

Revised: September 15, 2017 (1:22pm)

**** 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 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.**

**** These suggested answers are not necessarily the only answers that may earn full or partial credit.**

jrz

Summary of suggested answers & annotations to the essay part of the July 2017 Virginia Bar Exam. Prepared by the following, who attended the post exam meeting with the VBBE: William H. Shaw, III & J. R. Zepkin of William & Mary Law School, Emmeline P. Reeves of University of Richmond Law School, Benjamin V. Madison III of Regent University Law School, & C. Reid Flinn who is on the adjunct faculty of William & Mary Law School, George Mason University Law School, Washington & Lee Law School and University of Richmond Law School.

The following, while not attending the meeting, provided us great help with suggested answers in each's particular area of specialty: C. Elizabeth Belmont, Samuel W. Calhoun, Jonathan Shapiro & Mark A. William of Washington & Lee Law School, James J. Duane, L.O. Natt Gantt II, Michael V. Hernandez, Kimberly R. Van Van Essendelft & Stephen Walton of Regent University Law School, and Walter Erwin, Lynchburg City Attorney.

1. [07/17] [Criminal] Jerry and Bob worked as cashiers at a convenience store in Buchanan County, Virginia. They each owed substantial child support arrearages. In order to pay off their debts, Jerry and Bob decided to steal from the convenience store. They agreed that Jerry should take money from the cash register of the store at the end of his next shift. In order to facilitate the theft, Bob agreed to come to the store and distract the manager shortly before Jerry's shift ended. Jerry and Bob agreed to split any money that Jerry took from the cash register equally.

Near the end of Jerry's next shift, his manager left the convenience store to investigate a loud noise coming from behind the building. Assuming that Bob had caused the distraction, Jerry entered his unique personal security code to open the register, removed \$1,250 from it, and concealed the money in the pocket of his jacket. Jerry then "clocked out" and left the store.

Shortly after Jerry left the store, the manager discovered that the cash from the last shift was missing from the register. He reviewed video footage from the surveillance system installed in the store, which clearly showed Jerry opening the register and removing cash from it. When the manager asked Jerry to return the money the next day, Jerry denied that he took any money from the store. The manager then contacted the police and Jerry was arrested.

Jerry was taken into police custody, handcuffed, and placed in an interrogation room. In order to persuade Jerry to confess to the crime, the detectives agreed to interrogate him in two separate stages. Detective Wilson interrogated Jerry first. He assumed a friendly demeanor and purposefully did not advise Jerry of his *Miranda* rights. Believing that Detective Wilson would help him obtain a lenient sentence in exchange for his cooperation, Jerry fully confessed to the crime. He also explained the plan that he and Bob devised to distract the manager of the store.

After Jerry's confession to Detective Wilson, Detective Lee immediately entered the interrogation room and read Jerry his *Miranda* rights. He told Jerry that he had heard his confession, and that he knew Jerry had committed the offense. He then asked Jerry to explain his role in the theft. Once again, Jerry fully confessed to the crime and explained the plan he and Bob devised to distract the manager.

Jerry was charged with embezzlement and conspiracy to commit embezzlement. Prior to his trial, Jerry's attorney timely moved to suppress the statements that he made to both detectives. The Court granted the motion and ruled that the statements could not be admitted into evidence.

At Jerry's trial, the Commonwealth presented testimony from the manager of the convenience store. The manager testified that \$1,250 was missing from the register of the convenience store in Buchanan County following Jerry's shift and that video footage from the surveillance system in the store showed Jerry taking money from the register. The manager also testified that Jerry denied that he took any money from the store. After laying the proper foundation, the Commonwealth then introduced into evidence the video footage showing Jerry taking the money from the register and showed the footage to the jury. The Commonwealth did not call Bob as a witness because he had fled the area after Jerry's arrest. When the manager

was asked whether Bob was at the store on the night that Jerry took the money, he stated that he did not see Bob that night and attributed the noise he investigated outside of the store to a raccoon. At the conclusion of the Commonwealth's evidence, Jerry chose not to testify or present any additional evidence. The jury convicted Jerry of both offenses.

- (a) Did the Court err by granting Jerry's motion to suppress the statements that he made to the detectives? Explain fully.
- (b) Was the evidence presented by the Commonwealth sufficient to support Jerry's embezzlement conviction? Explain fully.
- (c) Was the evidence presented by the Commonwealth sufficient to support Jerry's conspiracy conviction? Explain fully.

✖✖

(a) The Court was correct to grant Jerry's Motion to Suppress. Before a citizen may be interrogated while in custody, the police are required to give *Miranda* warnings. Here, Jerry was both in custody and under interrogation. Because the police did not give him *Miranda* warnings prior to the interrogation, that first statement was properly suppressed.

As to the second statement, where police employ a technique of interrogating first, then giving *Miranda* warnings, then re-questioning in an attempt avoid *Miranda*'s requirements, they have violated *Miranda* and the subsequent *Mirandized* statement cannot be used Missouri v. Seibert, 542 U.S. 600, 124 S.Ct. 2601[2004]. Key under the *Seibert* decision is that the police conduct the two-step interrogation purposely with the hope that, having answered questions before being warned, the suspect will answer them once again even though given *Miranda* warnings, believing that "the cat is out of the bag." The facts here indicate that the police did just that. They cannot avoid *Miranda* in this way. The second statement was properly suppressed. [See also Kuhne v. Commonwealth, 61 Va. App. 79, 733 S.E.2d 667 (2012)]

(b) The evidence was sufficient to support a conviction for embezzlement. The Commonwealth was required to prove beyond a reasonable doubt that Jerry was in the employ of the store, that he was authorized to have custody of the money, and that he wrongfully and fraudulently took the money for his own use with the intent to permanently deprive the owner [Va. Code §18.2-111]. Assuming the employer-employee relationship, the video, combined with the empty drawer and Jerry's log-in, was sufficient to prove the taking. The manager's testimony that the money was "missing," along with the owner's request for its return, is likely sufficient to prove that the taking was wrongful. Jerry's denial that he took the money is evidence that he had the intent to permanently deprive the owner.

(c) The evidence of conspiracy was not sufficient to sustain a conviction. Conviction for conspiracy in Virginia requires proof beyond a reasonable doubt of an agreement to commit a felony, and the intent by the defendant to commit that felony. Here, there is proof of actual commission of the felony by Jerry but there is no proof of the essential element of an agreement between the two men. The agreement could have been proven based on Jerry's statements to the police had they not been suppressed. But without the proof of an agreement which those statements provided, the proof is insufficient. A conspiracy conviction can be had even though the defendant is also convicted for the underlying crime. Finally, in Virginia, there is no requirement that there be an overt act performed in furtherance of the conspiracy (of course, here, there was an overt act – Jerry's taking of the cash).

2. [07/17] [Fed. Civil Pro] In June 2015, Sara, while driving her personal vehicle in Charlottesville, Virginia, was struck in the rear by a pickup truck driven by Luke, a college student from Hawaii. Sara, who is a 50 year-old professional landscaper and lives in Charlottesville, complained of injury to her lower back as a result of the accident.

In June 2016, Sara timely filed a Complaint against Luke in the United States District Court for the Western District of Virginia, Charlottesville Division, properly alleging diversity jurisdiction and seeking damages for physical injury as a result of Luke's negligence.

In September 2016, during discovery, Luke filed a motion with the Court requesting an order requiring Sara to submit to (1) a physical examination by a physician, and (2) a mental examination by a psychiatrist. Over Sara's objections to the motion, the Court ordered Sara to submit to the requested examinations.

In October 2016, just days before the discovery cut-off date provided in the Court's Pre-Trial Scheduling Order, Luke, without Sara's consent, served Sara with a Notice of Trial Deposition of Dr. Cure, an orthopedic surgeon in Charlottesville who treated Sara for injuries related to a motor vehicle accident in 2012. Luke wanted to use the deposition testimony at trial because Dr. Cure charges \$500 for a deposition and \$8,000 per day to testify in person at trial. Sara intends to object to the Notice of Trial Deposition of Dr. Cure.

- (a) Did the Court err by ordering Sara to submit to (1) the physical examination and (2) the mental examination? Explain fully.
- (b) On what bases should Sara object to the Notice of Trial Deposition of Dr. Cure and how should the Court rule? Explain

fully.

✖✖

(a) The Court (1) did not err in ordering Sara to submit to the physical examination, but (2) did err in ordering Sara to submit to the physical examination. Federal Rule of Civil Procedure 35 allows the court to order a party to submit to a physical or mental examination by a suitably licensed examiner when the party's "mental or physical condition . . . is in controversy." Sara alleged in her complaint arising from the accident with Defendant Luke in 2015 that she suffered injury to her lower back. Luke later in discovery filed a motion for an order requiring Sara to submit to "(1) a physical examination by a physician, and "a mental examination by a psychiatrist." Sara opposed both motions. The pertinent facts state that Sara sought damages for "physical injury" and mention only complaints of injury to her lower back. Nothing in the facts suggest that Sarah sought damages for mental, emotional, or similar damages. Moreover, nothing in the facts state any defense by Luke that puts in controversy Sarah's mental condition. Sarah's physical injuries were in controversy. The request for a physical examination does suggest that the defendant Luke controverts the plaintiff's alleged physical injuries and/or the extent of these injuries. Because Sara's physical injuries were in controversy, the court properly ordered a medical examination as to those. However, because there was no basis for a controversy over Sara's mental condition, the court erred in ordering a mental examination.

(b) Sara can object to the Notice of Trial Deposition of Dr. Cure on a number of grounds, and the Court should sustain her objection.

First, Rule 32(a) provides for a deposition of a witness who is "unavailable," but no basis for "unavailability" exists here. Unavailability under the Federal Rule includes a witness who at the time of the trial is dead, is beyond a 100 mile radius from the place of trial or outside the U.S., is unable to attend trial because of "age, illness, infirmity or imprisonment," and/or the party offering the deposition could not procure the witness' testimony by subpoena, or other extraordinary reasons. The present action was filed by Sara in 2016 in Charlottesville. The facts state that Dr. Cure is an orthopedic surgeon in Charlottesville. Certainly, the reasons stated (cost of Dr. Cure to testify at trial and/or to give a deposition) are not grounds for finding him "unavailable." Therefore, the fact that Dr. Cure is not unavailable allows Sara to object. The Court should sustain that objection.

Second, the facts state that the in "October 2016, just days before the discovery cut-off provided in the Court's Pre-Trial Scheduling order, Luke, without Sara's consent, served Sara with a notice of Trial Deposition of Dr. Cure . . ." As the facts read on, it appears that Luke is not planning on taking the deposition in the 2016 action and offer Dr. Cure's testimony on the basis that he is unavailable (not valid, as shown above). Instead, he apparently noticed Sara that he planned to use the 2012 deposition testimony of Dr. Cure when Sara was involved in a prior accident and Dr. Cure was her treating physician. Two grounds are already stated above on which the Court should rule the deposition of Dr. Cure inadmissible at the 2016 trial. Here, the lateness of Luke's notice provides another ground on which Sara should object and the Court should rule that Dr. Cure's testimony cannot be offered in the 2016 trial. Sarah could rightly claim prejudice and violation of the Court's Pre-Trial Scheduling order because a deposition could not be done before the cut-off. The point of a cut-off is to preclude further work so close to trial and to allow parties to prepare for the final pretrial conference and for trial. Allowing Luke to proceed would undermine the schedule and impair such preparation.

Third, Federal Rule of Civil Procedure 32(b) provides that "an objection may be made at a hearing or trial to the admission of any deposition testimony the party offers . . ." In other words, the deposition testimony is subject to the Rules of Evidence. Here, Sara could argue that any testimony would be hearsay and she would be deprived of the ability to cross-examine Dr. Cure. Even if Dr. Cure testified as her treating physician in the 2012 accident case, she would not have in such circumstances cross-examined his testimony as she no doubt would in the 2016 proceedings.

Fourth, Federal Rule of Evidence 401 requires that evidence be relevant. Here, we know nothing of the 2012 accident and case other than that Dr. Cure was Sara's treating physician. For all we know the back injury for which she is suing in 2016 has nothing to do with the injuries in 2012. Thus, Sara ought to object to the deposition testimony on the grounds or relevance and the Court should sustain her objection on the facts as stated.

Fifth, Rule 403 precludes evidence if its probative value is outweighed by the prejudicial effect. Here, even if the deposition testimony from the 2012 proceedings had some probative value, the prejudicial impact of the testimony would likely outweigh the probative value. The facts, of course, as stated are silent on the injuries in 2012. The prejudicial impact of having Sara's treating physician testify in a matter related to physical injuries would be highly prejudicial. Unless the testimony was highly probative, it would not justify overcoming the prejudicial impact. For the reasons already stated, moreover, the testimony should not be allowed regardless of these evidence objections.

✖✖ We think the following, while applicable to the facts of the question, is not necessary for full credit:

Even if the witness was “unavailable,” Federal Rule of Civil Procedure 32(a)(8) provides that a deposition taken in a prior action “may be used in a later action involving the same subject matter between the same parties.” The facts state that Luke sought to use the deposition of Dr. Cure, an orthopedic surgeon who treated Sara for injuries related to a motor vehicle accident in 2012.” There is no indication, and it appears a fair inference, that Luke was not involved in the 2012 accident. Thus, the deposition by Dr. Cure was in an action not between the same parties, and arguably not related to the same subject matter, at least on liability. The lack of the same parties in the 2012 and 2015 actions itself precludes use of Dr. Cure’s deposition.

3. [07/17] [Real Estate] Jackie Curtis filed an action for damages against Pete West in the Circuit Court of Charles City County, Virginia, alleging a breach of contract. Jackie’s Complaint alleged that Pete, a local gentleman farmer, had recently acquired an improved parcel of land in Charles City County known as “The Rivah House,” had advertised it for resale, and on May 17, 2016, had entered into an oral agreement to sell it to Jackie for \$430,500 cash, promising to reduce the oral contract to writing on the following day. Instead, on May 20, 2016, Pete contracted to sell the property to the Baileys for the price of \$438,500 and, in fact, conveyed it to the Baileys a few days later. Subsequently, Pete sent Jackie the following letter, that Jackie attached to the Complaint:

“FROM THE DESK OF A.P. WEST Charles City County, Virginia 23030

May 20, 2016

Jackie Curtis

Isle of Wight, Virginia 23397

Dear Jackie:

I did today sell to the Baileys of Hampton The Rivah House property. They had proposed to pay me \$438,500 for this same property that I had told you I would sell to you but, as I told you on the phone, after discussing this with my son, I had no other alternative but to sell the property at a higher price and an all-cash transaction.

Jackie, for your sake I am sorry but, for my sake, as much time and effort as I had put into the sale of the property, I think I am entitled to this increase in price.

Sincerely,

/s/ A. Pete West”

Jackie’s Complaint asserted that the above facts and letter constituted a contract and her prayer for relief demanded specific performance or, in the alternative, damages for breach of the contract. In his Answer, Pete, as his sole defense, asserted that there was no contract because the foregoing letter was not a sufficient memorandum to satisfy the statute of frauds.

- (a) What arguments support Jackie’s demand for specific performance, and what arguments should Pete assert in response? Explain fully.
- (b) What arguments support Jackie’s claim for breach of contract damages, and what arguments should Pete assert in response? Explain fully.
- (c) How should the Court rule? If Jackie prevails, what relief, if any, should be awarded to her? Explain fully.

✖✖

(a) Jackie’s Arguments: The arguments that support Jackie’s demand for specific performance are: Jackie can argue that she reached an agreement with West on May 17, 2006 to buy the land in Charles City County called “the Rivah House” for \$430,000 cash. Ordinarily, an oral agreement to sell real estate would not be enforceable because it would violate the statute of frauds. [Va. Code §11-2(6)] Here, however, Jackie can argue that the Pete’s letter of May 20, 2016 constituted a written memorandum that would take the May 17 oral agreement out of the statute of frauds and make it enforceable. Ordinarily, a written memorandum would take an oral agreement outside the statute of frauds—and allow it to be enforceable—if the written memorandum identifies the subject of the contract, is sufficient to indicate a contract has been made, and includes the essential terms of such contract, as well as be signed by the party to be charged. The facts are drawn from *Drake v. Livesay*, 231 Va. 117 (1986). There, Livesay had agreed orally to sell a parcel of real estate in Southampton County for \$36,500. Three days later Livesay sold the property for \$38,500 to a third party. Livesay then sent a letter stating

he had sold the property to the third party; he said these buyers bought the “same property we [he] had told [Drake] he would sell to [Drake].” The letter did not mention the \$36,500 amount agreed on by Livesay and Drake.” The Letter was signed by Livesay.

The Supreme Court of Virginia, in *Drake* held that the letter took the oral agreement between Drake and Livesay out of the statute of frauds and made the oral agreement between them enforceable.

Thus, Jackie can argue the oral agreement to sell the Rivah House was enforceable against Pete. However, can she get specific performance? Specific performance is an equitable remedy typically employed to enforce a contract for unique property, such as land.

Pete’s Arguments: Pete could argue the letter is insufficient to take the oral agreement to buy real property outside the statute of frauds. The primary basis for the argument would be that a memorandum must, to take an agreement outside the statute of frauds, contain all essential terms. His letter to Jackie does not contain the purchase price of his agreement with her. One would certainly think that the purchase price is an essential term. However, the letter from Livesay in *Drake v. Livesay* also did not contain the purchase price to which they had agreed in the oral agreement. It refers only to the price the new buyer had agreed to.

✖✖ We think discussion that explored whether the *Drake v. Livesay* decision [i] permitting admission of a written memorandum that lacked what might be considered an essential term; and [ii] concluding it satisfied the Statute of Frauds, permitted the trial court to find that the Statute of Frauds had been complied with, and reaching the conclusion on the problem’s facts it was, is likely to earn some credit if the answer articulated the issue well.

(b) **Jackie’s claim for damages.** Jackie should argue she is entitled to all pecuniary damages she incurred as a result of Pete’s breach. Traditionally, she would be entitled to any amount representing the difference between the purchase price to which she agreed and the market value of the property. The difference between her agreed purchase price of \$430,500 and the price that the Baileys paid (\$438,500) is a difference of \$8,500. If the amount the Baileys paid is the market value, Jackie would be entitled to damages of at least \$8,500.

Pete’s Argument against Jackie’s claim for breach of contract damages: The answer is assuming that the written memorandum did not take the oral agreement outside the statute of frauds and thus the agreement was unenforceable. Assuming that, he should argue here that Jackie had no damages. She never paid the \$430,500. Thus, if the court has ruled specific performance is not available and breach of contract damages are the primary remedy, Jackie will have to show how she was actually harmed economically for her to recover damages. The facts do not show any way in which she was harmed economically—*i.e.*, there is nothing that says explicitly that the \$438,500 is the fair market value (unless the Examiners are assuming that the most a willing buyer pays represents fair market value).

(c) The likely result here would be that Jackie will prevail on her claim for breach of contract. The property having been transferred from Pete to the Baileys makes specific performance impossible. Pete will likely be held liable for \$8,500—the difference between the amount for which Jackie contracted and the presumed fair market value of what the highest amount buyers were willing to pay (the Baileys \$438,500).

4. [07/17] [UCC - Sales & Va. Civ. Pro] On August 5, 2015, Riles Plumlee, a Virginia resident and long distance truck driver, signed a written purchase agreement with Old Dominion Corporation (“ODC”), a Delaware corporation with its sole office and factory in Danville, Virginia, for a used 2010 commercial grade trailer truck manufactured by ODC.

The truck which Riles agreed to purchase included a used engine, which had been rebuilt by ODC prior to the sale. Riles knew about the rebuilt engine and felt he got a favorable price for the truck. The purchase agreement contained an “ODC Limited Warranty” for the engine, which stated in pertinent part:

If a defect in material or workmanship is found during the warranty period, ODC will, through an authorized dealer or at ODC’s own factory, provide (at ODC’s choice) new, rebuilt or otherwise ODC approved parts or components, with customary labor, to correct the defect.

The ODC Limited Warranty also stated in larger, bold type:

THIS WARRANTY IS EXCLUSIVE AND IS IN LIEU OF ANY OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING ANY WARRANTY OF MERCHANTABILITY. REMEDIES UNDER THIS WARRANTY ARE LIMITED TO THE PROVISION OF MATERIAL AND SERVICES, AS STATED HEREIN.

Shortly after taking delivery of the truck, Riles began to experience problems with the truck's engine, including low oil pressure, as well as engine misfire, and ultimately engine failure. Despite seven attempts to repair the alleged defects by ODC or one of its authorized dealers, Riles considers the truck to be unreliable for long distance hauling of the type of building materials which Riles had discussed with the salesman at the time of purchase.

On July 15, 2017, Riles informed ODC in writing of the failed repair history and that the truck's engine has such defects and nonconformities that the truck cannot be used for the purpose for which it was purchased. ODC has refused Riles' demand for a refund of his purchase money, citing the ODC Limited Warranty in the purchase agreement.

Riles is fed up and consults with you as his attorney, asking the following questions:

- (a) Is Article 2 of the Uniform Commercial Code, as adopted in Virginia, applicable to Riles' purchase of this truck and his effort to seek redress from ODC for the engine defects and nonconformities? Explain fully.
- (b) Can Riles assert against ODC a viable breach of contract claim based on either breach of the implied warranty of merchantability or of fitness for a particular purpose, and is he likely to succeed? Explain fully.
- (c) Can Riles assert a viable breach of contract claim based on ODC's Limited Warranty, and is he likely to succeed? Explain fully.
- (d) What is the limitations period applicable to any breach of contract claim Riles may have under Article 2 of the UCC?

✖✖

- (a) Yes. UCC Article 2 applies to transactions in goods [§8.2-102]. This contract concerns "goods" because a truck is movable at the time of identification to the contract for sale [§8.2-105(1)].
- (b) No. Both warranties are effectively excluded under §8.2-316(2). The disclaimer mentions "merchantability" in a writing that's conspicuous because its larger, bold type makes it noticeable by "a reasonable person against which it is to operate" [§8.1A-201(b)(10)]. The warranty of fitness is effectively excluded by the same conspicuous writing. There's no need to use the phrase, "warranty of fitness." Saying that no "other warranties" exist is equivalent to the statutory example, "There are no other warranties"

If Plumlee could negate the disclaimer, he'd have a good argument for breach of the implied warranty of merchantability. As a truck manufacturer, ODC "deals in goods of the kind" [8.2-104(1)] and thus makes the implied warranty of merchantability.

ODC might argue that it's not a merchant with respect to used trucks. This position would require evidence that ODC only made isolated sales of used trucks [see Comment 3 to §8.2-314]. Plumlee could also show breach because the truck's engine failure rendered it unfit for the ordinary purpose for which such trucks are used [§8.2-314(2)(c)]. The fact that the engine was rebuilt shouldn't be a problem; Comment 3 to §8.2-314 makes clear that even used products can give rise to the merchantability warranty. A rebuilt engine would likely be considered more "new" than "used." Even if a court labeled the engine "used," its failure shortly after delivery would violate a customer's reasonable expectations.

Assuming Plumlee's avoidance of the disclaimer, proving breach of the implied warranty of fitness [§8.2-315] would require proof that ODC had reason to know Plumlee's particular purpose and that he relied upon ODC to furnish a suitable truck. ODC knew what building materials Plumlee would be hauling, but this in itself wouldn't show a specialized purpose. Even if the materials were much heavier than what a commercial truck would normally carry, Plumlee's problem is showing that he relied on ODC to furnish a suitable truck. As a long distance truck driver, Plumlee presumably knew what kind of truck he needed.

- (c) Plumlee has a good argument that repeated unsuccessful repairs caused ODC's exclusive remedy to fail of its essential purpose. Consequently, under §8.2-719(2) Plumlee may resort to other remedies "as provided in this Act." Plumlee should be able to cancel and recover his purchase price under §8.2-711(1).

A potential problem for Plumlee is §8.2-607(3)(a)'s requirement that the seller be notified of the breach within a reasonable time after Plumlee discovered it. It's unclear from the facts exactly when this occurred; it was probably upon the seventh failed repair. If these seven repair efforts all occurred shortly after delivery, a court would likely find that Plumlee's letter of July 15, 2017 came too late to satisfy §8.2-607(3)(a). On the other hand, it's possible that the seven repair attempts were spread out over the two years between the contract and the subsequent letter. Depending upon when the seventh repair attempt was known to be unsuccessful, Plumlee might have a good argument that his letter was timely – the facts also don't specify when the truck was delivered.

- (d) Under §8.2-725(1), Plumlee must commence any action within four years of accrual of the cause of action.

✖✖ We think that a discussion of when the statute of limitations begins to run is not required for full credit, because it was not asked, but if included, may earn additional credit. Va. Code §8.2-725(2) provides that a cause of action accrues when the breach occurs and that a breach of warranty normally occurs upon tender of delivery. However, Va. Code §8.2-725(2) also provides that when a warranty explicitly extends to future performance and discovery of the breach must await the time of performance, the cause of action accrues when the breach is or should have been discovered. Thus, Plumlee has four years to sue, measured from when he discovered the breach. The starting point would be the date that Plumlee became aware of the seventh unsuccessful repair effort.

[See *Whittle v. Timesavers, Inc*, 614 F. Supp. 115 *; 1985 U.S. Dist. LEXIS 19748 **; 42 U.C.C. Rep. Serv. (Callaghan) 126 and *Beausoleil v. Peterbilt Motors Co.*, 2010 U.S. Dist. LEXIS 58445 *; 72 U.C.C. Rep. Serv. 2d (Callaghan) 476; 2010 WL 2365567]

5. [07/17] [Domestic Relations & Conflicts] In 2015, Wanda, a Naval Officer, met Harry when she was stationed in San Diego, California. After only a few weeks, they married and moved to a house near Wanda's base. Harry had just finished college and had dreams of starting his own business, but due to Wanda's impending transfer to Norfolk, Virginia, he opted to delay his plans.

On their six-month wedding anniversary, while still in San Diego, Harry prepared Wanda's favorite dinner and had plans for a romantic evening, but when Wanda came home, she abruptly announced "this marriage simply is not working out," gathered her belongings and moved out. A week later, Harry received a letter from Wanda apologizing for any hurt she had caused him. Wanda also stated in the letter that because she had delayed Harry's entry into the workforce, she was willing to pay him spousal support. Enclosed with the letter was a document entitled "Separation Agreement" signed by Wanda which included a provision entitled "spousal support" that stated Wanda would pay the sum of \$200 per month to Harry for three years. The letter asked that Harry sign and return the agreement to Wanda at her new address in San Diego. Harry reluctantly signed the agreement and returned it to Wanda.

Wanda transferred to Norfolk as planned in 2016, but she was dishonorably discharged shortly thereafter. Finding no other job options, she became a waitress at a local restaurant where she earned minimum wage and tips. Wanda never paid the spousal support as provided in the Separation Agreement. At the same time, Harry started a business that turned out to be very successful, and he relocated to Northern California.

In 2017, Wanda filed a Complaint for divorce in Norfolk Circuit Court. Unaware of where Harry lived, Wanda had him served by order of publication. When she appeared in court, Wanda showed the judge a magazine article detailing the success of Harry's business as well as pay stubs from her waitress job, and convinced the judge to award her \$300 per month in spousal support for the next five years. She did not provide a copy of, or even mention, the Separation Agreement.

A few months later, Harry moved to Norfolk to expand his business to the East Coast and to track down Wanda. By chance, Harry ran into Wanda's sister, who told him about the divorce and the ordered \$300 spousal support payments. Harry was furious.

- (a) Is Wanda's divorce from Harry valid? Explain fully.
- (b) On what basis can Harry object to the order directing him to pay spousal support to Wanda? Explain fully.
- (c) Is the spousal support provision in the Separation Agreement enforceable by the Norfolk Circuit Court? If so, what procedure should Harry follow to enforce the provision? Explain fully.
- (d) There is no choice of law provision in the Separation Agreement. Which state's law should apply to any action involving this agreement? Explain fully.

✖✖

(a) Yes. The Norfolk Circuit Court had *in rem* jurisdiction because one of the parties (Wanda) was a bona fide resident of the Commonwealth at the time she filed her suit, and had been for at least six months prior. Divorce is an action *in rem*, and assuming that Wanda complied with the requirements of notice by publication that notice is sufficient to empower the court to grant the divorce. Although the facts do not make clear the grounds for divorce alleged (or even that a divorce was actually granted), if one assumes that the court heard sufficient, corroborated facts supporting Wanda's entitlement to divorce on grounds of separation for a period in excess of one year – *i.e.* that the parties were competent, are not in the military, that they had been separated and apart continuously for a period in excess of one year, that they (or one of them) had and continue to have the intention to remain permanently separate and apart, and that no reconciliation is possible – Wanda's divorce from Harry is valid.

(b) No. Harry may object to the order regarding spousal support because (in contrast to the divorce) spousal support is an *in personam* right, the court did not have personal jurisdiction over Harry, and thus the judgment is void *ab initio*. Personal rights, which include spousal support rights in divorce cases, may not be adjudicated by a Virginia court lacking in personam jurisdiction. The mere fact of that Harry is married to Wanda, and she is now a Virginia domiciliary, was not sufficient to give the court jurisdiction over Harry's person, as the Commonwealth was never the marital domicile. Moreover, the separation agreement also does not confer *in personam* jurisdiction, because it was not executed in the Commonwealth, and Harry was not personally served in any event. The facts provide no other facts that would indicate that the court could exercise personal jurisdiction over Harry, as his only contacts appear to be with California. Thus, the spousal support order is void *ab initio*.

(c) Yes. The spousal support provision of the separation agreement should be enforceable in the Norfolk Circuit Court, provided that Harry properly institutes an action there. Virginia law permits married persons to enter into agreements settling the rights between them, including the right to spousal support, and such agreements become valid, enforceable contracts once reduced to writing and executed by both spouses. Thus, even though the separation agreement was not incorporated into the divorce decree, Harry may institute a suit for breach of contract or specific performance in the Norfolk Circuit Court, which has jurisdiction over the matter provided the amount in controversy exceeds \$4,500. Once Wanda is properly served with process and Harry obtains a judgment for the unpaid support, he may utilize all available post-judgment collection procedures (e.g. garnishment, judgment liens, etc.).

(d) There is no choice of law provision in the Separation Agreement. Which state's law should apply to any action involving this agreement? Explain fully.

Arguably, either Virginia law or California law may apply. As noted above, the separation agreement is a contract, to which Virginia's contract choice-of-law concepts will apply, since Virginia is the forum state. As a general rule, the law of the jurisdiction where a contract is made governs its validity, construction and effect, and in this instance the contract was fully executed in California. However, if, "at the time of execution, the parties intend for the contract to be fully performed in another, specific jurisdiction, the law of the place of performance will be applied rather than the law of the place where the contract was formally executed" Black v. Powers, 48 Va. App. 113, 132 (2006).

In this case, it appears that both parties understood Wanda would be moving to Virginia. Since Wanda was the party obliged to perform the contract, and both parties understood that performance would occur in Virginia, Virginia law would likely apply. Alternatively, It appears that the consideration for the contract was Harry's sacrifice during the marriage, or, by inference, his relinquishment of a claim for greater spousal support. In either event, Harry's performance occurred in California, in which case California law could apply. *Id.*

6. [07/07] [Personal Property - Bailments & Va. Civ Pro] James, who lives in Roanoke, Virginia, is in love with Isabel and plans to surprise her and propose to her next month at a formal event. He plans to give Isabel a two carat antique diamond engagement ring that he recently inherited from his grandmother. One night, James and his brother were sharing a bottle of champagne and decided to do a "dry run" of the proposal. James took out his brand new tuxedo and put it on. Then James took the ring out of its velvet box and placed it in the tuxedo jacket's chest pocket. He and his brother continued to drink champagne and James spilled some on his tuxedo. James eventually fell asleep in his living room wearing the tuxedo.

The next day James knew that he needed to get the tuxedo cleaned after the champagne spill. He also planned to take the ring to the jeweler to be re-sized for Isabel. He took the suit to Cate's Cleaners and asked that it be dry cleaned. Cate said she would have it ready for him in two days. James was a regular customer, and Cate properly entered his information into the computer but forgot to give him a ticket for the tuxedo. James then went to Jack's Jewelers, where his mother had just had the ring appraised for \$6,000. When he opened the ring box, it was empty. He assumed he had left the ring in his living room.

Two days later, Drake picked up his own dry cleaning from Cate's Cleaners. As he was walking up the public sidewalk, Drake accidentally dropped the dry cleaning. Unbeknownst to him, a ring fell out of the dry cleaning and onto the sidewalk. When Drake got home, he realized his dry cleaning included a very nice tuxedo with a label identifying James as the owner. Drake kept the tuxedo and never advised Cate that she had given the tuxedo to him.

Later that night while walking her dog, Linda found James' antique diamond ring, which had fallen out of the tuxedo pocket when Drake dropped the dry cleaning. The next day she took it to Jack's Jewelers, where it had been recently appraised, and the jeweler told her that it was a valuable antique and that it belonged to James.

When James went to pick up the tuxedo, Cate could not find it and after searching the next day had to admit to James that she had lost or misplaced the tuxedo. She apologized and offered him \$100. James declined her offer as he had just purchased the tuxedo for \$800, and believed he should be compensated for his trouble in getting a new tuxedo as well. James then remembered that the ring was in the chest pocket of the tuxedo.

James filed a Warrant in Detinue in the General District Court for the City of Roanoke against Cate's Cleaners for the loss of the tuxedo and the ring, basing his claims against Cate's Cleaners on a breach of duty as a bailee of the tuxedo and ring, and seeking damages in the amount of \$1,000 for the tuxedo and \$6,000 for the ring.

- (a) What must James prove to establish a *prima facie* bailment against Cate's Cleaners for the tuxedo, and is he likely to prevail? Explain fully.
- (b) What must James prove to establish a *prima facie* bailment against Cate's Cleaners for the ring, and is he likely to prevail? Explain fully.
- (c) If James does not prevail in either or both of his actions against Cate's Cleaners, to which Virginia court should he appeal, and what is the applicable standard of review? Explain fully.
- (d) Does Linda, as the finder of the diamond ring, have any legal right to the ring?

✖✖

(a) To establish a *prima facie* bailment against Cate's Cleaners for the tuxedo, James must prove a bailment as to the tuxedo and a breach by Cate's. To prove a contractual bailment in Virginia, the plaintiff must prove delivery of the item and acceptance by the bailee. Here, James clearly delivered, and Cate's clearly accepted, the tuxedo. James then has at least two options for establishing a breach by Cate's.

First, James can proceed against Cate's on a negligence theory. The bailee's standard of care depends upon the nature of the bailment. In a contractual bailment for consideration, or a mutually beneficially bailment, the bailee must exercise ordinary care and is liable for simple negligence. Here, Cate's was clearly negligent in giving the tuxedo to Drake.

Second, a bailee is obligated to return the bailed goods to the bailor, and the bailee is strictly liable for misdelivery of the goods. Here, Cate's misdelivered the tuxedo to Drake, instead of James. Thus, James will prevail in a bailment action against Cate's for the tuxedo.

(b) To establish a *prima facie* bailment against Cate's Cleaners for the ring, James again must prove a bailment as to the ring and a breach. As noted above, to prove a contractual bailment in Virginia, the plaintiff must prove delivery of the item and acceptance by the bailee. Here, James did deliver the ring to Cate's, as it was in the pocket of the tuxedo that he took to Cate's; however, Cate's did not accept the ring because she had no knowledge of its presence. Thus, there was no bailment of the ring, and James will not prevail in a claim against Cate's as to the ring.

(c) James' appeal would go to the Circuit Court and the appeal would be heard *de novo*. James would get a complete new trial in Circuit Court. Va. Code §§ 16.1-106 & 16.1-136

(d) No, Linda does not have any legal right to the ring as finder of the ring. With lost and mislaid property, the true owner retains title to the property and has a superior claim to the property over a finder. Thus, James has the superior claim to the ring and Linda has no legal right to it.

7. [07/17] [Va. Civ. Pro] Dave Dealer, the sole owner of Dave's Classic Cars in Saltville, Virginia, has been insolvent for the past year and has not paid his debts in a timely manner.

His principal supplier, Cars, Inc. ("Cars"), recently secured and recorded a \$15,000 judgment against Dave in the Circuit Court of Smyth County, Virginia, and told Dave they are preparing to sue again for the additional \$80,000 he owes if payment is not made immediately.

Within the past two months, Dave gave his daughter a new sports car from his inventory for her graduation and agreed to sell a low mileage Jaguar convertible to a North Carolina dealer. He also paid \$25,000 in past-due rent to a limited liability company ("Dave, LLC") that owns the car lot on which he keeps his inventory. Dave is the sole member of Dave, LLC. The car lot is currently listed for sale by a realtor.

Cars is considering proceeding in the circuit court in connection with the following:

- (a) How and upon what basis should Cars challenge the gift of the car to Dave's daughter? Explain fully.
- (b) What steps might Cars take to stop the sale of the Jaguar to the other dealer and apply its value toward the debts Dave owes Cars? Explain fully.
- (c) On what basis might Cars pursue an action to recover the \$25,000 paid to Dave, LLC? Explain fully.
- (d) Should Cars record a *lis pendens* in the county where the car lot is located? Explain fully.

✖✖

This question tested knowledge of two Virginia Statutes - §55-80 Fraudulent Conveyances & §55-81 Voluntary Conveyances. Both are set forth below. Both code sections make certain conveyances of property by a debtor void and subject to be set aside by a court, thus returning the property to the debtor and subject to the reach of creditors. The facts tell us that Dave Dealer, the debtor, was insolvent.

- (a) The conveyance of the sports car to his daughter as a graduation gift by an insolvent debtor, was a conveyance “not upon consideration deemed valuable in law” and was void as to then existing creditors. Cars should file suit in circuit court, under §55-81, asking the court to find the conveyance void and return title of the car to Dave Dealer. Cars should win. The facts do not suggest any fraudulent intent and §55-80 is not engaged.
- (b) The facts do not suggest that the contemplated conveyance is with the intent to defraud but the facts do not reveal whether the contemplated conveyance of the Jaguar will be for fair consideration or not. There’s no basis from the facts to challenge the conveyance as a fraudulent conveyance under §55-80. The conveyance by Dave, while insolvent, may engage §55-81 depending on whether the conveyance was “not upon consideration deemed valuable in law”. If the conveyance was for fair value, it would not be void under §55-81 because it would simply be a substitute of assets and not harmful to creditors by reducing the size of Dave’s assets. If the sale was to be for less than the fair value of the vehicle, the conveyance will be void and the court should enjoin the transfer , or if it’s been transferred, order the title to the car returned to Dave.
- (c) Here, Dave paid a limited liability company that was a creditor, \$25,000.00 for past due rent. In Bank of Commerce v. Rosemary & Thyme 281 VA. 207 [1978] it was held that a preference among creditors is permitted and does not violate §55-80, so long as it’s a bona fide payment for full value. Here, it was a payment for full value. However, the facts are that the LLC was entirely owned by Dave. Arguably, he was paying himself the money and this raises a question of whether it was a bona fide payment.

When a stockholder of an insolvent corporation, which was also a debtor of the stockholder, had corporate assets transferred to the stockholder to satisfy his claim against the corporation, it was held to be a voidable fraudulent preference under §55-80. Darden v. George G. Lee Co. 204 Va. 108 [1963] The facts here are a little different in that the recipient of the payment was an LLC that was owed money by the insolvent debtor [Cars] and the LLC was wholly owned by Cars. The answer should show knowledge that the LLC and Dave were separate entities and should discuss the effect of this.

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

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

HISTORY: Code 1919, §§ 5184.

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

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

(Code 1919, § 5185; 1988, c. 512.)

- (d) Under §8.01-268, a lis pendens is not to be filed “unless the action on which it is based seeks to establish an interest by the filing party in the real property....” Here there is no action pending and it would be improper to file a lis pendens now and until there is pending a suit, the outcome of which can affect the title to the car lot.

8. [07/17] [Local Government & Va. Civ. Pro] Stefan Grover works for the City of Norfolk, Virginia, as a street sweeper. Stefan and other street sweepers employed by the City drive motorized vehicles with mounted street-scrubbing brushes. The City provides all street sweepers, including Stefan, with a cellular telephone equipped with traffic-mapping GPS so that the street sweepers can avoid heavy traffic areas.

On June 30, 2015, Stefan was driving the sweeper on his regular rounds. As he often did to pass the time, Stefan was exchanging text messages with his friend Joe. As Stefan approached Main Street, he veered off the road and onto the sidewalk where the sweeper ran over and killed Pierre, a competition-winning show dog, on a walk with his owner, Frances Lockwood. Frances and Pierre were visiting from California for the 50th Annual World Dog Competition.

On January 29, 2016, Frances filed a Complaint in the Circuit Court of the City of Norfolk naming both the City of Norfolk and Stefan as defendants. The Complaint alleged that Stefan was grossly negligent and asserted that both Stefan and the City are liable for Frances' damages. Simultaneously with filing the Complaint in the Court, Frances also filed a Freedom of Information Act (FOIA) request with the City requesting the cellular telephone records for the phone used by Stefan on the date of the incident.

The City Attorney, who is representing both the City and Stefan, has filed a Motion to Dismiss the Complaint against both defendants on the grounds of sovereign immunity and failure to comply with notice requirements.

- (a) Is the information requested by Frances the proper subject of the FOIA request, and is the City required to respond to the FOIA request with the requested information? Explain fully.
- (b) Should the Court grant the Motion to Dismiss the Complaint against the City? Explain fully.
- (c) Should the Court grant the Motion to Dismiss the Complaint against Stefan? Explain fully.

✖✖

(a) The information may be the proper subject of a FOIA request, but the City is not required to respond with the requested information. FOIA applies to "public records," with some exceptions. Here, Frances has requested records from a cell phone used by a City employee while on the job, and the City had provided the cell phone to the employee for use during his employment. Thus, the cell phone records may qualify as public records. Additionally, the phone records do not fall within any of the exceptions to FOIA. Thus, the records may be the proper subject of a FOIA request.

✖✖ It's our thinking that, while not likely required for full credit, there's also the issue of whether the contents of a private text message sent on a public phone, as presented by the facts fall under the FOIA. The definition of "public record" in Va. Code § 2.2-3701 includes only records "in the transaction of public business." A record that was unrelated to the public employee's job or agency would not be a public record subject to FOIA.

Yet, there's also a question of whether, not the contents of the message, but the record of when and for how long the text exchange took place would come under FOIA. The text message exchange took place using publicly owned equipment by a public employee, while working on the public business. An issue presented in the facts is the gross negligence of the public employee. So, without disclosing the content the private text message, isn't the time, date and length of the time spent sending the text message, a public record.

Nevertheless, the City is not required to provide the records because a FOIA request may only be made by a Virginia citizen or a media outlet in Virginia. Here, the facts indicate that the FOIA request was made by Frances, who was visiting from California and presumably is not a Virginia citizen. Thus, the City is not required to provide the records. Va. Code §2.2-3704

(b) City's Sovereign Immunity: The Court should grant the Motion to Dismiss the Complaint against the City. Although the Court would most likely conclude that the City does not have sovereign immunity, the motion nevertheless should be granted because Frances failed to comply with the notice requirement.

A Virginia municipality is immune from negligence while acting in its "governmental" but not its "proprietary" functions. The Supreme Court of Virginia has described governmental functions as exercises of a municipality's discretion, activities undertaken for the common good or in the interest of public health and safety including emergencies, and exercises of powers delegated or imposed upon the municipality. Proprietary functions are performed primarily for the benefit of the municipality. Routine ministerial acts which involve no discretion are proprietary. Additionally, the Supreme Court of Virginia has held that road maintenance is a proprietary function and garbage collection is a governmental function.

Here, the City employee was sweeping the street at the time of the injury. Based on prior precedent, the Court will most likely conclude the street sweeping constitutes a proprietary function for which the City is not immune.

✖✖ We believe that an applicant could also make a strong argument that street sweeping is akin to garbage collection and is thus a governmental function for which the City would have immunity. The important thing the answer should include is a recognition of the governmental versus proprietary function distinction and the consequences of which the conduct was. We don't believe that the actual conclusion was significantly important, so long as the answered showed knowledge of the distinction.

Statutorily Required Notice: The Motion to Dismiss should be granted for failure to give the required notice in negligence claims against any county, city or town under Va. Code §15.2-209.. In order to bring an action for negligence against an county, city or town, the complainant must provide written notice of the claim, including time and place of the injury, within six months after the cause of action arises. There is an exception to the notice requirement if the requisite city official has 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. Here, the incident occurred on June 30, 2015, and thus, Frances was required to give written notice within six months of that date. The facts give no indication that notice was given, and nothing in the facts suggests that the actual knowledge exception would apply. Thus, the Complaint should be dismissed for failure to give notice.

(c) The Court should deny the Motion to Dismiss the Complaint against Stefan. First, Stefan is not entitled to immunity. In certain circumstances, a municipal employee may share in the employer's sovereign immunity, but a municipal employee is never entitled to immunity for gross negligence. Here, if the Court concludes that street sweeping is a proprietary activity, then the City is not entitled to sovereign immunity, and Stefan, as an employee of the City, also is not entitled to the benefit of that defense. Further, because the plaintiff has alleged gross negligence against Stefan, even if the City were immune, Stefan would not be.

Additionally, the claimant is not required to give notice to a municipal employee. The notice requirement applies to the locality, not to individual employees. Thus, the Court should not dismiss the Complaint against Stefan as an employee on the basis of failure to give the required notice.

9. [07/17] [Va. Civ. Pro] Lex Microbrewery, Inc., formed by four attorneys from Richmond, Virginia, recently acquired from Andrew Hops a 100-acre tract of land in Nelson County, Virginia, for the purpose of building and operating a brewery and farm for growing hops and barley. Hops had purchased the property from Farmer John 15 years ago. The deed to Lex Microbrewery from Hops conveyed title in fee simple without mention of any other interests in the property.

Farmer John had previously maintained a producing grape vineyard and commercial winery on the property. The winery was abandoned 25 years ago, and the tract has since reverted to woods and farmland.

There is evidence of a railroad spur that runs across the property for about 100 yards from the main line of the C & S Railroad to the old site of the winery. The tracks remain, overgrown with weeds and brush, and are unusable. They have not been used since the winery closed down.

A title examination revealed that the right-of-way for the railroad spur was conveyed by Farmer John to the C & S Railroad Company in 1930. That deed described a "right-of-way for construction and maintenance of a railroad track through the lands of the Grantor, not to exceed 50 feet in width, so long as said railroad track to be built shall be maintained and operated, but no longer."

A representative of Lex Microbrewery approached the C & S Railroad Company about a release of the right-of-way. C & S responded that, "We might have further use for the right-of-way, and, besides, we never voluntarily release any of our rights-of-way."

Lex wants to bring a legal action both to assert its claim of title and its right to possession free of the right-of-way and has asked you, as its attorney, the following:

Without regard to which party is likely to prevail, describe the nature and function of each of the following forms of action in a Virginia court, and whether each of them is an appropriate proceeding in which Lex Microbrewery can test both its title and right to possession free of the right-of-way.

- (a) Declaratory judgment
- (b) Unlawful detainer
- (c) Bill to quiet title
- (d) Ejectment

Explain each answer fully.

✖✖

a) Declaratory Judgment is an action is designed to permit one to have a judicial determination of his rights and/or responsibilities before he has suffered any injury or done a wrong to another. Declaratory judgments must involve disputes at "the crossroads of a controversy," meaning there must be more than just a disagreement. The dispute must be at the brink of the creation of a cause of action. Va. Courts have held that the declaratory judgment remedy, should not be used when alternative remedies are available. Based on Ejectment being available [see below] a declaratory judgment action is likely to

be an inappropriate proceeding.

b) Unlawful Detainer is a law claim that tries solely right to possession of real estate, not who holds title. The action is used typically to recover possession from either (1) a defendant who unlawfully gained possession, or (2) the defendant had lawful possession but lost that right (e.g., by defaulting on a lease).

The Railroad has not exercised possession for some time on the facts, unless one claims that the remnants of the railroad spur represent possession, which is unlikely. Here the claim of title is the primary dispute. Unlawful detainer would not be a remedy that Microbrewery would want to use to obtain a ruling that it has title to the land and that the prior easement no longer allows the Railroad any claim of title.

c) A Bill to Quiet Title, as its name suggest, is an equitable action employed to have the court determine title to property. Such a suit does not require alleging possession and only inferentially determines possession by determining who has title.

Microbrewery could try a bill to quiet title, but an action at law (ejectment) exists. When there is an adequate law remedy, then equitable actions are not generally available. A Bill to Quiet Title would not be an appropriate proceeding.

d) Ejectment is an established action at law for trying title to land. The plaintiff must recover on the strength of her own title, not on the lack of title in the defendant. The action is not designed to resolve merely possession, though inferentially by resolving a party's title, it does allow that party to exercise possession. Ejectment would be an appropriate proceeding to use to bring the claim.