chairs that would allow Madison to avoid the defense of the statute of frauds.

On December 1, 2014, Madison filed in the United States District Court a motion to remand the case to the Virginia Circuit Court on the following grounds: (i) the removal was untimely because it was filed after the 21 days in which Plumlee was required to file its answer in the Circuit Court, and (ii) the federal court lacks subject matter jurisdiction.

- a) How should the United States District Court rule on each ground of Madison's motion to remand? Explain fully.
- b) What arguments should Madison make against each of Plumlee's defenses, and how is the court likely to rule on each? Explain fully.

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✖✖✖✖ In May Of 2016, it was discovered that the initially suggested answer to a) was incorrect. It is retained, but with strike through editing. The correct suggested answer is substituted as of May 10, 2016.

a) ~~Motion to Remand~~

~~(i) Motion to remand was filed too late. A motion to remand must be filed within 30 days of the removal.~~

~~(ii) Denied. The federal court has subject matter jurisdiction based on diversity. The parties are completely diverse - the plaintiff is a citizen of VA and the defendant is a citizen of DE and GA & the amount in controversy exceeds \$75,000.~~

(a) Motion to Remand - The Motion to remand should be denied.

- (i) A motion to remove must be filed within 30 days of service on the defendant. Plumlee was served on November 03, 2014 and filed the motion to remove on November 27, 2014.
- (ii) The federal court has subject matter jurisdiction based on diversity. The parties are completely diverse - the plaintiff is a citizen of VA and the defendant is a citizen of DE and GA & the amount in controversy exceeds \$75,000.00.

- b) Madison's response - A contract for the custom manufacture of chairs is subject to Art. 2 of the Uniform Commercial Code. Plumlee's defense (i) should fail because the UCC requires very little in terms of subjective intention to form a contract for the sale of goods. A contract for the sale of goods may be made in any manner sufficient to show agreement including conduct by both parties that recognizes a contract. UCC § 2-204(1). In this case, the previous conduct between the parties as well as Plumlee's acceptance of 1,000 chairs is more than enough to show that a contract existed.

Defenses (ii) and (iv) should also fail because actual manufacture of specially manufactured goods that are not suitable for sale to others is an exception to the UCC Statute of Frauds. UCC § 2-202(3)(a). *Flowers Baking Co. v. R-P Packaging, Inc.*, 229 Va. 370, 329 S.E.2d 462 (1985).

Plumlee's defense (iii) will also fail for two reasons: first, because the Uniform Electronic Transactions Act as adopted in Virginia (Va. Stat. Ann. § 59.1-479 et seq.) renders an electronic signature effective (Va. Stat. Ann. § 59.1-485(d)) and second, because the federal E-Sign Act makes electronic "signatures" effective notwithstanding any state law to the contrary. 15 U.S.C. § 7001(a)(1).

The UCC Statute of Frauds in play here is:

§ 8.2-201. Formal requirements; statute of frauds.

(1) Except as otherwise provided in this section a contract for the sale of goods for the price of \$500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing.

(2) Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of subsection (1) against such party unless written notice of objection to its contents is given within ten days after it is received.

(3) A contract which does not satisfy the requirements of subsection (1) but which is valid in other respects is enforceable

(a) if the goods are to be specially manufactured for the buyer and are not suitable for sale to others in the ordinary course of the seller's business and the seller, before notice of repudiation is received and under circumstances which reasonably indicate that the goods are for the buyer, has made either a substantial beginning of their manufacture or commitments for their procurement; or

(b) if the party against whom enforcement is sought admits in his pleading, testimony or otherwise in court that a contract for sale was made, but the contract is not enforceable under this provision beyond the quantity of goods admitted; or

(c) with respect to goods for which payment has been made and accepted or which have been received and accepted (§ 8.2-606).
(1964, c. 219.)

6. [Va. Civil Procedure & Evidence] On a clear afternoon, Julie was attempting to cross a four-lane highway near Smithfield in Isle of Wight County, Virginia, when she was struck and severely injured by a silver Corvette driven by Ted at slightly above the posted speed limit. Ted's wife, Geneva, was a passenger in the car. They had just left a local tavern where they had consumed several alcoholic drinks during a discussion in which Geneva had told Ted that she would be filing for divorce the next day.

Julie filed and properly served a negligence action against Ted in the appropriate Virginia Circuit Court. Ted filed an answer denying the allegations of the complaint and asserting the affirmative defense that Julie was contributorily negligent.

The following facts were revealed during pretrial depositions at which the lawyers for both Julie and Ted were present:

- Julie admitted that, at the time she was struck, she was not crossing at an intersection, in a marked pedestrian crosswalk, or at a traffic light.

- Julie suffered a head injury and has no memory of whether she saw any vehicles coming toward her as she began to cross the road.
- Ted denied that he had been speeding and that he had been drinking before the incident. He said he saw Julie suddenly dart out in front of his car and that he could not avoid hitting her.
- Two eyewitnesses, Georgia residents who happened to be driving along the highway, testified that Julie ran out onto the highway without first looking either way.

After the depositions were taken, Ted's lawyer served the following written request for admission on Julie: "Admit that, just before you were struck by Ted's car, you ran out onto the highway without looking either way."

It wasn't until 60 days later that Julie's lawyer served a written response denying this request.

A jury trial ensued. At trial, Julie's lawyer asked Geneva if she knew how fast Ted was traveling and how much he had been drinking prior to hitting Julie. Ted's counsel objected, asserting the marital privilege as to testimony of a spouse. By this time, Ted and Geneva were finally divorced.

Over Julie's timely hearsay objection, the trial court allowed Ted to introduce into evidence those parts of the discovery depositions containing the testimony of the two Georgia residents stating that Julie ran out onto the highway without first looking either way. Ted had given Julie timely notice of his intention to use the deposition testimony at trial.

Ted also introduced in evidence the request for admission he had served on Julie. In opposition, and over Ted's objection, Julie sought to introduce her response denying the request.

At the conclusion of the evidence, Ted, asserting that the request for admission was a conclusive admission by Julie that she had run onto the highway without looking, moved the Court for a partial summary judgment on that issue. Julie opposed the motion on the ground that the request for admission was based upon the impermissible use of discovery depositions.

- (a) How should the Court have ruled on Ted's assertion of the marital privilege as to the questions Julie's lawyer asked Geneva? Explain fully.
- (b) How should the Court have ruled on Julie's objection to admitting into evidence the deposition testimony of the two eyewitnesses? Explain fully.
- (c) How should the Court have ruled on Ted's objection to Julie's introduction of the response to the request for admission? Explain fully.
- (d) Does the ground asserted by Julie in opposition to Ted's motion for partial summary judgment preclude the Court from granting the motion? Explain fully.

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- (a) The question is not clear as to what is being asked.
 - (i) If the question is whether Geneva was competent to testify against Ted, the answer is yes because §8.01-398 makes each spouse competent to testify for or against the other at trial.
 - (ii) If the question is whether Geneva can be compelled to testify against Ted, over Ted's objection, the answer is yes because there is no marital "take the stand" privilege in civil cases.
 - (iii) If the question is whether Geneva's can be compelled to testify as to her observations of how fast Ted was going and whether he had been drinking, this breaks down to discussing:
 - (I) Were the parties married at the time Geneva observed the crash; and
 - (II) Were these observations communications. Observations of conduct and circumstances

can be communication; if

- (a) The observations were under circumstances where it appears there was an intent for the observations to be confidential. This should be discussed and the better conclusion is that the circumstances do not show an intent of confidentiality. Both the drinking at the tavern and the driving were in public, subject to observation by others and this negates an intent for the conduct to be confidential.
- (iii) If the communication was intended to be confidential and at the time, the parties were married, the privilege does apply. It does not matter that they were no longer married at the time of the trial. The privilege against disclosure of a confidential communication continues and is held by both spouses.

Rule 2:504(a) §8.01-398

Editor's Note: Thanks to Professor Kent Sinclair of the University of Virginia Law School for sharing his comments with me the issues involving Geneva's testifying. jrj

- (b) As to use of the eye witnesses' depositions. Both witnesses were from out of state and lawyers for Ted were present at the taking of the depositions. Under Rule 4:7, the depositions should be admissible against Ted.
- (c) Under Rule 4:11, if a party against whom a request for admission does not respond within 21 days after service of the request with a denial, the matter is taken as admitted and under ¶(b) of the Rule, it's a conclusively established admission unless the court permits withdrawal or amendment of the admission.
- (d) The ground asserted by Julie in opposition to the motion for partial summary judgment should be over ruled. 8.01-420(B) provides:

Answers to requests for admission may be used in a summary judgment motion, even though the requests for admission are based on facts learned from testimony at a Rule 4:5 deposition, so long as

- (i) the request for admission makes no reference to the Rule 4:5 deposition; and
- (ii) the request for admission does not require that the party admit that the deponent gave specific testimony.

7. [UCC - Secured Transactions] In 2008, Willie Cabell ("Willie") inherited New Kent Farm, located in New Kent County, Virginia, from his mother. Since then, he has lived at New Kent Farm with his wife, Mary Scott, and their children. Soon after his inheritance, Willie leased from Bob Lee ("Lee") the surrounding acreage known as Riverland, on which Willie has continuously grown tobacco, peanuts, and corn. Lee has never recorded as a public record any document relating to the lease.

In 2009, when Willie's farming business was thriving, he conveyed New Kent Farm to "Willie Cabell and his wife, Mary Scott Cabell, in consideration of love and affection, as tenants by the entirety.

"Commencing in 2012, and continuing intermittently, a drought devastated Willie's crops, and over time he fell in arrears of his rent payments to Lee. He now owes Lee back rent of \$15,000.

In late 2013, Willie borrowed \$15,000 from Farm Bank ("Bank"). Willie granted Bank a security interest in "all crops growing on Riverland" as collateral for the loan. Bank properly filed all documents necessary to perfect its security interest in the crops as granted by Willie.

Willie used the money as a down payment on a new pickup truck. He financed the balance with Credit Union which retained legal title to the truck to secure the payment of the balance.

Although he continues to farm Riverland, Willie's debts at the beginning of 2015 exceed his assets. He owes Lee

\$15,000 in back rent, he has defaulted on the loan from Bank, and he has missed several months' payments to Credit Union on the pickup truck.

Credit Union lawfully repossessed the pickup truck. Willie went to Credit Union's office, tendered in cash the entire amount of the delinquent payments plus repossession expenses incurred by Credit Union, promised he would thereafter keep the payments current, and requested that Credit Union return the truck to him. Credit Union refused and handed Willie a letter informing him that it plans to sell the truck at an auction in five days and sue Willie for any deficiency.

Lee, knowing that Willie is unable to pay the arrears in rent, asserted an interest in crops growing on Riverland and sought to have them sold to satisfy the debt. Bank learned of Lee's claim and intervened to foreclose its interest.

- a) What is the nature of the respective interests asserted by Lee and Bank, and, as between them, whose interest is superior? Explain fully.
- b) Did Credit Union violate Willie's rights by refusing to accept his cash tender and giving him notice of its intention to sell the truck at auction in five days? Explain fully.
- c) May the creditors force the sale of New Kent Farm to satisfy any judgment they might ultimately obtain against Willie? Explain fully.

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- a) Bob Lee has a statutory lien on Willie's growing crops and any other personal property located on Riverland. Va. Stat. Ann § 55-231. In this case, Lee's lien is an agricultural lien. Va. Stat. Ann. § 8.9A-102(5). Lee did not, however, perfect the lien by filing a financing statement as required by the UCC. Va. Stat. Ann §8.9A-310(a). The Bank obtained a security interest in "all crops growing" on Riverland in late 2013. The Bank perfected this security interest. The Bank will have priority over Lee because its security interest was perfected and Lee's agricultural lien was not. Va. Stat. Ann. § 8.9A-317(a). See Dean v. Hall, 2003 WL 21650145 (E.D. Va.).
- b) A debtor like Willie whose collateral has been repossessed may redeem it only by tendering the *entire balance due* on the loan plus expenses of repossession. Va. Stat. Ann. § 8.9A-623(b). Willie does not have the power under the UCC to reinstate the loan by tendering only the arrearage. Timing of the notice of a sale by a repossessing creditor must be reasonable, which is a question of fact. Va. Stat. Ann. § 8.9A-612(a). For what it's worth, in my opinion five-days' notice of the sale of a repossessed truck is too short.
- c) Ownership of the farm as tenants-by-the-entirety will prevent any of Willie's personal creditors from reaching it to satisfy a judgment. Property held by spouses as tenants by the entirety are immune from the reach of a creditor of only on spouse.

8. (Federal Civil Procedure) On April 6, 2014, Susan filed a complaint in the United States District Court for the Western District of Virginia, Roanoke Division, against her former employer AAB Corporation ("AAB"). Her complaint names AAB and its President, John, as defendants. Susan alleges in general terms that until April 30, 2013, she was employed by AAB as its sole sales representative in Virginia and that, on that date, she was terminated by the "fraudulent, discriminatory, and physically threatening actions of John." She prays for \$100,000 in "damages.

"Paragraphs 1 through 5 of the complaint allege the following:

1. This action is brought to redress rights secured to plaintiff by the United States Constitution and applicable federal laws and statutes.
2. This Court has jurisdiction based on diversity of citizenship, in that plaintiff and defendants were at the time of the acts complained of in this complaint domiciled in different states and the amount in controversy exceeds the minimum required.
3. Plaintiff was at all times a resident of the Western District of Virginia.

4. Defendant AAB, by filing statutorily required documents with the Tennessee Secretary of State in 2012, became and remains a domesticated corporation in Tennessee, and has its principal place of business in Nashville, Tennessee.

5. On April 30, 2013, John was a Tennessee resident.

Service was properly effected on the defendants, and on May 1, 2014, they timely filed a joint motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1), asserting that the Court lacks subject matter jurisdiction on either of the bases alleged in paragraphs 1 and 2 of the complaint. John attached to the joint motion to dismiss an unsworn declaration which states truthfully that 1) he is and has been a citizen of the Commonwealth of Virginia since January 2, 2014, when he moved his family to Richmond, Virginia, registered to vote in Virginia, and purchased a home there, which he occupies as his principal residence; 2) AAB, which he incorporated in Virginia in 2011, is and continues to be a Virginia corporation; and 3) although he owns a condominium in Nashville, Tennessee, he occupies it only during intermittent visits to AAB's headquarters. The declaration included the following language: "I declare under penalty of perjury that the foregoing is true and correct." The declaration was dated April 30, 2014, and signed by John.

In addition to filing a brief in opposition to the defendants' motion to dismiss, Susan filed a motion to strike the declaration of John and asks the District Court to disregard it.

- a) How should the Court rule on Susan's motion to strike John's declaration? Explain fully.
- b) How should the Court rule on defendants' motion to dismiss on each of the following grounds:
 - (i) There is no federal question jurisdiction? Explain fully.
 - (ii) There is no diversity jurisdiction? Explain fully.

✖✖

- (a) The court should deny Susan's motion to strike John's declaration. John's signed declaration with the recital "I declare under penalty of perjury that the foregoing is true and correct" was sufficient. 27 USC 1746
- (b)(i) Based on the facts available, the court would most likely find that the plaintiff has not alleged sufficient facts to establish federal question jurisdiction. Federal courts have subject matter jurisdiction based on federal question where the plaintiff's claim raises an issue of federal law. Although a plaintiff does not need to cite the specific statutory basis for federal question jurisdiction, she must plead sufficient facts to establish jurisdiction. Here, plaintiff will argue that she has alleged that she was terminated by the "discriminatory" actions of John and that she is bringing the action to redress rights secured by federal law. If the complaint, as a whole, contained allegations that the boss subjected the plaintiff to an adverse employment condition because of her race or gender, then the court would have jurisdiction regardless of whether the plaintiff cited Title VII of the Civil Rights Act. If the complaint did not contain such allegations, then the court would find that jurisdiction is inappropriate under § 1331 either because the jurisdictional allegations were insufficient or the federal claims alleged were frivolous.
- (b)(ii) The defendants are correct that there is no diversity jurisdiction in this case. In order for a federal court to have subject matter jurisdiction based on diversity, there must be complete diversity - meaning no plaintiff is a citizen of the same state as any defendant - and the amount in controversy must exceed \$75,000. An individual is a citizen of her domicile, where she is physically present with an intent to remain. A corporation is a citizen of both its principal place of business and its state of incorporation. Citizenship is determined as of the time of the filing of the complaint. In this case, there is a sufficient amount in controversy as the plaintiff has alleged damages of \$100,000. The court will accept the plaintiff's allegation of damages unless it appears "to a legal certainty" that such allegations are incorrect. Diversity jurisdiction fails, however, because the parties are not completely diverse. The plaintiff is a citizen of Virginia. Defendant AAB is a citizen Tennessee, where it has its headquarters, and Virginia, where it is incorporated. Defendant John is also a citizen of Virginia. Prior to the complaint being filed, he moved to Virginia and the facts suggest that he intends to remain. He has purchased a home, which is his principal residence, in Virginia; his family is in Virginia; and he has registered to vote in Virginia. Thus, both the plaintiffs and the defendants are citizen of Virginia, and the court does not have subject matter jurisdiction based on diversity. FRCP 8(a) McCartney v. West Virginia 156 F 2d. 739 (1946)

9. (Wills & Estates) Sammy Cotton was 18 years old when, along with thousands of other U.S. Marines, he served multiple combat tours in the jungles of Vietnam in 1968 and 1969. The trauma of the experience left him disabled, and he was honorably discharged with a diagnosis of dementia incident to Post Traumatic Stress Disorder (then known as “shell shock”). For the rest of his life Sammy received a military disability pension.

Sammy returned to his hometown, Hampton, Virginia, where his five brothers also lived: Alton, Bobby, Charles, Dan, and Ed. Sammy moved in with Alton and Alton’s three children and lived a reclusive life for several years. Alton’s three children adored Sammy and the four of them grew very close. Because Sammy seemed incapable of handling his financial affairs, Alton was appointed his guardian. After Alton died suddenly, Sammy left Alton’s home and moved in with his brother Bobby, where he lived for the next 30 years until his death.

Because of Sammy’s continued apparent inability to handle his financial affairs, Bobby was appointed his guardian. While Bobby was at work, Sammy spent his time at home absentmindedly drawing pictures, hanging out with Alton’s children, or in Bobby’s wood shop making furniture for family members.

Sammy was frequently heard to say that, because Bobby was his closest living relative since Alton’s death, he was going to leave all his property to Bobby. Although Sammy did not know how much money he had, he knew that Bobby regularly deposited his monthly military disability checks into a savings account and made only small periodic withdrawals to pay for food and clothing.

In 2010, after discussing the need for a will and to save some money, Bobby asked a neighbor, a retired attorney, to draft a will for Sammy. At Sammy’s request, the neighbor drafted the will so that it left Sammy’s entire estate equally to all the brothers who survive him. Sammy signed the will in Bobby’s presence.

Later that day, Bobby deposited Sammy’s will with their long-time family attorney. The attorney noticed that Sammy’s will was not signed by any witnesses and, knowing that there were concerns about Sammy’s competence, took Sammy into his office and asked his paralegal to join them. With the paralegal in the room, the family’s attorney asked Sammy whether he knew what property he had, who his family members were, whether he intended to leave his estate to Bobby and his other brothers, and whether the signature on the will was his. Sammy responded, “I know Bobby puts my disability pension in a savings account. I don’t know how much is in the account. I sure love Alton’s three kids, but I think Bobby and maybe my other brothers should get my money when I die. Yeah, I signed that paper when Bobby handed it to me this morning.” Satisfied with Sammy’s answers, the attorney and his paralegal each signed their names below Sammy’s while Sammy was sitting across the table from them.

Sammy died in September 2014. He was survived only by his brothers, Bobby, Charles, Dan, and Ed, and Alton’s three children. In Sammy’s estate was \$150,000 in the savings account in which Bobby had deposited the military pension checks over the years. Charles qualified as Sammy’s executor and submitted Sammy’s will to the Circuit Court for probate.

Alton’s three children are considering challenging the validity of the will on the grounds that it was improperly executed and that Sammy lacked testamentary capacity. They hire you as their attorney, relate to you the foregoing facts surrounding the making of the will, and ask for your advice on the following questions:

- (a) How would the Court be likely to rule on whether Sammy’s will was properly executed?
- (b) On the question whether Sammy had testamentary capacity, what must be proved to establish that he did have such capacity, whose burden is it to prove it, and how would the Court be likely to rule on the issue?
- (c) To whom and in what proportions would the \$150,000 in the savings account be distributed if (i) they were to lose the will contest or (ii) if they were to prevail? Please advise Alton’s children on each of their questions and explain your answers fully.

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- (a) The statutory requirements for due execution are as follows:

§ 64.2-403. Execution of wills; requirements.

A. No will shall be valid unless it is in writing and signed by the testator, or by some other person

in the testator's presence and by his direction, in such a manner as to make it manifest that the name is intended as a signature.

...

C. A will not wholly in the testator's handwriting is not valid unless the signature of the testator is made, or the will is acknowledged by the testator, in the presence of at least two competent witnesses who are present at the same time and who subscribe the will in the presence of the testator. No form of attestation of the witnesses shall be necessary.

Sammy did not sign in the presence of the witnesses, but he did acknowledge the document in front of the attorney and paralegal, saying "I signed that paper ...". The attorney and paralegal were both present and signed at that time. The court should find that the will was properly executed.

- (b) The proponent of the will is entitled to a presumption that testamentary capacity existed by proving compliance with all statutory requirements for the valid execution of the will. Once the presumption exists, the contestant then bears the burden of going forward with evidence to overcome this presumption, although the burden of persuasion remains with the proponent. *Gibbs v. Gibbs*, 239 Va. 197, 200, 387 S.E.2d 499, 501 (1990) (citing *Redford v. Booker*, 166 Va. 561, 569–70, 185 S.E. 879, 883 (1936)).

The mere fact of appointment of a guardian for an individual is not prima facie evidence of lack of testamentary capacity, and evidence of such appointment, of itself, is insufficient to rebut the presumption of capacity or shift to the proponent the burden of going forward. *Gibbs v. Gibbs*. If the presumption of capacity is rebutted and the burden of going forward were shifted to the proponent, the proponent would be required to prove the elements of capacity, which include showing that the testator had, at time of execution, "the mental capacity to (a) know the nature of his property, (b) the natural objects of his bounty, (c) be capable of forming an orderly plan of disposition and (d) understand the disposition made by the will." (quoting from Haskell, *Preface to Wills, Trusts and Administration*, p. 36, Foundation Press, 1987. Given the un rebutted presumption of capacity, the Court should find that Sammy possessed testamentary capacity. [Although proof of due execution, coupled with the absence of evidence rebutting the presumption of capacity, is sufficient to prove capacity, it is possible, perhaps likely, that the examiners wanted a discussion of the elements that comprise testamentary capacity.]

Note: Thinking is that the capacity issue could come out either way.
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- (c) The relevant statute is

§ 64.2-418. When children or descendants of devisee or legatee to take estate.

Unless a contrary intention appears in the will, if a devisee or legatee, including a devisee or legatee under a class gift, is (i) a grandparent or a descendant of a grandparent of the testator and (ii) dead at the time of execution of the will or dead at the time of testator's death, the children and the descendants of deceased children of the deceased devisee or legatee who survive the testator take in the place of the deceased devisee or legatee. The portion of the testator's estate that the deceased devisee or legatee was to take shall be divided into as many equal shares as there are (a) surviving descendants in the closest degree of kinship to the deceased devisee or legatee and (b) deceased descendants, if any, in the same degree of kinship to the deceased devisee or legatee who left descendants surviving at the time of the testator's death. One share shall pass to each such surviving descendant and one share shall pass per stirpes to such descendants of deceased descendants.

- (i) If the nephews lose, then the account goes to the brothers equally. The will uses "words of survivorship" in saying which brothers take (i.e., those that survive Sammy). These words of survivorship are words showing a "contrary intention" and thus preclude the nephews from claiming under Virginia's anti-lapse statute. " See Section 64.2-418.
- (ii) If the nephews win, then the property passes by intestacy. Each brother gets an equal share and one share is set aside for Alton's children.

