

**February 2023 - Virginia Bar Exam - Essay Questions**

✖✖ After each bar exam, the Virginia Board of Bar Examiners invites the Deans [or the Deans' designees] of all Law Schools located in Virginia, to meet with the Board [remotely]. Representatives from all 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.✖✖ It should also be noted that while we think the answers that follow should be acceptable for full credit, keep in mind that the VBBE do give credit for good analysis and sometimes will accept for at least partial credit, alternate theories of analysis that are not what they had in mind as the preferred answer. jrjz

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Revised: **March 27, 2023 (5:19am)**

1. [Criminal] Able, Baker and Conrad were longtime friends. They lived in Norfolk, Virginia. They were all down on their luck and were determined to make some quick money. Able recently had been released from prison after being convicted of several felonies. While in prison, he became friends with a member of a drug cartel. His prison friend told him that he had connections in the illegal narcotics business and that his drug cartel could always use help transporting and selling their drugs.

With the help of his prison friend, Able contacted a local member of the cartel. Able was given the opportunity to buy 400 grams of illegal methamphetamine at a location in Norfolk. Able planned to pay for the methamphetamine and transport it to Richmond, where it would be sold for a sizeable profit. Able discussed this opportunity with Baker and Conrad. Able, Baker and Conrad all knew that it was a felony to possess methamphetamine, and to possess it with the intent to distribute the drug. They all knew that if they were caught, they would probably go to jail. All three agreed to participate and split the profit equally. They were to pick up the methamphetamine on a Wednesday night in Norfolk and transport it to Richmond the same night.

On Monday morning, Baker found out that his wife had cancer and would have surgery on Wednesday morning. Later on Monday, Baker met with Able and Conrad and told them that he could not help with the trip to buy the methamphetamine. Able said that was okay but that Baker would be cut out of the profits. Baker responded, "that's fine with me," and left.

On Wednesday morning, Conrad became apprehensive about being involved with a drug cartel. Instead of meeting Able to pick up the methamphetamine that night, he secretly reported the plan to the Virginia State Police.

Determined to make some money, Able stole a van and picked up the methamphetamine in Norfolk as planned and set out for Richmond. Along the way, Able was stopped by the Virginia State Police, who found the methamphetamine in the stolen van.

Able, Baker and Conrad have each been charged in the appropriate circuit court with theft of the van and conspiracy to sell methamphetamine.

(a) Can Able be convicted of conspiracy to sell methamphetamine? Explain fully.

(b) Can Baker be convicted of conspiracy to sell methamphetamine? Explain fully.

(c) Can Conrad be convicted of conspiracy to sell methamphetamine? Explain fully.

(d) Can Baker be convicted of theft of the van? Explain fully.

(e) Can Conrad be convicted of theft of the van? Explain fully.

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(a),(b),(c). A criminal conspiracy is an agreement between two or more persons by concerted action to commit a criminal offense. Here, Able, Baker and Conrad agreed to commit the distribution of methamphetamine which they all acknowledged was a crime. There was no ambiguity in the agreement. The conspiracy was complete when the agreement was made; no further act was required to effect it. Therefore Able, Baker and Conrad may each be convicted of conspiracy to distribute the drug. Baker's subsequent withdrawal is no defense to the conspiracy charge because the conspiracy crime was already complete.

(d). Abel's theft of the van was a reasonably foreseeable act in furtherance of the desired act of transporting the methamphetamine, and Baker and Conrad as co-conspirators would otherwise be criminally liable for Able's theft. A co-conspirator may effectively withdraw from the conspiracy if he affirmatively informs the other conspirators of his withdrawal from the conspiracy. Here, Baker, effectively withdrew from the conspiracy by telling the other two co-conspirators that he would no longer be involved in the plan, a position which the others ratified by denying him any part of the proceeds from the intended crime. By making an effective withdrawal, Baker is not liable for any subsequent crime, including Able's theft, committed in furtherance of the conspiracy. Baker cannot be convicted of the theft of the van.

(e.) Although Conrad abandoned the plan by reporting the conspiracy to the state police, he did not also tell Able of his abandonment of the plan. By failing to inform Able of his abandonment of the plan, he does not escape liability for the theft of the van. Therefore, as a matter of law, Conrad can be convicted of the theft of the van.

2. [Wills] Wilma and Harry, who resided in Chesapeake, Virginia, were married for ten years, but separated because of a serious argument over Harry's children by his first marriage, George and Martha. After the separation but before the divorce was final, at George and Martha's urging, Harry went to Len Lawyer to prepare a new estate plan. Harry executed a new Will in 2010 in which he left his sizeable estate to George and Martha and designated them as his co-executors.

Harry still cared a great deal for Wilma and wanted to provide for her well-being even after the separation, so he allowed Wilma to continue to live in the marital home and transferred it to Wilma with a Transfer on Death Deed in 2010. This deed was silent about the separation and divorce.

Wilma and Harry divorced in 2011, but about a year following the divorce decree, they reconciled. They resumed living together in the marital home but never remarried. They lived in harmony for another decade until Harry suffered a heart attack and died without any warning.

Shortly before his death, Harry wrote a letter to Len advising him that he and Wilma had resolved all their old problems and that they planned to get married again. He wanted to revise his estate plan to be more generous with Wilma. The letter said the following:

*Dear Len: I am on a trip and cannot come to your office, but I am writing this letter only in my handwriting until you can prepare the proper documents. I want to take care of Wilma and leave her one-third of my estate. She has always been the love of my life. I want to divide the remainder of my assets between George and Martha equally. Signed, Harry 11/20/2022*

Len promptly prepared a new Will for Harry, but Harry died before he signed the new Will. Upon Harry's death, the clerk admitted Harry's 2010 Will to probate and granted administration to George and Martha. George and Martha challenged Wilma's right to the marital home because Wilma and Harry were not married at his death. When Len learned of this, he informed Wilma of the letter that Harry wrote him. Wilma then filed a complaint to renounce the 2010 Will. She is seeking to establish the 11/20/2022 letter as Harry's final Will. Wilma is also seeking to claim an elective share of Harry's estate.

(a) Is Wilma entitled to the marital home? Explain fully.

(b) Can the 11/20/2022 letter qualify as a valid Will which can be admitted to probate? Explain fully.

(c) Is Wilma likely to succeed in renouncing Harry's 2010 Will and obtaining an elective share of Harry's estate? Explain fully.

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(a) A transfer on death deed (TODD) allows a real property owner to designate a beneficiary to receive title to certain residential real property on the owner's death without a probate proceeding or trust administration. § 64.2-621. A TODD will supersede the provision of a will related to the specific real property. If, after making a TODD, the transferor is divorced, the divorce revokes any transfer to a former spouse as designated beneficiary unless the transfer on death deed expressly provides otherwise. § 64.2-632(5).

Here, after ten years of marriage Wilma and Harry separated. In 2010, Harry executed a new Will, leaving his sizeable estate to the children of his first marriage, George and Martha. After the separation but before the divorce was final, Harry allowed Wilma to continue to live in the marital home. Harry also transferred the marital home to Wilma with a Transfer on Death Deed in 2010, which was silent about the separation and divorce. The transfer through the TODD would supersede the bequest made in the 2010 Will. However, in 2011, Wilma and Harry formally divorced. The divorced revoked the transfer made to Wilma.

Therefore, based on the TODD, Wilma would not be entitled to the marital home since they divorced after execution of the TODD.

(b) A prior will can be revoked in a number of ways, including by the execution of a new will or writing in the manner in which a will is required to be executed, whether or not that document expressly revokes the prior will. §64.1-58.1(revocation). A valid holographic will must be (1) entirely in the handwriting of the testator, (2) signed by the testator, and (3) evidence testamentary intent. A testator may use any marking to indicate their signature. There is no requirement that the testator sign with their legal name. Testamentary intent must be found on the face of the will, not from extrinsic evidence. *Quesenberry v. Funk*, 203 Va. 619 (1962).

Here, Harry executed a will in 2010, in which he left his estate to George and Martha. Shortly before Harry's death in 2022, Harry wrote a letter to his lawyer, Len, advising Len that he wanted to revise his estate plan by leaving 1/3 of his estate to Wilma, and the remainder to George and Martha. The 2022 letter was entirely in Harry's handwriting ("only in my handwriting") and was signed by Harry. Even though Harry only signed with his first name, this would be accepted as a valid signature for purposes of a testamentary document. The letter, however, appears to lack testamentary intent. Harry writes that he is sending the letter "until the *proper* documents" can be prepared. "Proper" seems to suggest that Harry did not believe this letter would be sufficient to dispose of his estate. Harry also wrote that "I *want to* take care of Wilma..." and "I *want to* divide the remainder of my estate...". "Want to" seems to suggest his intent to take care of them, but only in the future by way of a "proper" document.

Therefore, the 2022 letter cannot qualify as a valid holographic will that can be admitted to probate since it lacks testamentary intent.

✖✖ Regarding the issue of testamentary intent in part (b), we think that a good argument can be made either way. An applicant who concludes that Harry intended the letter to be a will and makes a persuasive argument should receive full credit if they recognize the issue of testamentary intent. Likewise, an applicant who concludes that Harry was simply giving instructions on how to prepare a new will, and that the letter was not intended to serve as the will itself, should receive full credit.

(c) A surviving spouse may claim an elective share regardless of whether (i) any provision for the surviving spouse is made in the decedent's will or (ii) the decedent dies intestate. However, this is only available for a legal spouse of the testator. A common law marriage is one by agreement of two people who consider themselves married without any formal ceremony or license and who hold themselves out to the public as married. Virginia does not have common law marriage. Therefore, a claim as a common law spouse is not available, regardless of whether they are engaged, have lived together for a long time, or based on being formally married previously.

Here, Wilma and Harry were formally divorced in 2011, after being married for over ten years. A year later they

reunited, resumed living together. They lived together for 10 years and were planning to get married. Harry even attempted to revise his estate plan in light of their pending marriage. Still, since the Commonwealth does not recognize a common law marriage, Harry died without a surviving spouse.

Therefore, regardless of the validity of the 2010 will, Wilma would not be entitled to an elective share since she is not a surviving spouse.

3. [UCC Negotiable Instruments] Tim lived in Lawrenceville, Virginia. Tim had seen a blue metallic paint color that he thought would look good on his car. He went to his usual autobody shop and requested that Art, the shop's owner, paint his car the metallic blue that he had admired. Art painted the car and Tim wrote a check for \$500 from his account at the First National Bank of Lawrenceville (the Bank), payable to Art. When Tim delivered the check to Art, he approved of the paint job. However, the next morning, Tim saw the car in sunlight and did not like the paint job. Specifically, Tim did not like the paint color, but he did not have any complaint about the workmanship. Without telling Art, Tim called the Bank and stopped payment on the check.

Art worked long hours and did not have time to shop for a birthday present for his adult son, Sam. Art endorsed Tim's \$500 check and gave it to Sam.

Sam took the check to the Bank to cash it, but the Bank refused due to Tim's stop payment order. Sam took the check to Tim and demanded payment, but Tim refused to make payment on the check to Sam.

Several days later, Art wrote a check for \$100 as a birthday gift payable to his niece, Nora. He gave the check to Nora on her birthday. Before Nora cashed the check, she and Art got into an argument. Art was angered and stopped payment on the \$100 check to Nora.

Not knowing about the stop payment order, Nora endorsed the check and cashed the check at Cash Express and received \$80. Cash Express charged \$20 as a handling fee. When Cash Express presented the \$100 check for payment to the Bank, it was declined because of the stop payment requested by Art. The Bank stamped the check with notification that payment had been stopped. Cash Express then sold the check for \$25 to Collections, Inc., a collection agency. Collections, Inc. presented the check to Art and demanded \$100. Art refused to pay, citing his stop payment order as his reason.

(a) Can Sam enforce the \$500 check against Tim? Explain fully.

(b) Can Collections, Inc. enforce the \$100 check against Art? Explain fully.

(c) Assume for this question only that Nora did not endorse the \$100 check that she cashed at Cash Express. What actions, if any, might Cash Express take to make the \$100 check a negotiable instrument? Explain fully.

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(a) Sam is likely able to enforce the \$500 check against Tim.

To be negotiable under the UCC, an instrument must be in writing, signed by the maker/drawer, contain an unconditional promise or order, to pay a fixed amount of money, to an order or bearer, payable on demand or at a definite time, without any additional undertaking or instruction. §8.3A-104. A check is an order instrument which requires for there to be endorsement by the holder (e.g., a signature) and transfer to the subsequent party in order to negotiate. §8.3A-201.

A holder in due course is a party who took possession of an instrument for value, in good faith, and without notice that the instrument had some type of defect including whether it had been dishonored. §8.3A-302. In absence of any of those elements a party in possession of the instrument would simply be a holder. See *id.* A holder can enforce payment of the original obligation. §8.3A-301.

The \$500 check is a negotiable instrument Tim issued to Art in consideration for the painting work performed by Art, because it was in writing, signed by Tim (the drawer), for a specific amount of money of \$500, with either the language to be payable to the order of Tim or the implication that it would be payable to such order, and the facts don't indicate there were conditions or additional instructions. §8.3A-104. As the named payee, Art negotiated the check to

Sam by endorsement and delivery. §8.3A-201. Art would have been a holder in due course because Tim expressed his satisfaction with the paint job to Art and didn't tell Art about stopping payment to the check, so he took the check without notice of it being dishonored and in good faith. §8.3A-302. Further, he took the check as a result of the contract to repair the car, which would be for value.

However, Sam did not give value to Art for the item, so Sam is a holder, without holder in due course status. §8.3A-302(a)(2). Being a holder, Sam is entitled to enforce the instrument against Tim, as the stop payment does not impair Tim's obligation as drawer. §8.4-403, Off. Comm. 7, §8.3A-301, 305 and 414. Tim, being the drawer, assumed the obligation of a drawer to pay the item according to its terms when issued. §8.3A-414. However, as a holder, Sam is subject to Tim's simple contract defenses. §8.3A-305(a)(2). Had Art not negotiated the item to Sam but sought to enforce Tim's drawer obligation after the check was not paid upon the stop payment, Tim would raise the defense that the paint color on his vehicle was not as agreed upon with Art, that Art breached their agreement (though, the facts don't indicate that Art had not used the metallic blue color that had been requested or that this was a satisfaction contract). Tim is entitled to raise the same defense to Sam's enforcement of the instrument as a holder.

Therefore, Sam would be able to enforce payment of the \$500 check.

(b) Collections, Inc. (Collections) is not likely to be able to enforce the \$100 check against Art. To be negotiable under the UCC, an instrument must be in writing, signed by the maker/drawer, contain an unconditional promise or order, to pay a fixed amount of money, to an order or bearer, payable on demand or at a definite time, without any additional undertaking or instruction. §8.3A-104. A check is an order instrument which requires for there to be endorsement by the holder (e.g., a signature) and transfer to the subsequent party in order to negotiate. §8.3A-201.

A holder in due course is a party who took possession of an instrument for value, in good faith, and without notice that the instrument had some type of defect including whether it had been dishonored. §8.3A-302. Such status may be protected in a subsequent transferee; however, that protection will not be maintained in the case that there is fraud. See §8.3A-203(b). Should there be any absence of any of the elements of being a holder in due course, a party in possession of the instrument would simply be a holder. See *id.* A holder can enforce payment of the original obligation. §8.3A-301. However, this would be subject to contractual defenses by the maker/drawer. §8.3A-305. Specifically, under §8.3A-303(b) the drawer has a defense if the negotiable instrument was issued without consideration, which defense is available against a holder. §8.3A-305(a)(2).

When Art issued the check, he did so without consideration, so he would be able to raise such defense against a subsequent holder.

The \$100 check was a negotiable instrument because it was in writing, signed by Art (the drawer), for a specific amount of money of \$100, with either the language to be payable to the order of Art or the implication that it would be payable to such order, and the facts don't indicate there were conditions or additional instructions. §8.3A-104. Art was the drawer and Nora was the payee and regular holder because she did not take it for value, because it was a birthday gift. §8.3A-302.

When Nora negotiated the check to Cash Express by endorsement and transfer, Cash Express became a holder in due course as it, considering Nora also, did not have notice of the stop payment order, it apparently acted in good faith, and it gave value by giving Nora \$80 in exchange for a \$20 handling fee. There was no indication of infirmity in the check.

However, when Cash Express transferred the check to Collections, the check had already been stamped by the Bank to show it had been dishonored upon the stop payment order, thus, Collections did not become a holder in due course, because Collections had notice that the check had been dishonored. §8.3A-302(a)(2)(iii). While Art had the obligation of a drawer under §8.3A-414 to pay according to the terms when issued, Art can raise the defense provided in §8.3A-303(b), lack of consideration, pursuant to §8.3A-305(a)(2) upon Collections effort to enforce. Further, Art would be able to argue that the attempt to enforce such instrument with knowledge that it was defective is fraudulent, and would not protect the enforceability of the instrument. See §8.3A-203(b).

Therefore, it is unlikely for Collections to be able to enforce the \$100 check against Art, because it was a gift (no consideration) and Collections had ample notice about the defective status of the instrument.

**Note:** Our sense is that the VBBE were interested in testing the applicants on their knowledge of the Shelter Rule, which is provided within Section §8.3A-203(b). Applicants should be able to get full credit if they either concluded that the check was protected by the Shelter Rule so the check was enforceable or that it was not protected by the Shelter Rule because Collections knew about the defect so the check was unenforceable.

(c) Assuming that Nora did not endorse the \$100 check cashed at Cash Express (Express), Express may take some

steps to make the \$100 check negotiable.

A check is an order instrument which requires for there to be endorsement by the holder (e.g., a signature) and transfer to the subsequent party in order to negotiate. §8.3A-201. However, a transferee for value fails to become a holder because there was no endorsement, the transferee would have an enforceable right to achieve an unqualified endorsement from the transferor. §8.3A-203(c). Note that there would not be negotiation until such endorsement is actually made. *See id.*

The issue raised in the revised facts involves Cash Express's right to enforce the instrument, as it must be at least a holder. While Nora transferred the instrument for value, for there to have been a negotiation to Cash Express she was also required to endorse it as the check was payable to her as opposed to being payable to bearer. As the transferee for value, Cash Express has a specifically enforceable right to the unqualified endorsement by Nora. §8.3A-203(c). Cash Express may file an action at law against Nora seeking specific performance should she refuse to endorse the item. However, there would not be negotiation until Nora actually endorses the check.

4. [Va. Civil Procedure] Brenda and Cody Coleman, a married couple who are residents of New York, bought two tickets to travel from New York City to Asheville, North Carolina, on an Acme Busways (Acme) bus. They purchased the tickets from a kiosk in New York City through a third party ticket broker, Togo Ticketing (Togo).

While the Acme bus was driving through Caroline County, Virginia, on January 1, 2020, the driver of the bus fell asleep and crashed. Brenda was injured and Cody was killed. Brenda properly qualified as personal representative of Cody's estate.

Acme was judgment proof, so on June 30, 2021, Brenda filed two lawsuits against Togo in the Circuit Court for the City of Richmond, Virginia, both alleging that Togo was negligent because it knew Acme was a dangerous company and it should not have sold them the tickets.

The first suit was styled *Brenda Coleman v. Togo Ticketing* and sought damages for Brenda's personal injuries (the Personal Injury Suit).

The second suit was styled *Cody Coleman, deceased v. Togo Ticketing* and sought damages for Cody's wrongful death (the Wrongful Death Suit)

Both lawsuits were properly served on Togo on January 1, 2022.

On January 21, 2022, in response to the Personal Injury Suit, Togo filed an Answer to the Complaint. With the Answer, Togo filed a Motion to Dismiss for improper venue.

Togo was incorporated and has its principal place of business in New York. After filing its Answer, Togo established through discovery that it has no employees, officers, or agents in Virginia and that it conducts no business in Virginia. Based on these undisputed facts, on March 1, 2022, Togo filed a Motion to Dismiss the Personal Injury Suit for lack of personal jurisdiction.

On January 21, 2022, in response to the Wrongful Death Suit, Togo filed a Demurrer, arguing that the suit was not brought by the proper party, and a Plea in Bar, arguing that the statute of limitations had expired, so the Wrongful Death Suit should be dismissed with prejudice

In June 2022, the court heard the defendant's motions in both cases.

The plaintiff's opposition to the Motion to Dismiss the Personal Injury Suit argued that personal jurisdiction and venue were both good anywhere in Virginia, because the crash occurred in Virginia, and that Togo waived its objection to both personal jurisdiction and venue. The plaintiff's opposition to the Motion to Dismiss the Wrongful Death Suit argued that Cody was the proper party plaintiff to bring the Wrongful Death Suit because he was the one who was killed and was the real party in interest in the case.

a) In the Personal Injury Suit, how should the court rule on Togo's Motion to Dismiss for lack of personal jurisdiction? Explain fully.

(b) In the Personal Injury Suit, how should the court rule on Togo's Motion to Dismiss for improper venue and what, if any, action should the court take? Explain fully.

(c) In the Wrongful Death Suit, how should the court rule on Togo's Demurrer on the ground that the Wrongful Death Suit was not brought by the proper party? Explain fully.

(d) In the Wrongful Death Suit, how should the court rule on Togo's Plea in Bar of the Statute of Limitations? Explain fully

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a). Togo's motion to dismiss for lack of personal jurisdiction should be denied. Under the facts of the underlying case, it appears that Virginia lacks personal jurisdiction over Togo, as Togo has no contacts with the Commonwealth. It is incorporated in New York, which is also where it has its principal place of business. It has no employees, officers, or agents in Virginia and conducts no business in Virginia. There is no long-arm jurisdiction under §8.01-328.1 (A)(4) as jurisdiction over a non-resident can only be exercised if the out-of-Commonwealth tortfeasor caused tortious injury in the Commonwealth by an act or omission outside the Commonwealth, if the non-resident 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. None exists here.

However, Togo has waived its right to object to personal jurisdiction by entering a general appearance in the case. It did so by filing an answer and conducting discovery. See §8.01-277.1(1) It should be noted, however, that discovery, if ordered by the court to adjudicate any objection to personal jurisdiction, does not of itself, waive personal jurisdiction. See §8.01- 277.1 (3). Although personal jurisdiction can be challenged at any time (unless waived), Togo's filing of its motion to dismiss for lack of personal jurisdiction on March 1, 2022 comes well after it entered a general appearance.

b). Togo's motion to dismiss for improper venue should be denied. Venue is not jurisdictional in Virginia and no case shall be dismissed on that basis. See §8.01-258 and §8.01-264(A). However, a party may object to venue as being improper venue. A defendant must file an objection to venue (not a motion to dismiss as Togo did here) within 21 days of service of process upon the defendant. In its pleading, a defendant must set forth where it believes venue to be proper (Caroline County). The matter shall be heard promptly by the court. The court should sustain a properly raised objection under the facts of this case, and transfer the case to Caroline County Circuit Court, a court of proper venue. See §8.01-264(A).

Note, however, that it could be argued that Togo may have waived its objection to venue, as §8.01-264 requires that a party "promptly" have the matter heard by the court. Here the motion was filed on January 21, 2022. Under the fact pattern, there is no mention when, or if, Togo requested the court to hear the matter, but the court did not rule on the venue issue until June 2022.

c). Togo's demurrer should be sustained. A demurrer challenges the legal sufficiency of a complaint (or counterclaim, crossclaim or third-party claim). Here, the complaint is filed by an improper party and cannot legally stand. Every action for wrongful death must be filed in the name of the personal representative, not the deceased as in this case. The action should be styled: *Brenda Coleman, personal representative of the estate of Cody Coleman v. Togo Ticketing*. See §8.01-244 (B) and 8.01-50 (C). Filing suit in the name of the deceased in this case is a legal nullity, and therefore any attempt by the plaintiff to amend or substitute the proper party should be denied. See *Cook v. Radford Community Hospital*, 260 Va. 443 (2000).

d). Togo's plea in bar based of the statute of limitations should be granted. In Virginia, a wrongful death action must be filed within two (2) years of the date of death (not two years from the date of the accident). See §8.01- 244(B). In this case the decedent died on January 1, 2020. Suit was filed against Togo on June 30<sup>th</sup> 2021, and why this well within the two-year statute of limitation, because the designated plaintiff was a legal nullity, this was tantamount to there being no filing and consequently the statute of limitations ran out. The WD claim is time barred.

5. [Professional Responsibility] Clara Client had a habit of engaging in somewhat shady business deals, but she had escaped criminal problems until a recent effort to profit from the COVID pandemic. Clara's most recent business deal was the sale of face masks which were supposed to protect the individual wearing the mask from COVID and influenza. Clara imported the masks from China in large quantities, arranged for the masks to be dyed multiple colors and sold on the internet at a substantial mark-up in price.

Clara's mask business was an instant success and grew quickly; however, Clara knew that the face masks were not effective in preventing either COVID or influenza. Nonetheless, she continued to advertise them for preventing COVID and influenza. She made a big profit on the masks even though they were worthless for the purpose the people bought them. Clara's scheme went on for a few months until the Commonwealth's Attorney in Norfolk, Virginia, charged her with fraud and false advertising. At that point, Clara shut down her mask business.

Clara engaged her old college friend, Alice Attorney, a Virginia lawyer, to represent her on the charges. Clara confessed to Alice that she knew that the masks were not effective to prevent COVID or influenza and that what she was doing was wrong, but she had been able to make over a million dollars before getting caught and had deposited the money in an offshore bank account in the Bahamas. Alice was confident that she would get the charges against Clara dismissed and, because Clara was an old friend, Alice agreed that she would only take a fee if the charges were dismissed.

While preparing for the criminal trial, Clara shared with Alice that her next business venture was selling a powder that would promote memory health. Clara told Alice that the powder was nothing more than crushed aspirin and sugar, but Clara was convinced that she could make a market for such a memory enhancer over the internet even if it was totally ineffective and, in fact, might cause harm to people who took it. Clara asked Alice if she would like to join this new venture as a partner in exchange for setting up the business entity.

(a) Does Alice have an obligation to reveal the nature of Clara's scheme with the masks to the court? Explain fully.

(b) What, if any, Virginia Rules of Professional Conduct has Alice violated in her representation of Clara on the criminal charges regarding the mask business? Explain fully.

(c) What, if any, are Alice's obligations under the Virginia Rules of Professional Conduct regarding Clara's plans and offer of partnership in the memory enhancing business? Explain fully.

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[a] Alice cannot reveal the nature of Clara's mask scheme to the court. VRPC Rule 1.6(a) is clear: a lawyer shall not reveal information protected by attorney-client privilege "or other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client..."

Although VRPC Rules 1.6(b) and 1.6(c) do allow (and sometimes require) attorneys to disclose confidential information to prevent "substantial bodily harm to another or substantial injury to the financial interests or property of another," those exceptions do not apply because Clara has shut down her mask business. Harms (financial and physical) caused by Clara's actions are wholly in the past.

To the extent that Alice is worried that representing Clara will require her to defend the indefensible, Alice should be reassured by VRPC Rule 3.1: while a lawyer cannot make frivolous arguments in court, "[a] lawyer for the defendant in a criminal proceeding ... may nevertheless so defend the proceeding as to require that every element of the case be established."

[b] Alice proposes "that she would only take a fee if the charges were dismissed," i.e., she proposes a contingency fee arrangement. Yet Rule 1.5(d)(2) provides that a lawyer cannot collect a contingent fee "for representing a defendant in a criminal case." Alice is therefore subject to discipline under VRPC Rule 1.5 because she used this contingent fee structure in her retainer with Clara.

[c] Alice must reject the proposal to join a new venture with Clara to sell "memory enhancing" powder. If Alice were to participate in the fraudulent scheme that Clara proposes, she would violate VRPC Rule 1.2(c). It states, "A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent..."

Indeed, Alice might have an obligation to disclose Clara's fraudulent scheme if she fears that it would be criminal and "reasonably certain to result in death or substantial bodily harm to another or substantial injury to the financial interests or property of another..." See VRPC Rule 1.6(c)(1). Alice should therefore try to dissuade Clara from moving forward with the scheme and might reference "relevant moral and ethical considerations in giving advice." See VRPC Rule 2.1, Comment [2a].

Even if Clara did have a lawful and honest product to sell, Alice would still need to exercise caution before joining the business venture. VRPC Rule 1.8(a) advises, "A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client" unless various conditions to ensure fair and reasonable treatment of the client are met.

**6.** [Evidence] Drake Davis was involved in an automobile accident in Fairfax County, Virginia. Drake's car struck and killed a pedestrian in a crosswalk. Drake and his passenger, Theresa Freeman, were not injured



Officer Carla Ramirez, the investigating police officer, arrived at the scene within a few minutes of the crash. As she exited her car, Officer Ramirez overheard an eyewitness to the accident standing on the street corner, who kept yelling into his phone, *“He drove right through the red light! He almost hit me!”*

When she spoke to Drake, Officer Ramirez asked if she could look at his phone. Drake handed her the phone that was in his lap and gave her the password to open it. Officer Ramirez saw that an unsent and incomplete text message was visible on the phone, which read, *“Joe- I am running late to your house. Theresa and I will get there as...”* Drake told Officer Ramirez that he was on his way to Joe’s house immediately before the accident.

Officer Ramirez then noticed that Drake’s passenger, Theresa, also had a cell phone in her hand. Officer Ramirez asked Theresa, *“Were you taking a video of Drake just before the crash?”* Without saying a word, Theresa nodded her head and handed Officer Ramirez her phone. Based on Theresa’s reaction, Officer Ramirez concluded that she had, in fact, been videotaping right before the crash. With Theresa’s permission, Officer Ramirez looked at her phone. The only video clip found on Theresa’s phone was a video in which Drake could be heard laughing as the camera zoomed in on the speedometer of his car showing 92 mph.

Drake was charged with involuntary manslaughter, and at his trial, the prosecutor called Officer Ramirez to the stand:

Prosecutor: *“Officer Ramirez, tell the jury what the eyewitness said on his phone at the scene of the crash.”*

Defense: *“Objection. The question calls for inadmissible hearsay.”*

The court overruled the objection and allowed Officer Ramirez to testify that, at the scene, she overheard the eyewitness yelling into his phone, *“He drove right through the red light! He almost hit me!”*

Next, Officer Ramirez testified that when she asked to see Drake’s phone, he took it from his lap, gave it to her and gave her the password. Then, the following exchange took place:

Prosecutor: *“Officer Ramirez, when you first looked at the phone Mr. Davis handed you, please tell the jury what you read.”*

Defense: *“Objection. The question lacks a proper foundation establishing the authorship of the statement and calls for inadmissible hearsay.”*

The court overruled the objection as to foundation, finding a sufficient foundation had been laid that Drake was the author of the text, but found that the unsent text message on the phone was inadmissible hearsay.

Finally, the prosecution sought to enter the following into evidence:

Prosecutor: *“Officer Ramirez, please describe to the jury Theresa’s behavior when you asked her, ‘Were you taking a video of Drake just before the crash?’ and show the jury the video you found on her phone.”*

Defense: *“Objection. The question calls for inadmissible hearsay and, therefore, the video lacks a proper foundation and should not be shown to the jury.”*

The court overruled the objection and allowed Officer Ramirez to describe how Theresa had nodded her head and handed the phone to Officer Ramirez in response to her question, and Officer Ramirez’s conclusion from this reaction was that Theresa had, in fact, been videotaping just before the crash. With this foundation, the court permitted the jury to see the video.

- a) Did the court err in overruling the objection and allowing Officer Ramirez to testify that at the scene, she overheard the eyewitness yelling into his phone, *“He drove right through the red light! He almost hit me!”* Explain fully.
- b) Did the court err in finding that a sufficient foundation had been laid establishing that Drake was the author of the incomplete and unsent text message on his phone? Explain fully.
- c) Did the court err in excluding the incomplete and unsent text message on Drake’s phone as inadmissible hearsay? Explain fully.
- d) Did the court err in overruling the objection to Officer Ramirez’s description of Theresa’s reaction to the question, *“Were you taking a video of Drake just before the crash?”* as hearsay and in allowing the jury to see the video? Explain fully.

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[a] Hearsay is a statement, verbal or non-verbal, that is not made by the person testifying (the declarant) offered to prove the truth of the matter asserted. Hearsay is generally not admissible unless it falls within a recognized exception in Virginia.

The trial court did not err in allowing Officer Ramirez to testify that she overheard the eyewitness at the scene because his statement was an excited utterance. An excited utterance is an exception to the hearsay rule and is a spontaneous or impulsive statement prompted by a startling event and made by a declarant with firsthand knowledge at a time and under circumstances negating deliberation. Here the accident was likely a startling event that was witnessed by the person on the phone, indicating the person had firsthand knowledge. Also, the aftermath of the event was still unfolding which means it is unlikely that the witness had made a deliberate decision to make the utterance in the presence of officers. Thus, because the excited utterance exception applies, the trial court did not err in overruling the objection. [Note: This is not a present sense impression because the statement was not made contemporaneously with the accident itself.]

[b] The determination of admissibility of evidence is within the sound discretion of the court. When hearsay is offered, the court must first authenticate or identify the declarant. Thus, the Commonwealth needed to prove that Drake wrote the text message. Here the officer asked Drake if she could see his phone and he handed the phone that was in his lap to her. He also provided his password, which opened the phone. The unsent and incomplete text message was open on his phone, indicating that it was likely open when the crash occurred. Finally, the message itself indicated that the writer and Theresa were on their way to Joe's house, Drake admitted he was on his way to Joe's house, and because he and Theresa were the only occupants of the vehicle it is unlikely anyone else had written the text. The trial court did not err in finding a sufficient foundation establishing that Drake wrote the text message.

[c] Yes. The court erred in excluding the incomplete and unsent text message on Drake's phone as inadmissible hearsay for two reasons.

First, the text message is not necessarily being offered for the truth of the matter asserted in the message itself. The text is evidence from which a jury could infer Drake was distracted and texting while driving, but not necessarily that he was, in fact, running late.

Second, even if the Commonwealth wanted to introduce the message to prove that Drake was running late to Joe's house and as a result was speeding or driving recklessly, the court erred in excluding the text message because the statement was made by Drake. One exception to the hearsay rule in Virginia is that an out of court statement by a criminal defendant is admissible as a party admission. Drake is the criminal defendant and thus, the statement is admissible against him.

[d] Teresa's reaction to the question by nodding her head and handing over the phone will be considered a statement. A statement can be an oral or written assertion, or nonverbal conduct, if it is intended as an assertion. Here, Teresa nodded and handed over the phone in response to the officer's question. Although Teresa did not say anything verbally, her conduct clearly was intended to be an assertive response to the officer's question.

Because the assertion was offered to prove the truth of the matter asserted: that Theresa was taking a video of Drake just before the crash, the assertion itself is hearsay. Thus, the trial court erred when it allowed Officer Ramirez to testify about Theresa's reaction.

Furthermore, the trial court likely erred when it allowed the jury to see the video. Admissibility of the video, as a witness to the event, would require authentication. Absent the hearsay evidence above, the only evidence to authenticate the video would be Officer Ramirez's observation that Theresa was holding the phone. That may provide authentication, by a preponderance of the evidence, as to ownership of the phone (and perhaps who filmed the video). However, it may be difficult to establish relevance absent evidence, such as a time stamp, that would connect the video to the timing of the crash. [Note: Because videos do not constitute statements, the video itself is not hearsay.]

7. [Torts] Harley was near the banana display at XYZ Market when she observed her ex-husband, who had cheated on her, approximately twenty feet away from her. She screamed, "You jerk!" in his direction and when he turned toward her, she hurled a banana at him. The banana went over his head and was about to strike Barb, another customer. Barb saw the object at the last second, ducked and avoided it. While ducking, Barb lost her balance and fell backward, striking her head on a metal refrigerated case.

Barb lay on the floor unresponsive. Charlie, her husband, saw the whole thing happen. When the ambulance arrived, Charlie described how Barb fell, violently striking her head. Charlie was distraught when Barb left in the ambulance, fearing she would die.

Barb was responsive by the time she arrived at the hospital. She remained hospitalized overnight and was released the following day. Barb was told at the hospital that she should follow up with her own doctor to make sure that she hadn't suffered any further injury; however, Barb was busy and decided that she didn't need to do so. A few months later, Barb began to have serious issues with hearing and speech. She underwent a full evaluation and was found to have suffered a traumatic brain injury because of her fall at the XYZ Market, resulting in significant medical expenses and leaving her unemployable. Her doctor opined that had she sought appropriate treatment and medication sooner, she would likely have had a full recovery.

Barb timely filed a civil Complaint against Harley in the appropriate circuit court, alleging personal injury based upon the following causes of action: assault, battery and negligence.

Charlie also filed a timely civil Complaint against Harley in the appropriate circuit court, alleging intentional infliction of emotional distress. Charlie's Complaint stated that, "although Charlie was not physically injured in the altercation, he has nightmares of Barb dying in front of him." He alleges that he has trouble sleeping, avoids public places and has sought care from a counselor to assist him with these issues.

- (a) What arguments should Barb make in support of her claim of assault, what defenses might Harley reasonably raise in response, and who is likely to prevail? Explain fully.
- (b) What arguments should Barb make in support of her claim of battery, what defenses might Harley reasonably raise in response, and who is likely to prevail? Explain fully.
- (c) What arguments should Barb make in support of her claim of negligence, what defenses might Harley reasonably raise in response, and who is likely to prevail? Explain fully.
- (d) What arguments should Charlie make in support of his claim of intentional infliction of emotional distress, what defenses might Harley reasonably raise in response, and who is likely to prevail? Explain fully.

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- (a) This question raises the issues of whether Barb can establish the elements of the intentional tort of assault and whether Harley can raise any successful defenses.

The tort of assault consists of the following elements: (1) a voluntary act; (2) intended to cause either harmful or offensive contact or apprehension of such contact with another person; and (3) that causes reasonable apprehension of imminent contact in the other person. Under the transferred intent doctrine, the intent to commit an intentional tort against one person can be transferred to the person actually injured or to the tort actually committed. This doctrine specifically applies to the intentional torts of battery and assault.

Barb should argue that she can satisfy the elements of the intentional tort of assault. Harley committed a voluntary act when she hurled the banana. Although it was her purpose to make harmful or offensive contact with her ex-husband, this intent satisfies the intent requirement for assault both by definition and under the transferred intent doctrine. Furthermore, Harley's intent, which was directed to her ex-husband, transferred to Barb. Harley's act caused Barb to apprehend imminent contact with the banana when she saw the banana at the last second. Because the banana was about to strike Barb, her apprehension was reasonable. Accordingly, Barb satisfies the elements of assault.

Although there do not appear to be any applicable defenses to negate tort liability, Harley should raise "mitigation of damages" as a defense. This defense is not dispositive of the claim of assault, but could decrease the damages recovered by Barb. Virginia law recognizes a plaintiff's duty to mitigate damages in a personal injury action by submitting to reasonable medical treatment. Here, Barb was told to follow up with her doctor, but she was busy and failed to do so. Her doctor opined that if she had sought appropriate treatment, she would have had a full recovery. Therefore, Harley may reasonably raise the argument that Barb failed to mitigate her damages.

In conclusion, Barb will likely prevail on the claim of tortious assault, but Harley should not be liable for the losses that would have been avoided if Barb had sought medical treatment.

*Koffman v. Garnett*, 265 Va. 12 (2003); *Bannister v. Mitchell*, 127 Va. 578 (1920); *Monahan v. Obici Med. Management*, 271 Va. 621 (2006); *Sawyer v. Comerci*, 264 Va. 68 (2002); *Lawrence v. Wirth*, 226 Va. 408 (1983)

**(b)** This question raises the issues of whether Barb can establish the elements of the intentional tort of battery and whether Harley can raise any successful defenses.

The tort of battery consists of the following elements: (1) a voluntary act; (2) intended to cause either harmful or offensive contact; and (3) resulting in harmful or offensive contact to the plaintiff's person. The contact may be caused directly or indirectly. Similar to assault, the intent element can be satisfied by the transferred intent doctrine as discussed in subpart (a).

Barb should argue that she can satisfy the elements of the tort of battery. Harley committed a voluntary act when she hurled the banana. As discussed in subpart (a), Harley's purpose in hurling the banana was to make harmful or offensive contact with her ex-husband. Her intent transfers to Barb under application of the transferred intent doctrine. Although Barb ducked and avoided contact with the banana, she lost her balance and fell backward, striking her head on a metal refrigerated case. Accordingly, Harley's act caused Barb's person to make harmful contact with the metal refrigerated case. While the contact was caused indirectly, this is sufficient for purposes of meeting the elements of battery.

Similar to the claim of tortious assault, there do not appear to be any applicable defenses to negate tort liability. However, Harley should argue that the contact element is not satisfied because Harley did not touch Barb and the banana Harley threw did not make contact with Barb. Harley should also raise "mitigation of damages" as a defense to the battery claim for the same reasons as discussed in subpart (a).

In conclusion, Barb will likely prevail on the claim of tortious battery, but Harley should not be liable for the losses that would have been avoided if Barb had sought medical treatment.

*Koffman v. Garnett*, 265 Va. 12 (2003); *Monahan v. Obici Med. Management*, 271 Va. 621 (2006); *Sawyer v. Comerci*, 264 Va. 68 (2002); *Lawrence v. Wirth*, 226 Va. 408 (1983)

✖✖ We think full credit should also be awarded for a well-reasoned conclusion that Harley should prevail because Harley made no direct contact with Barb.

**(c)** This question raises the issues of whether Barb can establish the elements of negligence and whether Harley can raise any successful defenses.

Four elements are required to establish a prima facie case of negligence: (1) a duty on the part of the defendant to conform to a specific standard of conduct for protection of the plaintiff against an unreasonable risk of injury; (2) a breach of that duty by the defendant; (3) the breach is the actual and proximate cause of the plaintiff's injury; and (4) the plaintiff suffered injury as a result. The proximate cause of an event is that act or omission which, in natural and continuous sequence, unbroken by an efficient intervening cause, produces the event, and without which that event would not have occurred. A plaintiff must prove a connection sufficiently close or reasonably foreseeable that it is fair and just to require the defendant to pay for the wrong done.

Barb should argue that she can establish the elements of negligence against Harley. She was standing just behind Harley's ex-husband, who was only 20 feet away, when Harley threw the banana. As such, Barb was a foreseeable victim, to whom Harley owed a duty of care. Barb should also argue that Harley owed Barb a duty of ordinary care and failed to conform to that standard when she threw the banana, thus establishing the breach element. Barb will argue that Harley's breach caused Barb to duck, lose her balance, fall backward, and strike her head on a metal refrigerated case. Arguably, her injury would not have happened but for Harley's breach and came about as a result of a natural and continuous sequence of Harley's conduct.

While Harley could certainly argue that she owed no duty to Barb or, if she did, she did not violate the standard of ordinary care, the more reasonable argument is that any breach of duty she committed was not a proximate cause of Barb's injury. Harley would assert that the sequence of events that followed after she threw the banana at her ex-husband, including the injury sustained by Barb, was not reasonably foreseeable and, therefore, not sufficiently close to fairly hold her liable. Although Virginia follows the doctrine of contributory negligence, Barb's failure to seek appropriate medical treatment following the accident should instead be considered in support of the defense of mitigation of damages as discussed in subparts (a) and (b) above.

In conclusion, Harley has a good argument that Barb cannot establish proximate causation, but this will likely constitute an issue for the fact finder. In addition, Harley should not be liable for the losses that would have been avoided if Barb had sought medical treatment.

*Atrium Unit Owners Ass'n v. King*, 266 Va. 288 (2003); *Fox v. Custis*, 236 Va. 69 (1988); *Beale v. Jones*, 210 Va. 519 (1970); *Monahan v. Obici Med. Management*, 271 Va. 621 (2006); *Sawyer v. Comerci*, 264 Va. 68 (2002); *Lawrence v. Wirth*, 226 Va. 408 (1983); *Wyatt v. Chesapeake & Potomac Tel. Co.*, 158 Va. 470 (1932); *Pergolizzi v. Bowman*, 76 Va. App. 310 (2022)

**(d)** This question raises the issues of whether Charlie can establish the elements of the intentional tort of intentional infliction of emotional distress and whether Harley can raise any successful defenses.

The tort of intentional infliction of emotional distress (IIED) consists of the following elements: (1) a voluntary act amounting to extreme and outrageous conduct; (2) committed intentionally or recklessly by the defendant; (3) causing emotional distress that was severe. The conduct must transcend all bounds of decency and be utterly intolerable in a civilized society. The distress must be such that no reasonable person could endure it. The transferred intent doctrine generally does not apply to IIED. However, the Restatement (Second) of Torts recognizes that a close relative of the victim who is present at the scene of the outrageous conduct may recover for IIED if the defendant knows the plaintiff is a close relative and all other elements are met.

Charlie will argue that Harley engaged in a voluntary act, amounting to extreme and outrageous conduct, when she screamed “you jerk” and hurled the banana at her ex-husband. Charlie will further argue that these acts were committed intentionally and recklessly with regard to causing severe emotional distress and did in fact cause severe emotional distress to him. Although the conduct was not directed at Charlie, he will argue that as husband of Barb, a close relative of the victim, he may recover for IIED because he was present at the scene of the injury.

Harley should defend the claim on the grounds that Charlie cannot satisfy the elements of IIED. More specifically, her conduct could not be characterized as going beyond all bounds of decency or being utterly intolerable; rather, her conduct was nothing more than a mere insult. Further, Harley should argue that Charlie was not physically injured and only suffers problems with sleeping and being in public places, thus not rising to the requisite level of severity for IIED. Finally, Harley should argue that the intent element cannot be met because her conduct was not directed at Charlie or Barb, the traditional doctrine of transferred intent does not apply to IIED, and the Restatement (Second) does not apply because, among other reasons, there is no evidence she knew Charlie was related to Barb. Similarly, Charlie could not establish a claim for negligent infliction of emotional distress based on witnessing the injury to Barb because there was no physical impact with the banana or physical injury resulting from his emotional distress.

In conclusion, Harley will likely prevail because Charlie will be unable to establish all of the elements of IIED.

*Doe v. Baker*, 299 Va. 628 (2021); *Harris v. Kreutzer*, 271 Va. 188 (2006); *Russo v. White*, 241 Va. 23 (1991); *Womack v. Eldridge*, 215 Va. 338 (1974); *Hughes v. Moore*, 214 Va. 27 (1973); Restatement (Second) of Torts, Section 46

**8.** [Local Government] In 2021, the City of Salem, Virginia (the City), appropriated funds for the construction of an outdoor pickleball complex. In early 2022, the City issued a press release for the grand opening of the complex for a June 1, 2022, tournament. The cost of participation was \$50 per team, with proceeds to assist with landscaping improvements at the complex.

The City hired an architect who specialized in pickleball courts to design the complex, but fired him shortly after breaking ground. City maintenance employees constructed the complex pursuant to the architectural plans and under the direction of Frank, the City’s Director of Facilities. In late April, Frank discovered that the silica sand to be incorporated into the court’s acrylic coating for grip was on back order for over six months. Concerned about the timeline, Frank directed his employees to finalize the surface of the courts with smooth acrylic without added texture in order to have the complex ready for the grand opening tournament.

Frank was present for the festivities on the morning of June 1. The first doubles match was held on court 1 between Mayor Maggie and the City Attorney (Amy), and their friends, Polly and Claire. While warming up, Amy commented, “the court feels unusually slick.” On the first point of the match, Polly moved forward for a routine shot, slipped, and fell violently, severely fracturing her elbow. Polly was taken by ambulance to the hospital to undergo emergency orthopedic surgery. All play ceased after Polly’s incident and the courts were closed for months until they were resurfaced and texturized per the original plans.

Amy texted Polly a few weeks later, in July, to check on her. Polly promptly texted back, “Amy, I am sorry that you are the City Attorney, but I am going to sue the City because that pickleball court was dangerously slick. I have already had one surgery and will need at least one more.” Amy failed to relay this information to anyone at the City and left for a job in California in December 2022.

On February 1, 2023, Polly filed a Complaint in the Circuit Court for the City of Salem alleging simple and gross negligence against the City in the design and construction of the pickleball court surface and that it was liable for her damages.

Amy's successor, the new City Attorney, filed a Special Plea on behalf of the City seeking dismissal of Polly's Complaint on the grounds of sovereign immunity and failure to comply with the applicable notice requirement.

(a) What arguments should the City make in support of its claim of sovereign immunity? What arguments should Polly make in response? How is the court likely to rule? Explain fully.

(b) What arguments should the City make in support of its claim that Polly failed to provide the required notice of her claim? What arguments should Polly make in response? How is the court likely to rule? Explain fully.

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[a] Sovereign Immunity.

The City will argue that the pickleball complex is a recreational facility and, as a result, sovereign immunity prevents Polly from asserting her negligence claim against the city. While sovereign immunity does not extend to claims of gross negligence, the City will argue that Polly's claim for gross negligence should also fail because the danger was open and obvious.

Although Polly will argue that a pickleball complex is not a recreational facility, the City should prevail in its position that it is a recreational facility and, thus, the claim for simple negligence is barred by sovereign immunity. The facts state that the City constructed an outdoor pickleball complex. §15.2-1809 of the Code of Virginia specifically provides the City, a "locality", with immunity from "simple" negligence in the operation of various facilities including, "parks", "playgrounds", and "recreational facilities." A pickleball complex would fall within the meaning of a recreational facility. Prior cases have held a city boardwalk and municipal hall to be a recreational facility insofar as it has the purpose of diverting and entertaining the public. The court should grant the City's motion to dismiss the simple negligence claim based on sovereign immunity. However, Polly's claim of gross negligence requires more discussion as the statute does not provide immunity against claims of gross negligence.

"Gross negligence" is that degree of negligence which shows an utter disregard of prudence amounting to complete neglect of the safety of another. "It is a heedless and palpable violation of legal duty respecting the rights of others." *Town of Big Stone Gap v. Johnson*, 184 Va. 375, 378, 35 S.E.2d 71, 73 (1945). Gross negligence amounts to the absence of slight diligence, or the want of even scant care. *Id.* Where the danger is open and obvious, the city's failure to install safety devices does not constitute gross negligence. *Id.*

Here, the City will argue that the danger – an unusually slick court – was open and obvious. Polly even commented as they were warming up that the court felt "unusually slick." Thus, the City will argue that Polly's claim for gross negligence should fail because the danger was open and obvious.

On the other hand, Polly should argue that while the court felt unusually slick, the danger presented by the city's failure to use a smooth acrylic without added texture was not open and obvious. Polly might succeed on her argument. The facts indicate that the City knew it should use silica sand in the acrylic but chose to use the smooth acrylic in order to meet the grand opening deadline. That decision demonstrates an utter disregard of prudence that amounts to complete neglect of the safety of another. The purpose of the silica sand in the acrylic is to prevent the precise type of accident that occurred here – a player slipping and falling while playing on the court. Thus, the court is likely to deny the City's motion to dismiss Polly's claim for gross negligence.

✖✖ Draftors' note: We think it likely [hope] that the Board of Bar Examiners will give credit for an answer that did not discuss the recreational facilities statute but instead explained the doctrine of sovereign immunity, explained whether the operation of a pickle ball court was a governmental or proprietary function, and then discussed whether the city could be liable for either ordinary or gross negligence].

[b] Failure to Provide Notice Defense.

The City will argue that Polly failed to provide notice of her claim prior to filing suit. Section § 15.2-209 of the Virginia Code provides that every claim against a county, city, or town for negligence shall be forever barred unless the claimant or his agent, attorney, or representative has filed a written statement of the nature of the claim, which includes the time and place at which the injury is alleged to have occurred, within six months after such cause of action accrued. The purpose of the notice requirement is to afford a locality the opportunity to investigate the circumstances giving rise

to the alleged negligence. In this case, Polly did not provide written notice to the City of her claim within six months of the accident. Rather, she filed her suit 8 months after the June 1 incident.

Polly, however, will argue that written notice is not necessary because the Mayor and City attorney had actual notice of the time, place, and nature of the injury. Polly will rely on the exception contained in the statute, which states that failure to provide such statement shall not bar a claim against any county, city, or town, provided that the attorney, chief executive, or mayor of such locality, . . . had actual knowledge of the claim, which includes the nature of the claim and the time and place at which the injury is alleged to have occurred, within six months after such cause of action accrued.

Here, both the Mayor and City Attorney had actual knowledge of the claim, including the nature of the claim and the time and place at which the injury took place. The Mayor and City Attorney not only were at the June 1 grand opening but were on the court playing a doubles match with their friends Polly and Clair at the time the injury occurred. The Mayor and City Attorney saw the accident and that she injured her elbow. At that moment, the game was cancelled and the complex closed for months until the court was resurfaced with texturized acrylic. The facts also indicate that a few weeks later, in July, the City attorney communicated with Polly, learning that Polly planned to file suit against the City because the pickleball court was “dangerously slick.” During that conversation, the City also learned that Polly sustained physical injuries that had already necessitated one surgery and would likely need at least one more. Thus, the City Attorney also was aware of the nature of the claim and the time and place at which the injuries took place. The analysis should not change even though at some point after that communication Amy was replaced as City Attorney. Polly provided sufficient notice under the statute to the then City Attorney.

As a result, the court is likely to deny the city’s motion to dismiss for lack of notice.

[Case support: *Jones v. City of Danville*, 2021 WL 3713063, at \*12 (W.D. Va. 2021) (suggesting that publicity and protests surrounding the event might be sufficient to provide notice)].

**9. [Business Organizations]** Cooper, Dean and Ronnie agreed to start a medical marijuana cultivation and dispensary business in the City of Richmond, Virginia. Cooper, who has experience in manufacturing, will be an investor and expects to spend his full time operating the business. Dean and Ronnie will be the other two investors and will not be involved in the business operations.

Cooper, Dean and Ronnie all made equal monetary contributions to the business. The three investors expect the business to be profitable commencing in its second year of operation and to produce a net profit and cash flow sufficient to pay them 20% annually on their investments.

Cooper, Dean and Ronnie consulted you, as their attorney, about their goals to (1) limit their individual liability for debts of the business, (2) have the flexibility to conduct other businesses over the coming years, and (3) understand how profits are to be distributed from each form of entity. They have narrowed the list of possible business entities to a corporation, a general partnership, a limited partnership, and a limited liability company. Please answer the following questions to address their goals and concerns:

- (a) What legal steps must Cooper, Dean and Ronnie take to establish each form of business entity? Explain fully.
- (b) To what extent, if any, will the form of business entity shield the investors from personal liability for the debts of the entity? Explain fully.
- (c) How are profits and losses distributed from each form of business entity? Explain fully.
- (d) In view of their stated goals, which form of business entity will be most advantageous to the investors? Explain fully.

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(a) Cooper, Dean and Ronnie must take the following steps to establish each form of business entity:

(1) Corporation: To form a corporation, they must file articles of incorporation with the State Corporation Commission and pay the registration fee. §13.1-619. The Articles must include the name of the corporation, including a designation that it is a corporation; the number of authorized shares; and the registered agent and office. *See id.*

(2) Limited liability company (LLC): To form an LLC, the parties must file articles of organization with the State Corporation Commission and pay the required fee. §13.1-1011. The articles of organization must include the name of

the LLC, which must indicate that the entity is an LLC; the registered agent and office; and the principal office of the LLC. *See id.* A LLC is able to convert into a corporation. §13.1-1082.

(3) General partnership: No filing is necessary to form a general partnership. §50-73.79. The parties simply must intend and operate a business for profit as co-owners. *See id.*

(4) Limited partnership: To form a limited partnership, the parties must file a certificate of limited partnership with the State Corporation Commission and pay the required fee. §50-73.11.

The certificate of limited partnership must include the name of the limited partnership, including a designation that it is a limited partnership; the registered agent and office; the principal office of the limited partnership; and the name and address of each general partner. *See id.* A general partnership may be converted into a limited partnership by approval of all of the partners and filing the aforementioned filing certificate. §50-73.11

(b) Each of the entities, except a general partnership, would provide the investors at least some protection from personal liability for debts of the business.

In a general partnership, the partners have unlimited personal liability for the debts of the partnership. 50-73.96. Thus, if the investors choose to operate their business as a general partnership they each will be jointly and severally liable for the debts of the business.

A limited partnership has two classes of owners, limited partners and general partners, and the limited partnership must have at least one general partner and at least one limited partner. §50-73.1.

Limited partners enjoy limited liability and typically are not liable for debts of the partnership; however, general partners have unlimited personal liability for debts of the partnership. In Virginia, the general partner may be a limited liability entity, so the investors could effectively limit their personal liability for business debts by forming another limited liability entity, e.g. a corporation or an LLC, to serve as the general partner in a limited partnership.

In a corporation, shareholders generally are not personally liable for debts of the corporation. §13.1-644. This limited liability protection is not absolute, however, and one exception is piercing the corporate veil. *See Dana v. 313 Freemason, A Condo. Ass'n., Inc.*, 266 Va. 491, 587 S.E.2d 548 (2003). A court can disregard the corporate entity and hold shareholders personally liable for debts of the corporation if the shareholders fail to observe the separateness of the corporation (i.e. alter ego) and use the corporation to perpetrate fraud or injustice. Thus, if the investors choose to organize their entity as a corporation, they should be advised to follow corporate formalities and not engage in fraud to ensure that they maintain their protection from personal liability for debts of the business

In an LLC, members also enjoy limited liability and are not personally liable for the debts of the business. §13.1-1019. As with a corporation, however, the members of an LLC can lose limited liability protection if they fail to treat the LLC as a separate entity and misuse the limited liability form to perpetrate a fraud or injustice. *See A.G. Dillard, Inc. v. Stonehaus Constr., LLC*, No. 151182, 2016 BL 178651 (Va. June 2, 2016),

(c) Profits and losses are distributed as follows:

(1) Corporation – The owners, or shareholders, would be issued shares of stock based on their percentage of ownership interest in the corporation. §13.1-638. Directors then may issue dividends, generally payable in cash, to the shareholders based on the number of shares they hold. Corporate shareholders do not bear losses directly, however, the value of their shares could be affected by losses.

(2) Limited Liability Company – Unless the members have agreed otherwise, profits and losses are allocated according to the value of each member's contributions to the company. §13.1-1029.

(3) General Partnership – The default rule is that partners in a general partnership share profits equally and they share losses the same way that they share profits (thus, equally if they have not agreed otherwise). §50-73.99.

(4) Limited Partnership – In a limited partnership, the default rule is that profits and losses are allocated according to the value of each partner's contributions to the partnership. §50-73.52.

(d) In view of their stated goals to limit their individual liability and have flexibility to conduct other businesses over the coming years, a limited liability company would likely be the most advantageous form of business entity for the investors, although a corporation would be an appropriate choice as well.



Both an LLC and a corporation would provide all of the investors with protection from personal liability for the debts of the business. Either entity could be structured to serve the investors' goals of having one investor manage the business while the other two act as passive investors without management rights, although LLCs are generally considered to be more flexible for customizing management structure. If the investors choose to organize as an LLC, they could opt to be a manager-managed LLC with Cooper as the manager. Cooper would then have management rights and decision-making authority over day-to-day operations.

The investors also report being concerned about having "flexibility to conduct other businesses," which suggests that they may want to limit their fiduciary duties. In a manager-managed LLC, the manager owes fiduciary duties to the LLC, but the two non-manager members do not.

Thus, if the parties choose to organize their LCC as a manager-managed LLC with Cooper as the sole manager, Cooper would owe fiduciary duties to the LLC, but Ronnie and Dean would not. The parties likely could modify the manager's fiduciary duties in their operating agreement to best meet their objectives. Finally, should the investors change their mind, they would be able to convert the LLC to a corporation.

Therefore, because of the flexibility, liability insulation, and distribution capabilities, the investors may consider the LLC to be the most appropriate choice.