

Final Edition April 2, 2020 (8:51am)

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

Summary of suggested answers to the essay part of the February 2020 Virginia Bar Exam

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

The following, while not attending the meeting, provided us great help with suggested answers in each's particular area[s] of specialty: Profs. Samuel W. Calhoun, Carliss Chatman, Robert T. Danforth, and Mark A. Williams of W&L School of Law; Walter Erwin, Lynchburg City Attorney, Professors Eric DeGroff, Jim Duane, Natt Gantt, Lynne Kohn, Craig Stern & Kim VanEssendelft of Regent University Law School.

[1] [Criminal] While on routine traffic patrol in Norfolk, Virginia, Officer Jones noticed a car plastered with bumper stickers depicting the emblems of several bands. Jones believed that fans of these particular bands were often drug users. Hoping for a reason to stop the car, he followed it for about five minutes through heavy traffic. When the car made an illegal left turn in the middle of Main Street without signaling, Jones activated the blue lights on his police cruiser and the car pulled to the side of the road.

As Jones approached the car, he noticed that the driver, who was the sole occupant, appeared to be nervous and twitchy. The driver identified himself as Ron and handed Jones his driver's license. When Jones asked for the vehicle registration, Ron shifted his position to block Jones's view of the glove compartment, fumbled around, pulled out the registration card, handed it to Jones, and locked the glove compartment with a key. While Jones was verifying Ron's identification and the vehicle registration through the police department's computer system, he noticed that Ron continued to appear nervous, he was sweating profusely and glancing furtively at the glove compartment. Jones returned and asked Ron why the vehicle was registered to Billy Morris, a Richmond resident. Ron said that he was driving the car across the country for his friend Billy. Jones then asked Ron if he could search the vehicle, to which Ron replied, "It's not my car, but, yeah, I guess it's OK."

Jones asked Ron to step out of the vehicle and searched the car. The car was cluttered with junk food wrappers and empty coffee cups, completely filling the area between the floorboard and the dashboard on the passenger's side. Rummaging through the trash, Jones found near the bottom of the pile a small clear plastic bag containing a white powder, which he believed from its appearance and his experience to be cocaine. Jones then took the car key and unlocked the glove compartment, where he found a loaded pistol.

Jones asked Ron if the pistol and plastic bag belonged to him. Ron replied that he no longer wished to speak to him without the presence of an attorney. Jones then arrested Ron and confiscated the plastic bag and the pistol.

Subsequent analysis revealed Ron's DNA and fingerprints on the pistol. A lab analysis confirmed that the substance in the plastic bag was cocaine. The DNA and fingerprints of an unknown individual, not Ron's, were found on the plastic bag. Ron's criminal history showed a prior conviction for forging a public record, a crime punishable by a term of imprisonment of at least two years and a possible additional fine not exceeding \$100,000. The investigation also revealed that Ron's friend Billy had moved to California and had indeed asked Ron to drive the car out there for him.

Ron was charged with possession of cocaine and unlawful possession of a firearm by a convicted felon. Before the trial, Ron filed motions to suppress the pistol and the cocaine, arguing that the initial stop and the search of the car were unlawful.

[a] How should the Court rule on Ron's assertion that the initial stop was unlawful? Explain fully.

- [b] How should the Court rule on Ron's motion to suppress the cocaine and the pistol on the basis that the search of the car was unlawful? Explain fully.
- [c] At trial, is Ron likely to be convicted on the charge of possession of cocaine? Explain fully.
- [d] At trial, is Ron likely to be convicted on the charge of possession of a firearm by a convicted felon? Explain fully.

✖✖

- [a] The Court should rule that the stop was lawful. Despite the officer's subjective intent, he had an objectively reasonable suspicion to stop Ron when he observed what appeared to be his traffic violation.

See *Whren v. U.S.*, 517 U.S. 806 (1996)(subjective intent and objective reasonableness)

- [b] As a bailee of the vehicle, Ron had a reasonable expectation of privacy as to the vehicle and therefore has standing to object to its search. Similarly, as bailee, he also had lawful authority to consent to a search of the vehicle. Here, because Ron voluntarily gave his consent to Jones to search the vehicle without limitation as to scope or place, the officer could look anywhere in the vehicle including the floorboard and glove compartment.

See e.g. *Hardy v. Commonwealth*, 17 Va. App. 677 (1994) (bailee of vehicle.)

- [c] Ron is likely to be convicted of possession of the drug.. He has exclusive possession of the vehicle, and sat within a few feet of the drugs; neither of those circumstances is dispositive but each supports a conviction. He was clearly nervous during the stop. The terms of the bailment would indicate that he would have the car for at least a matter of days. The cocaine bag is among the wrappers and given the length of the bailment, it is reasonable to assume that he, rather than someone else, discarded the wrappers, which in turn would indicate that Ron discarded the drug baggie as well. Although another's prints and DNA are on the bag container, ownership of the drug is not a element of the offense. Actual or constructive possession of the drug with knowledge of its character by one who exercises dominion and control of the drug meets the requirements for conviction. Here, the circumstances support the conclusion that Ron constructively possessed the cocaine.

See e.g. *Hargraves v. Commonwealth*, 37 Va. App. 299 (2002)(occupancy of vehicle, circumstances of possession of illegal drug)

- [d] Ron is likely to be convicted of possession of a firearm by a convicted felon. Ron has a prior felony conviction. He had exclusive control of the vehicle. He tried to block Jones' view of the contents of the glove box when Ron retrieved the registration and was obviously nervous about its contents, all indications of his knowing possession of the firearm. Only possession of the gun is required to convict, rather than proof of its ownership. The gun had Ron's fingerprints and DNA on it. Ron was alone in the vehicle and in close proximity to the glove box, to which he had a key. These circumstances clearly support the conclusion that Ron had actual knowledge of the weapon's presence.

See generally *Hancock v. Commonwealth*, 21 Va. App.466 (1995)

- [2] [Local Government] The members of the Fauquier County Board of Supervisors ("Board"), the governing body of Fauquier County, Virginia, voted at a public meeting to adopt as part of the County Code an ordinance regulating the towing of motor vehicles ("Ordinance"), which states in part:

Every site to which trespassing vehicles are towed shall comply with the following requirement:

A. Tow truck operators must tow each vehicle picked up in Fauquier County to a storage site located within the boundaries of Fauquier County.

The Ordinance also contains requirements for safekeeping of vehicles and for minimum daily operating hours of storage sites for the protection and convenience of vehicle owners. The Ordinance is based on the following Virginia statute:

The governing body of any county, city or town may by ordinance regulate the removal of trespassing vehicles from property by or at the direction of the owner, operator, lessee or authorized agent in charge of the property. In the event that a vehicle is towed from one locality and stored in or released from a location in another locality, the local ordinance, if any, from which the vehicle was towed shall apply.

In their public remarks, all Board members emphasized the importance of Fauquier County residents not being inconvenienced by non-local towing companies storing vehicles outside of the County.

Riley's Auto Towing Service ("Riley's"), which has its principal place of business in nearby Prince William County, Virginia, filed a Complaint in the Circuit Court of Fauquier County against the Board, challenging the validity of the Ordinance as beyond the Board's legal authority under the Dillon Rule and seeking a declaratory judgment.

Separately, the Board was sued in the Circuit Court of Fauquier County by a landowner, claiming that his farmland had been damaged and substantially diminished in value as a result of great quantities of water discharged over his farm by a storm sewer system used and maintained by the County to support a new residential community on adjacent property. The landowner's lawsuit sought \$200,000 in money damages and is based upon Article 1 Section 11 of the Constitution of Virginia, which states, "no private property shall be damaged or taken for public use without just compensation to the owner thereof." The Board, through its counsel, filed a demurrer on the ground that the County is a political subdivision of the Commonwealth and is, therefore, immune from tort liability.

On another occasion, the Board chairman signed a \$500,000 contract between the Board and a Colorado-based energy consulting firm to analyze the chairman's proposal for a zoning change to take effect in 2022, requiring all new planned residential communities in the County to include solar panels for each dwelling. In lieu of voting at a public meeting, all Board members signed and dated a written, unanimous consent to approve the consulting contract and to authorize the chairman to sign the contract on behalf of the Board. A resident of Fauquier County recently requested a copy of this consulting contract from the Office of the Board of Supervisors.

- [a] What is the Dillon Rule and is Riley's action challenging the validity of the Ordinance and seeking a declaratory judgment likely to prevail? Explain fully.
- [b] How should the Circuit Court rule on the Board's demurrer to the landowner's Complaint? Explain fully.
- [c] Does the Board members' unanimous written consent, approving the \$500,000 consulting contract, constitute valid action by a local public body under Virginia law? Explain fully.
- [d] Is the resident of Fauquier County entitled under Virginia law to review and obtain a copy of the consulting contract from the Office of the Board of Supervisors? Explain fully.

✖✖

- [a] The Dillon Rule is a rule of strict statutory construction that requires narrow interpretation of the powers granted to localities by the Commonwealth. Briefly stated, the Dillon Rule provides that localities have only those powers that are: (i) expressly granted by the General Assembly; (ii) necessarily or fairly implied or incident to powers that are expressly granted; and, (iii) essential and indispensable, not simply convenient. If there is any doubt as to whether or not a local government has been given a specific power by the General Assembly, under the Dillon Rule, the local government does not have the power in question. See *Taber v. Bd. of Supervisors of Fairfax County*, 221 Va. 200 (1980); *City of Winchester v. Redmond*, 93 Va. 711 (1896).

The Virginia towing statute provided expressly authorizes the Fauquier County Board of Supervisors to adopt an ordinance to regulate the removal of trespassing vehicles from property. The requirement that towed vehicles be stored within the County, while not expressly authorized in the statute, can be fairly implied from the authority that was granted to the Board of Supervisors. Although the statute implies that localities may permit vehicles to be towed outside their borders, it falls short of compelling them to do so. As stated by the Supreme Court of Virginia, under the "reasonable selection method rule", when a statutory grant of power has been given, but is silent as to the manner of its execution, a governing body has reasonable discretion in the manner of that execution. Therefore, under current Virginia law, Riley's action challenging the validity of the ordinance and seeking a declaratory judgment is not likely to prevail. See *Advanced Towing Co., LLC v. Fairfax County Board of Supervisors*, 280 Va. 187 (2010).

- [b] The Board's demurrer will probably be overruled. While sovereign immunity is "alive and well in Virginia", and may protect a county from liability in tort, it does have its limitations. See *Niese v. City of Alexandria*, 264 Va. 230, (2002). Sovereign immunity does not apply to a constitutional taking claim for inverse condemnation, which sounds in contract. See *AGCS Marine Ins. Co. v. Arlington County*, 293 Va. 469 (2017) (Supreme Court of Virginia held that the flooding of a Harris Teeter grocery store by Arlington County's sewer system could constitute an inverse taking); *Bell Atl.-Va., Inc. v. Arlington Cnty.*, 254 Va. 60, 486 S.E.2d 297 (1997). See also *Nelson Cnty. v. Coleman*, 126 Va.

275, 101 S.E. 413 (1919). Also, in *Livingston v. Virginia Department of Transportation*, 284 Va. 140, 160 (2012), the Supreme Court held that allegations of an incident of flooding by a property owner could support an inverse condemnation claim under Article 1, Section 11 of the Virginia Constitution and were sufficient to withstand a demurrer.

- [c] No. The “unanimous written consent” by the Board members approving the contract does not constitute a valid action by a local public body under Virginia law. Section 15.2-1415 of the Virginia Code provides that a governing body may exercise the powers that are conferred upon it “at any meeting” in which a quorum of the governing body is present. Further, Section 15.2-1427 of the Virginia Code provides that ordinances and resolutions may be adopted by a majority of a local governing body who are “present and voting at a lawful meeting.” There is no authority in the Virginia Code that authorizes a local governing body to take action to approve a contract in lieu of voting at a public meeting.

Further, under section 2.2-3710 of the Virginia Freedom of Information Act (“VFOIA”), the transaction of public business by a local public body other than by votes at public meetings is prohibited. The Act requires that public business be conducted in the open. In order to be properly authorized, a contract must be voted on in a properly called and noticed, open, public meeting by recorded vote in accordance with all requirements of the VFOIA.

Therefore, the contract is *ultra vires* and invalid.

- [d] Yes. Under section 2.2-3704 of the VFOIA, all public records involving the transaction of public business shall be open to inspection and copying by any citizen of Virginia, unless a specific exemption from disclosure applies.

Under the definitions in section 2.2-3701 of the VFOIA, the Board of Supervisors falls within the definition of a “public body”, and the consulting contract falls within the definition of “public records.” The VFOIA requires that exemptions must be narrowly construed in accordance with the VFOIA’s purpose of openness in government. The facts provide no basis to claim an exemption from disclosure. Therefore, within 5 working days, the Board is required to make the contract available for inspection and copying. The Board may make reasonable charges to the resident, not to exceed actual costs.

- [3] [UCC Negotiable Instruments & Business Organizations - Partnerships] Al Adams and Joe Jones, two licensed Virginia attorneys, formed a general partnership in 2014 for the practice of law in the City of Virginia Beach, Virginia. By 2017, the practice had grown beyond their expectations and they began to expand by hiring several associates and paralegals. In May 2017, they converted their general partnership to a professional limited liability partnership (“PLLP”) and purchased an office building in Virginia Beach in the name of the PLLP to accommodate their growing practice.

Clara, a long-time client of Joe’s, recently called on Joe to discuss two promissory notes from her son, Stanford, that Joe had prepared. Clara loved Stanford, her only child, but she had always explained to Joe that she wanted both notes in writing so that they could be sold if she ever needed cash.

The first note had been prepared by Joe in July 2016, when Clara loaned Stanford some money for repairs on a duplex he had purchased a few months earlier. This note follows:

July 4, 2016
Virginia Beach, VA.

For value received, I promise to pay Clara Client, or order, the sum of TEN THOUSAND DOLLARS (\$10,000) with interest at the prime rate of Bank of Virginia Beach plus one percent (1%) per annum to be adjusted daily. The principal sum and all accrued interest shall be payable in full on demand but not later than August 5, 2020. This Note is secured by an assignment of rents from the property at 123 Main Street, Virginia Beach, Virginia.

/S/ Stanford

The second note was for a loan Clara made to Stanford in June 2018 for the down payment on a surf shop he bought at the beach. Joe prepared the following note:

June 7, 2018
Virginia Beach, VA

For value received, I promise to pay to my mother, Clara Client, the sum of FIFTEEN THOUSAND DOLLARS (\$15,000) with interest payable quarterly at ten percent (10%), per annum. The principal sum and any accrued

interest shall be payable in full two (2) years after the opening of Stanford's Surf Shop in Virginia Beach, Virginia.

/S/ Stanford

In early 2019, the surf shop had not yet opened, and Clara tried to sell the two notes to Southeast Finance Co. ("Finance") in order to get the funds to buy a new car. Finance refused to buy the notes and told her that neither of the notes was negotiable.

- [a] Was Finance correct when it advised Clara that neither of the notes was negotiable? Explain fully.
- [b] Assume for this part of the question only that neither of the notes was negotiable, and that Clara can prove malpractice by Joe in preparing them. From what party or parties should Clara seek to recover damages? Explain fully.

- [a] The July 4, 2016 note is negotiable, but the June 7, 2018 note is not.

2016 Note

The 2016 note satisfies all of the §3-104 negotiability requirements (a signed writing, payable to order or bearer, with no additions or conditions, and payable on a date certain for a sum certain).

The note is a "promise" under 3-103(a)(12) because it's a written undertaking to pay money signed by Stanford, the person undertaking to pay. The note promises to pay "money," *i.e.*, U.S. dollars that under §1-201(b)(24) are a medium of exchange currently adopted by a domestic government. The "unconditional" requirement isn't a problem because nothing triggers §3-106.

The note satisfies §3-104(a)'s fixed amount of money requirement even though it doesn't state an explicit dollar amount of interest. §3-104(a) permits references to interest, and §3-112(b) elaborates by authorizing an interest rate stated or described in the instrument in any manner, including those requiring reference to information not contained in the instrument, *i.e.*, the Bank of Virginia's prime rate.

The note satisfies §3-104(a)(1) because the promise to pay "to Clara or order" makes the note payable to order under 3-109(b)(ii); moreover, the note had this quality upon its issuance [§3-105(a)], *i.e.*, when it was delivered to Clara by Stanford (we can assume she had the note when she tried later to sell it; Stanford's initially transferring the note to her was a delivery under §1-201(b)(15) because it was a voluntary transfer of possession).

The note satisfies §3-104(a)(2) via §3-108(c); it's payable on demand up until August 5, 2020, when it becomes payable at a definite time (August 5, 2020).

The note satisfies §3-104(a)(3) via §3-104(a)(3)(i), *i.e.*, Stanford's undertaking to give collateral (the assigned rent) to secure payment.

2018 Note

The 2018 note isn't negotiable for two reasons.

- [i] The note isn't payable to bearer or order under §3-104(a)(1). Paragraph 1 to Comment 2 to §3-104 implicitly recognizes that a note promising to "Pay John Doe" is not a negotiable instrument. A check with the same language would still be negotiable via §3-103(c), but Comment 2 makes clear that this exception applies only to checks.
- [ii] The note isn't payable on demand or at a definite time under §3-104(2). Promising payment two years after the Surf Shop opens is too indefinite to satisfy §3-108(b). That section does allow payment upon elapse of a definite period of time following another event, but only when the starting date is readily ascertainable when the promise is issued.

- [b] If neither of the notes were negotiable and Clara could prove malpractice by Joe in preparing them, then Clara should seek to recover damages from Joe, the partnership and AI on the July, 2016 note and from Joe and the partnership on the June, 2018 note.

As for the July, 2016 note, Joe would be personally liable. The tortfeasor is always personally liable for his own negligence, and thus Joe would be liable for his malpractice. The partnership would also be liable. A partnership is liable for the torts of a partner committed within the ordinary course of partnership business. Here, Joe was clearly acting within the ordinary course of the law firm's business when he negligently prepared the note for his client Clara. Finally, because the partnership was a general partnership at the time of the malpractice, Clara could also potentially recover from AI. Each partner is jointly and severally liable for the debts of the partnership, although the creditor must seek to recover from the partnership entity first, before pursuing recovery from individual partners. Thus, Clara could also recover from AI if she cannot recover from the partnership.

As for the June, 2018, Joe would again be personally liable for his own malpractice. The partnership would also be liable because, again, Joe was acting within the ordinary course of partnership business when he negligently prepared the note. AI, however, would not be personally liable on the June, 2018 note. In a limited liability partnership, partners are not personally liable for the debts of the business. Because the partnership converted to a limited liability partnership in May, 2017, prior to Joe's negligent preparation of the second note, AI would not be personally liable.

[4] [Federal Civil Procedure & Virginia Civil Procedure] Old Dominion Bourbon Company ("Old"), a Virginia corporation with its office, distillery, and warehouses located in Loudoun County, Virginia, has distilled and sold premium grade Virginia bourbon for more than 100 years. Aging premium bourbon is essential as well as time consuming and expensive.

In 2017, Old's president became aware of a revolutionary new process that reduces the traditional aging time for bourbon by half without sacrificing quality (the "System"). The predominant feature of the System is its mechanized racks which hold the barrels of bourbon and are calibrated to slowly rotate and gently vibrate the barrels, which enhances the bourbon maturation process. The System is owned by and available only through Cornhusker Innovations Corporation ("Cornhusker"), a Nebraska corporation with all of its offices and facilities in Lincoln, Nebraska.

Old's president called Cornhusker, and following a series of phone calls and emails, determined that Old could rely upon Cornhusker's specialized skill and expertise for this project. Therefore, Old's president told his contact at Cornhusker that Old would defer to Cornhusker's recommendations and advice. Based on this, Old contracted with Cornhusker to design, furnish, and install a customized System for Old's largest warehouse in Virginia.

Old forwarded engineered drawings of its warehouse to Cornhusker in Nebraska so the System could be custom designed to the contours of Old's facility. Following Old's receipt and acceptance of Cornhusker's layout drawings, Cornhusker fabricated the racks of the System in its Nebraska plant and delivered them to Old's warehouse in Loudoun County. Because it had no Virginia-based employees, Cornhusker sent two of its employees from Lincoln, Nebraska to Loudoun County, Virginia to supervise the assembly and installation of the racks at Old's warehouse by its Virginia subcontractor. Following testing of the installed System, Old paid Cornhusker \$800,000 and began using the System to age its bourbon.

After using the System successfully for fourteen months, the racks in Old's warehouse suddenly collapsed, leaving the System inoperable. Cornhusker blames Old for misusing the racks and refuses to replace or repair them without receiving payment in advance. Instead of paying, Old filed a Complaint against Cornhusker in the United States District Court for the Eastern District of Virginia, seeking \$1,000,000 in compensatory damages on the ground that Cornhusker breached an implied warranty under the Uniform Commercial Code in furnishing defective racks.

Without any other pleading or qualification, Cornhusker timely filed a Motion to Dismiss Old's Complaint for lack of personal jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(2).

- [a] Is the United States District Court authorized to exercise personal jurisdiction over Cornhusker in this case? Explain fully.
- [b] Assume for this part of the question only that Old claims that Cornhusker submitted to the jurisdiction of this District Court by failing to make a special appearance before filing its Motion to Dismiss. How should the Court rule on Old's claim? Explain fully.
- [c] Which Uniform Commercial Code implied warranties, if any, should Old allege was breached by Cornhusker, and what would Old need to show in order to prevail? Explain fully.

✖✖

- [a] Yes, the Court may exercise personal jurisdiction over Cornhusker. To exercise personal jurisdiction over a

nonresident defendant, a Virginia court needs to satisfy both the Virginia Long Arm statute and show that the exercise of does not violate principles of Due process

Long Arm

The VA Long Arm statute provides that a court in VA can exercise personal jurisdiction over a nonresident if the cause of action arises from any one of several enumerated activities or conduct. The plaintiff can satisfy at least two of the categories of the VA Long Arm when only one is required.

The Long Arm includes in these activities “transacting business in this Commonwealth.” §8.01-328.1[1] VA is a single transaction state, and one business transaction leading to the cause of action will suffice. Here, Cornhusker transacted business in VA by constructing the System of bourbon manufacturing at a warehouse in VA, sending Cornhusker employees to VA to supervise assembly and installation of the racks. The System, put into a warehouse in VA, led to \$800,000 for its work in putting in the System.

Another category of the Long Arm is “contracting to supply services or things in this Commonwealth.” §8.01-328.1[2] Cornhusker contracted to supply the System in the warehouse in VA and services in installing and assembling the racks.

Due Process

Even if the Long Arm statute is satisfied, personal jurisdiction over a nonresident may violate principles of due process. The test developed by the US Supreme Court and the Virginia Supreme Court evaluates whether the minimum contacts (International Show) of a nonresident that lead to the claim in the case are sufficient in quality and nature to make it reasonable to exercise personal jurisdiction. The analysis asks whether the defendant purposefully availed himself of the privilege of conducting business under the laws of Virginia. Moreover, so long as the contact has a substantial connection to the forum, even a single act can satisfy due process. In short, the minimum contacts test is satisfied if the defendant had contacts with Virginia displaying purposeful availment of Virginia’s laws and, thus, putting the defendant on reasonable notice of suit in VA.

Here, Cornhusker contracted with a VA company and agreed to supervise and install the System of Bourbon manufacture at a VA warehouse. In doing so, it was receiving \$800,000. Based on its contract with a Virginia company and its participation in the installation of the System, it is reasonably foreseeable for Cornhusker to anticipate being sued in VA.

The following case is the inspiration for this essay question: *Liberty Mutual Fire Insurance Co. v. Menozzi Luigi & C. S.p.A.*, 92 F. Supp. 3d. 435 (ED Va. 2015).

[b] The Court should reject Old’s claim that Cornhusker waived its personal jurisdiction challenge. Under Federal Rule of Civil Procedure 12, a defendant is not required to either make a special appearance before or simultaneously with a motion to dismiss for lack of personal jurisdiction. So long as the defendant files a timely motion to dismiss for lack of personal jurisdiction in the first-filed challenge to the plaintiff’s Complaint, such as in the first motion filed, then the personal jurisdiction defense is preserved. Cornhusker could, under Rule 12, even raise other issues under other subparts of Rule 12(b), so long as the Rule 12(b)(2) challenge is included in the initial motion timely filed in response to the Complaint. Here, we are told that “Without any other pleading or qualification, Cornhusker timely filed a Motion to Dismiss Old’s Complaint for lack of personal jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(2).” We read no mention of any earlier response to the Complaint. Thus, we can conclude that the motion challenging jurisdiction is the first response. That the first response included a challenge to personal jurisdiction is all that Rule 12 requires. For these reasons, the Court should reject Old’s claim of waiver of the defense by failing to make a special appearance.

[c] This is a contract for the sale of goods even though the System when installed might be characterized as a fixture. The definition of goods in §2-105(1) establishes the key criterion as mobility at the time of identification to the contract for sale (§2-501). The System presumably was movable because Cornhusker was able to transport it to Old’s warehouse for installation. Thus, UCC Article 2 applies (§2-102).

Old has potential claims for breach of two implied warranties: the implied warranty of merchantability and the implied warranty of fitness for a particular purpose.

To sue for breach of the implied warranty of merchantability under §2-314, Old also must show that Cornhusker was a merchant with respect to goods of that kind. §2-104(1) speaks of one who deals in goods of the kind, and Comment 2, paragraph 3, elaborates by referring to a professional status as to particular kinds of goods. Cornhusker qualifies as a professional regarding the System, especially because it is the device's only source. §2-314 allows for the merchantability warranty to be excluded or modified, but there are no facts to suggest that happened.

Suing under §2-315 for breach of the implied warranty of fitness for a particular purpose requires proof that the seller knew the buyer's particular purpose and that the buyer relied upon the seller to furnish suitable goods. The facts plainly show that Cornhusker knew why Old wanted the System. There's nothing to suggest that Old depended upon anyone other than Cornhusker for designing an appropriate system (the System). The facts stipulate that Old's president told his Cornhusker contact that Old would be deferring to Cornhusker to design, furnish, and install a customized System. §2-315 allows for the fitness warranty to be excluded or modified, but there are no facts suggesting that happened.

As to both causes of action, Old bears the burden of proving breach and that the breach was the proximate cause of the loss; Old must comply with §2-607(3)(a) by notifying Cornhusker of the breach; and Old must prove damages (under §2-714(2), *i.e.*, the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted).

[5] [Wills] Ziggy, a resident of Sussex County, Virginia, executed a valid will with a self-proving affidavit in 2006. The will appointed Quinn as Executor of his estate and devised the entire estate to Ziggy's younger brother, Steve.

Ziggy married once and was divorced prior to 2006. There were no children of his marriage, and he had not remarried. He had no continuing obligations to his first wife or any other debts.

Ziggy died in 2019, survived by Steve. Ziggy's entire estate at the time of his death consisted of a farm in Sussex County, securities, and a checking account, together worth \$2.4 million. All of the estate's assets were in Ziggy's name alone.

Quinn found among Ziggy's papers a life insurance policy on Ziggy's life in the amount of \$500,000, listing Ziggy as owner. Ziggy had paid all the premiums and named Charlotte as the beneficiary. Quinn discovered that Charlotte is a woman with whom Ziggy had a romantic relationship dating back to the early 2000's. Charlotte had a son, Clyde, born in 2009, who Ziggy had never acknowledged as being his child.

Following Ziggy's death, Charlotte, as mother and next friend of Clyde, filed suit in the Circuit Court of Sussex County, alleging that Ziggy was Clyde's father. Evidence at the trial established that Ziggy and Charlotte had an intimate relationship, and genetic testing established conclusively that Ziggy was Clyde's father, even though Ziggy's name did not appear on Clyde's birth certificate.

Charlotte demands that Quinn distribute to her, as Clyde's mother, whatever share of Ziggy's estate Clyde may be entitled to receive. Quinn believes that she is not required to do so.

- [a] Is Clyde entitled to inherit from Ziggy, and, if so, what portion of Ziggy's estate is he entitled to inherit? Explain fully.
- [b] What, if anything, would Quinn be required to do with regard to any share of the estate to which Clyde may be entitled? Explain fully.
- [c] If Clyde dies in the year 2021, unmarried and without issue, survived by Charlotte and Steve, who succeeds to the undistributed balance, if any, of Clyde's share of the estate? Explain fully.

✖✖

[a] Yes. Clyde is an omitted child under § 64.2-419.A:

If a testator executes a will when the testator has no children, a child born or adopted after the execution of the testator's will, or any descendant of his, who is neither provided for nor mentioned in the will is entitled to such portion of the testator's estate as he would have been entitled to if the testator had died intestate.

The facts stipulate that Ziggy's paternity has been "conclusively established," satisfying the clear and

convincing standard; that Ziggy executed his will in 2006; and that Clyde was born in 2009. Thus, the statute applies.

Had the testator died intestate, Clyde would have taken the entire probate estate of \$2.4 million.

- § 64.2-200 (a)(2): If there is no surviving spouse, then the estate descends and passes to the decedent's children and their descendants.
- Ziggy left no surviving spouse because he married only once and was divorced prior to the execution of his will in 2006.
- Clyde is Ziggy's only child because Ziggy had no children of his only marriage.
- Thus, Clyde's share is 100% of the assets passing by intestacy.

As to Steve, Ziggy's will is entirely revoked by operation of law because Steve is Ziggy's sibling, and would thus only take if Ziggy had been survived by neither issue nor parents. § 64.2-200 (3) and (4).

The life insurance proceeds are a non-probate asset and pass to the contractual beneficiary.

[b] Quinn will be required to petition the court to have a guardian of the estate appointed to manage the property passing to Clyde. He cannot simply distribute the property to Clyde or to Clyde's mother, who is the natural guardian of the person but not of the estate.

The guardian of the estate must post bond, unless will waives doing so [§ 64.2-504, -505]; provide a list of heirs at the time of qualification [§ 64.2-509]; file an inventory within four months of appointment [§ 64.2-1300]; and file an accounting within 16 months of qualification and annually thereafter [§ 64.2-1304].

[c] Under § 64.2-419.B, if the omitted child dies before reaching age 18, rather than passing to his mother by intestacy, the property would revert to Steve.

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

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

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

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

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

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

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

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

✖✖

[a] The appeal will go to the Supreme Court of Virginia by Petition, not of right. Civil appeals, other than Workers Compensation, Appeals from State Administrative Agencies & Domestic Relations cases go to the Supreme Court of Virginia by Petition.

[b] The Circuit Court was correct in overruling the Plea of the Statute of Limitations. Chronology was:

10.01.16 Erin turned age 16 was served bad food.
 10.01.18 Erin turned age 18
 10.01.19 Erin filed suit.

Under §8.01-229 A.1., Erin being an infant, the statute of limitation on his claim for injury to person, via breach of warranty, negligence and strict liability did not begin to run until he reached his majority. The statute of limitation for injury to person, no matter what the theory of recovery, is two years under §8.01-243 A. Suit was filed within one year of Erin's reaching age 18.

[c] The trial court was correct in denying Burger Bar's Motion for Summary Judgment. Under §8.01-420 and Rule 3:20, the trial court is barred from considering discovery depositions in support of a Motion for Summary Judgment. There are some exceptions to this prohibition, but none apply to these facts.

[d] Under Rule 5:25, a party wishing to preserve an objection must make timely objection and state the grounds for the objection at the time of the Court's ruling. When Erin filed a motion *in limine* to exclude the evidence, Burger Bar filed a written brief in objection to Erin's motion, stating all the grounds for its objection. This was sufficient to preserve the issue as to the Court's ruling under §8.01-384 A., which reads in part: "No party, after having made an objection or motion known to the court, shall be required to make such objection or motion again in order to preserve his right to appeal, challenge, or move for reconsideration of, a ruling, order, or action of the court." This was sufficient to preserve Burger Bar's objection to the court's ruling.

✖✖ This problem appears to have been based on the case of: <u>Chawla v. BurgerBusters, Inc.</u> , 255 Va. 616 [1998]
--

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

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

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

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

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

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

Bob moved into the house in June. When Bob turned the air conditioner on, it made a loud banging sound, promptly turned off and then failed to work at all. As outside temperatures reached 98 degrees, Bob was miserable. To make matters worse, several days after Bob moved in, a woman appearing at the front door told him that based upon a DNA test she had recently taken, she is Fred's daughter and Sam's sister, and that she has a right to a partial interest in the house.

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

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

✖✖

[a] Bob is likely to prevail against Sam for breach of the general warranty deed and the English Covenants of Title as to the sister's claim of an interest in the house but not as to the faulty air conditioner. With a general warranty deed, the grantor covenants against title defects that either he or his predecessors created. The English Covenants of Title include seisin, the right to convey, quiet possession, further assurances, and no encumbrances. Seisin is a covenant that the grantor has the interest that he purported to convey. Right to convey assures that the grantor has the right, power and authority to convey the property. Quiet possession covenants that the grantee can peaceably and quietly hold and possess the property without demand or claim to the property from a third party. Further assurances is a covenant to execute deeds or otherwise take action to perfect title if necessary. No encumbrances assures that there are no encumbrances against title or interest in the property.

[i] Bob is likely to prevail against Sam as to the sister's claim of an interest in the house. Because of the sister's claim, the covenants of seisin, right to convey and quiet possession have been breached. With seisin and the covenant of right to convey, Sam covenanted that he had the right to convey an undivided fee simple absolute interest in the property, and the sister's claim of partial ownership breaches these covenants. Similarly, the sister's claim also violates the covenant of quiet possession as a third party is now asserting a claim to the property.

[ii] Bob is not likely to prevail against Sam as to the faulty air conditioner. A general warranty deed and the English Covenants of Title guarantee against defects in title, not defects in the condition of the property. Thus, the deed and the covenants provide no remedy for this claim.

[b] Bob is not likely to prevail against Sam for breach of the warranty under Paragraph 12 of the Purchase and Sale Agreement. In that paragraph, Sam warranted that the air conditioning system would be "in good working order at Closing." Because Bob did a walk-through inspection at closing on February 15 and did not raise any issue as to the condition of the air conditioning at that time, Bob will lose on his claim for breach of warranty.

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

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

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

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

A week later, when Art went to pick up the car, Bart presented the invoice, with a copy of the work order, in the amount of \$1,800, which was 12.5% over the total estimate. Bart explained truthfully that the over-estimate charges were justified because it had been necessary to paint the front fender since the paint had chipped and cracked during the repair of the dent and that the door panel had required extra sanding and preparation. Art objected, saying he knew nothing about why the door panel had to be repaired. He said he would pay only \$100, the cost of knocking out the front fender dent, which was all he had authorized Ethan to direct Bart to do. Also, when Art checked the glove compartment, he found that an expensive digital camera he had left in there was missing. It was later established that one of Bart's employees who worked on the car and was no longer employed had stolen the camera.

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

✖✖

- [a] In Bart's Body Shop's suit to recover the entire \$1800, Art will assert the defense of Ethan's lack of authority to enter into the contract to fully repair the vehicle. Bart's strongest argument in response is that Art ratified the contract; however, the ratification argument will likely fail.

In order to bind a principal in contract, the agent must act with either actual or apparent authority, or the principal must subsequently ratify the contact. Actual authority may be either express or implied, and it is based on the principal's communications with the agent and the agent's reasonable belief that he is authorized.

Here, Ethan clearly did not have actual authority to authorize repainting of the front fender. In fact, Art expressly instructed him not to have the front fender repainted. Additionally, Art did not ask Ethan to have the side door repaired, and there was no basis on which Ethan could reasonably believe that Art approved that work. Art was unaware of that damage.

Ethan also likely did not act with apparent authority. An agent acts with apparent authority where the third party reasonably believes, based on manifestations of the principal, that the agent is authorized. Apparent authority arises out of the principal's holding out of the agent as authorized. Here, Bart recognized Ethan as Art's employee, but merely holding Ethan out as an "employee" is not a manifestation that Ethan had authority to contract for all of these repairs, nor was there a sufficient basis for Bart to reasonably believe that Ethan was authorized. Thus, Ethan did not act with apparent authority.

Bart will argue that Art ratified the contract. Ratification is a subsequent affirmation of an unauthorized contract. In order to ratify, the principal must know the material terms of the contract, or be aware of his lack of knowledge. In other words, a principal cannot avoid ratification by relying on his ignorance of the contract terms where he was deliberately ignorant of those terms. Additionally, silence may constitute ratification where a person would be expected to speak. Here, it is a close call as to whether Art's actions were sufficient to ratify the contract, but the better conclusion is that they were not. Art's "nod" was not ratification because he did not yet know the material terms of the contract. Ethan had just handed him the work order. There is a stronger argument that his subsequent silence, or failure to object, constituted ratification. However he clearly did not have actual knowledge of the contract terms, as he did not read the work order closely. Bart will argue that he should have read the work order, but it doesn't seem from the facts that Art was even aware of his lack of knowledge. In other words, this does not seem to be a case of deliberate ignorance. Thus, the better conclusion is that Art did not ratify and thus he will be successful in his defense of lack of authority.

[b] In the suit by Art to recover the value of the stolen camera from Bart's Body Shop, Bart is likely to assert as defenses (1) waiver of liability, (2) no bailment and (3) no breach of the standard of care. Bart will not prevail on the waiver defense but it is likely to win on the other two defenses.

First, Bart will argue that Art waived any claim based on the language on the work order providing that "Customer also agrees that Bart's Body Shop is not responsible for losses or damage to the vehicle while the vehicle is in Bart's possession." Such contractual waivers are disfavored and generally not enforceable in Virginia, and thus, Bart will lose on his claim that such language constitutes a defense to Art's claim.

However, Bart is likely to prevail on his defense that no bailment was created. Art's claim against Bart is presumably based on the existence of a bailment relationship between Art & the body shop as to the camera. A bailment relationship requires delivery by the bailor and consent by the bailee. Because the camera was out of sight in the glove compartment and presumably not disclosed to Bart when the car was delivered for repair, Bart could successfully argue that he did not consent to a bailment of the camera and thus incurred no liability for its care.

Even if a bailment relationship did exist, Virginia follows the common law approach of basing the standard of care upon who benefits from the relationship. In a commercial relationship such as this one, the benefit is typically considered to be mutual, and an ordinary standard of care applies. Thus, Bart would have to have been guilty of ordinary negligence in his care of the camera in order to be liable for its loss.

Another analysis that could be offered [though thinking is that it was not required for full credit] is that Art may attempt to recover the value of the stolen camera from Bart on an agency theory. Under the doctrine of respondent superior, an employer is liable for the torts of his employee committed within the scope of his employment. Here, Bart's employee was acting outside the scope of his employment when he stole the camera. The theft was an intentional act committed with no purpose to serve his employer's interest. Bart would not be liable based on respondent superior.

[c] In the suit by Speedy Burger against Art and Ethan to recover for the damages to the microphone stand, Art will assert the defense that Ethan acted outside the scope of employment; however, Art is likely to lose on this defense. Art's liability for Ethan's actions would be based on respondeat superior. Under the doctrine of respondeat superior, an employer is liable for the torts of his employee that are committed within the scope of employment. Art will argue that Ethan's stop for lunch was a personal errand and thus he was not acting within the scope of his employment at the time. However, courts generally hold the employer liable for employees' minor deviations, often referred to as a "detour." Here, Art's deviation from his employment was quite minor and would therefore likely be considered within the scope of employment.

[d] Yes, if Art is found liable to Speedy Burger, Art would have a right to recover against Ethan. Where an employer is found liable for his employee's torts under the doctrine of respondeat superior, the employer has an indemnification claim against the tortfeasor employee.

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

Terry showed the Wilsons Lot 8 on a cul-de-sac shown on a plat map as being on the edge of "Phase I" of the development plan of Powhite Park. The plat map showed, behind Lot 8, a tract of open, wooded land owned by the Development Company and described on the plat as "conservation area." Terry informed the Wilsons that the designation "conservation area" meant

that the Development Company had no intention of developing it.

Two weeks later, the Wilsons returned to discuss with Terry the signing of a contract to purchase Lot 8, and the Wilsons again stressed the importance to them that the land behind Lot 8 remain in its natural condition. Terry again assured them that the Development Company definitely had decided not to develop the “conservation area” in any manner. Based on this assurance, the Wilsons signed a contract on June 1, 2017, to purchase Lot 8 and for the Development Company to build them a residence, all for a purchase price of \$650,000. Neither the contract nor the deed that conveyed Lot 8 to the Wilsons said anything about the “conservation area.” Powhite Park completed construction of the Wilsons’ home. The Wilsons closed on the purchase on April 15, 2018, and moved into their new home the next day.

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

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

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

[a] Have the Wilsons timely filed suit? Explain fully.

[b] Do the Wilsons have an interest in the lots behind their home that would entitle them to prevent Powhite Park from developing the lots, and, if so, what is that interest, and should the Court:

1. grant an injunction and/or
2. award damages for breach of contract? Explain fully.

[c] Can the Court properly award the Wilsons attorney’s fees if they prevail in their suit? Explain fully.

✖✖

[a] Yes, the Wilsons timely filed suit. The statute of limitations for breach of a written contract is five years. The Wilsons signed a contract on June 1, 2017, with the understanding that the tract of open wooded land described as the “conservation area” on the plat maps. There is no mention of the contract having a merger clause. Through parole evidence, the Wilsons can establish that the agreement included assurances that The Developer would not develop the conservation area. That contract was anticipatorily breached on June 1, 2018, when the Development Company announced that the conservation area would be developed—contrary to previous promises. The Wilsons filed suit by May 15, 2019, less than a year from the anticipatory breach. Thus, their claim is timely.

The request for a permanent injunction ought not to require the application of laches because laches typically will not apply if there is a specific statute of limitations for a claim, ie contract. If the Court did evaluate laches, the doctrine would not bar the Wilsons’ suit because laches requires knowledge of rights, significant delay, and prejudice to the defendant—requirements that the Development Company could not show.

✖✖ Attendees Comment: We don’t think the claim for an injunction invites a Laches discussion because the action was filed so soon after the Wilsons discovered the misrepresentations. Laches requires knowledge of the claim before the running of time will operate to raise an issue of Laches. Also, the Development Company, from the facts, is not able show any prejudice from the time it took Wilson to file the action.

The Wilsons' fraud claim is also timely. Actions for damages for fraud carry a two-year statute of limitations. Fraud accrues when the plaintiff becomes aware of or should have become aware of the fraud. Here, the representations began on May 1, 2017. The Developer's representative reassured the Wilsons that the conservation area would not be developed on June 1, 2017, before the Wilsons signed their contract. The Wilsons did not become aware of the fraud, or have reason to become aware, until the homeowners' meeting on June 1, 2018, at which the Developer's Director made known the intention to develop the conservation area contrary to previous assurances. The Wilsons filed suit on May 15, 2019, well within the two-year limitations period.

For all these reasons, the Wilsons' suit is timely.

- [b] Yes, the Wilsons have an interest in the lots behind their homes (the conservation area) that entitles them to prevent Powhite Part from developing the lots. The Supreme Court of Virginia has recognized that the owner of a tract of land can have a "negative easement" in a servient tract that allows the plaintiff to demand the owner of the servient tract to refrain from specific uses of the land. In the *Prospect* case cited below, the Court referred to this power as a "veto power." Representations and inducements to a purchaser of the property, such as the representations here that the conservation area would not be developed, are precisely the kind of statements and assurances that give rise to such a negative easement. The statements by Terry, the sales agent of Powhite Park, all of which PoWhite reaffirmed at the time the Wilsons signed their contract on June 1, 2017, gave rise to their interest in preventing Powhite, who had made the representations through its agents, from developing the conservation area.

✖✖ Attendees Comment: We think it is possible that reasonable credit would be given if an applicant presumed from the facts that the conservation area had not been developed and offered a reasoned answer that prevention [via injunction] of the change in the condition of the conservation area would reduce Wilson's damages from the defendant's fraud because the diminution in the value of Wilson's property would not occur. The answer should note that if the conservation area had been developed it would have increased Wilson's damage claim because of the reduction in value of Wilson's home.

- [c] Yes, the Wilsons can recover attorneys' fees in their suit. The general rule in Virginia is that, in the absence of a statute or contract to the contrary, a court may not award attorneys' fees to the prevailing party. A significant exception to that rule is that in a fraud suit, the chancellor, judge, in the exercise of his the court's discretion, may award attorneys' fees to a defrauded party. Thus, the Court should award the Wilsons attorneys' fees for their suit.

This essay question derives from *Prospect Development Co. v Bershader*, 258 Va. 75 (1999).