

**February 2022 Virginia Bar Exam - Essay Question Portion
Suggested Answers**

✖✖ After each bar exam, the Virginia Board of Bar Examiners invites the Deans [or the Deans' designees] of all Law Schools located in Virginia, to meet with the Board. Representatives from all of the law schools in Virginia collaborate to prepare suggested answers which we think should be acceptable to the Virginia Board of Bar Examiners. These answers also include cites to some of the case and statutory law for reference even though the VBBE may not expect such specificity in applicants' answers on the exam. For the July 2021 exam, due to the current pandemic the VBBE did not hold a face to face meeting with us, but asked that the representatives from the law schools collaborate and send in a single summary of what was thought should be acceptable answers to the essay questions. This was done.

✖✖ It should also be noted that while we think the answers that follow should be acceptable for full credit, keep in mind that the VBBE do give credit for good analysis and sometimes will accept for at least partial credit, alternate theories of analysis that are not what they had in mind as the preferred answer. jrj

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The following, provided us great help with suggested answers in each's particular area[s] of specialty: Nathan Bowden, Sam Calhoun & Robert Danforth of Washington & Lee Law School, Thornton Max Hare of Regent University Law School, Jeremy W. Hurley of Appalachia Law School.

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1. {02.22} [Criminal Procedure] Jameson is a retired narcotics officer. He owns an auto repair shop in Abingdon, Virginia. Recently, when he arrived to open his shop, he found an unattended older model Chevrolet Malibu in front of his garage. It had a note on the windshield stating that the car had been overheating. The note was signed by "Larry" and a key was left in the ignition. Jameson then received a telephone call from an individual who identified himself as Larry. Larry said that he needed the car repaired and would be by the shop in the early afternoon to pay for the repairs. Larry advised that he left the only key to the car with Jameson and told Jameson that the trunk was locked and there was no key to the trunk. Larry did not give his last name or telephone number.

Jameson put the car onto his lift and determined that the problem was a broken water pump, which he quickly repaired. When he lowered the car to the floor, the trunk lid flew up. Jameson saw 10 bags of white powder packaged in a brick-like manner with clear plastic covering in the trunk. Based upon his experience and training as a narcotics officer, Jameson believed that the packages contained cocaine. Jameson immediately called the local police and closed the trunk.

Jameson removed the ignition coil to ensure that the vehicle could not be started. When the police officers arrived, Jameson advised them of what he had seen in the trunk and that he had made the car inoperable.

The officers determined by the license plates that the Malibu belonged to Larry, a resident of Winchester, Virginia. One of the officers was in plain clothes and waited inside the shop as if he was a customer. Three other officers waited

Shortly thereafter a vehicle with Florida license plates pulled up to the garage with a driver and a passenger. The passenger got out of the vehicle and the vehicle left. The passenger identified himself as Larry, the owner of the Malibu. When Larry got in the car to attempt to start it, the police moved in and arrested Larry without a warrant. The police asked Larry for a key to the trunk, and he told them that he didn't have one. Without obtaining a search warrant, the police then pried open the trunk and found what appeared to be 10 bricks of cocaine. They photographed the white bricks and secured them as evidence. It was later determined that the bricks did contain cocaine.

After opening the trunk, the police officers advised Larry that he was under arrest. He was put in handcuffs and placed

into the police car. One of the officers then asked him, "What did you intend to do with all of the drugs? Sell them?" Larry replied, "I spent my life savings to buy those bricks."

Larry was then transported to the local jail. At that point he was read his Miranda rights and charged with possession of cocaine with the intent to distribute.

Larry made several pre-trial motions.

- [a] How should the court rule on Larry's motion to dismiss the charges on the ground that the warrantless arrest violated Larry's rights under the Fourth Amendment of the Constitution? Explain fully.
- [b] How should the court rule on Larry's motion to suppress the cocaine on the ground that the warrantless search of the trunk of the car violated Larry's rights under the Fourth Amendment of the Constitution? Explain fully.
- [c] How should the court rule on Larry's motion to suppress his response to the officer's question about what he intended to do with the drugs on the ground that it violated his Miranda rights? Explain fully.

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[a] The court should deny Larry's motion to dismiss the charges on the ground that the warrantless arrest violated Larry's rights under the Fourth Amendment. First, a violation of the Fourth Amendment, if one occurred, should only result in the suppression of any evidence that resulted from the violation. Second, the Fourth Amendment protects persons from unreasonable searches and seizures. The US Supreme Court has held that police officers may make an arrest without a warrant if the officers have probable cause to believe the person had committed a crime. The inquiry considers the totality of the circumstances and probable cause exists if the officer has knowledge that would warrant a reasonably prudent person to believe that the person has committed or is committing a crime.

Here, the bricks of white powder in the trunk were discovered by Harry, a former narcotics officer, whose prior experience and training led him to believe the bricks were cocaine. Because of his experience and training and his description of the bricks of white powder, a reasonably prudent person would believe that the trunk contained bricks of cocaine. Furthermore, the information the police received was reliable, as it was not anonymous, and thus, no additional corroboration was necessary. Finally, police were able to identify Larry by name, through running his license plates, and because Larry got into the vehicle and attempted to start it. The arrest of Larry did not violate the Fourth Amendment.

Theoretically, an exam taker may try to argue that the initial search by Jameson violated the Fourth Amendment. Such argument would not succeed because the Fourth Amendment protects citizens against unreasonable searches by government actors, and although Jameson was once a government actor, he is currently a private citizen. Furthermore, the trunk popped open on its own and the bricks were in plain view when Jameson saw them. Likewise, any argument that Jameson conducted an improper seizure by removing the ignition coil, which prevented Larry from starting the vehicle and driving away before he was placed under arrest, should fail also because Jameson was a private actor.]

[b] The court should deny Larry's motion to suppress the cocaine on the ground that the warrantless search of the trunk of the car violated Larry's rights under the Fourth Amendment. While the Fourth Amendment protects people from unreasonable searches, and searches without a warrant are presumptively unreasonable, there are several exceptions to the warrant requirement. One such exception is the automobile exception, which allows a warrantless search of an automobile because vehicles are inherently movable, and subject to disappearing, provided that the officers have probable cause to believe that the vehicle contains contraband or other evidence of a crime.

Here, as discussed above, the officers had probable cause to believe that the vehicle (specifically the trunk) contained cocaine and thus, properly searched the vehicle.

Comment: Theoretically, an exam taker may try to argue that police did not have the authority to access a locked compartment inside the vehicle (the trunk), however the probable cause existed specifically as to the trunk, so that argument should bear little weight. The examiners may see arguments that the search of the trunk was proper as a search incident to arrest, however such arguments should fail because the trunk was not within the Larry's reach when he was placed under arrest, and entry into the trunk is supported by probable cause.]

[c] The court should grant Larry's motion to suppress his response to the officer's question about what he intended to do with the drugs on the ground that it violated Larry's Miranda rights. The Fifth Amendment protects a person's right not to incriminate oneself. In support of that right, Miranda v. Arizona and its progeny, require that once a person is placed in custody that person must be informed of his right to remain silent before interrogation is commenced. That requirement applies also to statements or other actions by police that are designed to elicit a response. A person is in custody once their freedom of movement is restrained.

Here, Larry was under arrest, he was placed in handcuffs, and placed in the police car. He was fully in custody when he was asked what he intended to do with the drugs. Prior to asking the question, the officer did not provide Larry with his Miranda warnings, and thus, Larry's response should be suppressed.

2. [02.22] [UCC - Secured Transactions] John is the owner of Suck It Up, Inc. (Suck It Up), a retail vacuum cleaner store in Williamsburg, Virginia, that sells ACME vacuum cleaners. To expand its business, Suck It Up took out a loan from the Bank at New Kent (BANK) to hire new employees, rent more space and expand its product line. John personally guaranteed the loan. The promissory note and security agreement contained the following clause: "The note is secured by all current and future inventory of Suck It Up, Inc. and all appliances owned by John personally." BANK filed a financing statement noting its interest in current and future inventory and John's appliances with the State Corporation Commission in Richmond, Virginia, on January 16, 2021. BANK took no other action related to the loan.

John decided to add the Dust Beater brand vacuum to his product line, so Suck It Up purchased 100 new Dust Beater vacuums from VACU Company (VACU) on credit on February 1, 2021, and took immediate possession of them. The promissory note with VACU contained a security agreement listing the 100 Dust Beater vacuums as specific collateral for the note. VACU filed a financing statement with the State Corporation Commission on February 2, 2021, immediately after it delivered the vacuums to Suck It Up. VACU took no other action related to the sale to Suck It Up.

Because John believes in the products he sells, on February 1, 2021, John purchased an additional Dust Beater from VACU personally, also on credit, to use at his home. The contract noted that VACU retained a security interest in the vacuum, but it took no other action related to the sale to John.

On April 1, 2021, Colleen bought a Dust Beater from Suck It Up for the manufacturer's suggested retail price. Colleen knew that BANK had filed a financing statement with the State Corporation Commission covering the machines.

Also on April 1, 2021, John gave a Dust Beater from Suck It Up to his nephew Nate as a wedding present. Nate did not know about either BANK's or VACU's interest in the vacuum.

By December 1, 2021, a downturn in the economy forced Suck It Up and John to default on all the loans.

BANK and VACU both seek to repossess the remaining Dust Beaters in Suck It Up's inventory and sell them to satisfy their respective notes. BANK and VACU also seek to repossess the Dust Beater from John's home. BANK seeks to repossess the Dust Beaters from both Colleen and Nate.

[a] As between BANK and VACU, who has priority to repossess the Dust Beaters in Suck It Up's inventory? Explain fully according to Virginia law.

[b] As between BANK and VACU, who has superior rights to the Dust Beater at John's home? Explain fully according to Virginia law.

[c] As between BANK and Colleen, who has superior rights to her Dust Beater? Explain fully according to Virginia law.

[d] As between BANK and Nate, who has superior rights to his Dust Beater? Explain fully according to Virginia law.

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[a] BANK has priority as first to file. Assuming that the security agreements of both creditors were effective under 8.9A-203, both creditors have security interests in the vacuums. VACU holds a valid security interest in the vacuums that it

sold to Suck It Up (SIU), which were individually listed on its security agreement. But because the vacuums immediately became part of SIU's inventory (8.9A-102(a)), BANK also has a valid security interest in them under its after-acquired collateral clause, which extends its security interest to all "current and future inventory" of SIU. After-acquired collateral clauses generally are valid in Virginia under 8.9A-204.

Both creditors have also properly perfected their security interests. When the debtor is a corporation organized under Virginia law, the usual means of perfecting a security interest is filing a financing statement (8.9A-310(a)) with the State Corporation Commission (see 8.9A-501(a)(2)). Both BANK and VACU filed financing statements with the SCC, so assuming that SIU is incorporated in Virginia and that both financing statements contained sufficient information under 9-502, both security interests were properly perfected.

When two parties with perfected security interests are competing for the same collateral, priority normally goes to the one who was first either (1) to perfect or (2) to file a valid financing statement (8.9A-322(a)(1)). Under this rule, BANK prevails because it filed its financing statement in January 2021, more than fifteen days before VACU filed a financing statement and perfected its security interest on February 2, 2021.

In some circumstances, a purchase money security interest (PMSI) will have priority ("super priority") even if it is not the first to file or perfect. Although VACU's security interest is a PMSI (8.9A-103), VACU has not taken the steps necessary to assure itself a super priority. As here, where the collateral is inventory (8.9A-102(a)(48)), a PMSI will have super priority only by complying with the requirements of 8.9A-324(b), which require that the creditor, before handing over possession of the inventory to the debtor (1) send a special written notice to other security interest holders (here, BANK), and (2) take steps to assure that its PMSI will be perfected at the time the debtor receives possession.

However, VACU "took no other action" to protect its interests aside from filing a financing statement "immediately after it delivered the vacuums" to SIU. Because VACU failed to send a notice to the Bank, it failed to satisfy the first requirement. Because VACU's security interest was not perfected until its financing statement was filed, which occurred after SIU took possession (8.9A-308), VACU failed to satisfy the second requirement. VACU therefore does not have a super priority under 9-324(b) and the Bank prevails as first to file under 9-322(a)(1).

[b] VACU has priority because its PMSI perfected automatically upon attachment, whereas BANK is merely an unsecured creditor. The vacuum at John's home is a consumer good (for personal, family, or household use) under 8.9A-103(a)(23). VACU's security interest thus automatically perfected under 8.9-309(1).

VACU therefore beats BANK under 8.9-324(a) because its security interest was perfected when the debtor received possession of the non-inventory collateral (we aren't told when this occurred, but it doesn't matter because the interest was perfected upon attachment).

Although BANK's security interest extends to "all appliances owned by John personally," the facts are clear that John acquired the vacuum more than 15 days after the transaction with BANK was finalized. BANK's security interest extended to after-acquired inventory of SIU, but there is no similar language extending it to appliances that might be acquired by John after the security agreement was signed. Even if such language had been included, it would not have been effective as to the vacuum, because under Virginia law an after-acquired collateral clause is ineffective as to consumer goods acquired more than 10 days after the creditor has given value – see 8.9A-204(b)(1). BANK's security interest therefore never attached to (and the Bank is therefore unsecured as to) John's vacuum.

Thus, the applicable rule for priority is 8.9-201(a): "Except as otherwise provided in the Uniform Commercial Code, a security agreement is effective according to its terms between the parties, against purchasers of the collateral, and against creditors."

[c] Collen has priority because as a customer of the store she is a buyer in the ordinary course of business (buying a vacuum from a merchant of goods of the kind) via 8.1A-201(b)(9). She therefore beats BANK under 8.9-320(a) because BANK's security interest was created by the "buyer's seller," *i.e.*, SIU.

Her knowledge of the fact that BANK had filed a financing statement does not defeat her. She would only lose if she knew that the sale to her violated the terms of the agreement between SIU and BANK, and there are no such facts in the question – see Comment 3 to UCC 9-320(a). (Note that she also takes good title under UCC Art. 2.)

[d] BANK has priority. Unlike Collen, Nate is not a buyer in the ordinary course of business and thus does not

qualify for the protection of 8.9-320(a) for two reasons. As the donee of an inter vivos gift, he gave no consideration and is not a “buyer”. He also received the vacuum outside the ordinary course of business. Even though Nate never knew about any of the security interests in SIU’s inventory, his vacuum remains subject to BANK’s security interest as of December 2021, when SIU defaulted on its obligations to BANK. Because Nate and his spouse now have an interest in the vacuum, they are “debtors” within the meaning of 8.9A-102(a)(28), and BANK has the right to resort to Article 9’s remedies against them, including the right to repossess the collateral under 8.9A-609.

3. [02.22] [FCVP] Game Time, Inc. (Game Time), a Maryland corporation, designs and manufactures web-based games for children. Game Time recently filed a civil action in the U.S. District Court for the Eastern District of Virginia against two companies which distribute and sell its products, Imagination of Maryland, LLC (Imagination), a Maryland limited liability company, and its subsidiary, Imagination South, LLC (South), a Virginia limited liability company.

The action alleges antitrust violations by both Imagination and South for unfair competition in the pricing and advertising of a cell phone game for children designed by Game Time called “Raise Your Own Pet.” Game Time’s Complaint includes three counts: Count I alleges a violation of federal antitrust law based upon unfair competition in pricing of the game; Count II alleges a similar violation of Virginia state antitrust law based upon this pricing; and Count III alleges breach of the distributor agreement between Imagination and Game Time for Imagination’s failure to make required fee payments to Game Time. The amount in controversy is \$50,000. The action was timely filed and properly served on both defendants.

The defendants had heard that the U.S. District Court for the Eastern District of Virginia was considered a “Rocket Docket” court, known for its speedy disposition of cases. Not being interested in a speedy disposition, the defendants want to remove the case to a Virginia circuit court. The defendants also discovered that a Wyoming corporation that had worked closely with them and is the entity that is primarily responsible for the conduct complained of by Game Time, has not been named as a defendant in the case.

- [a] Does the U.S. District Court have jurisdiction over all three of Game Time’s counts against Imagination and South? Explain fully.
- [b] Are the defendants likely to succeed in removing the lawsuit from the U.S. District Court to a Virginia circuit court? Explain fully.
- [c] What action, if any, might the defendants take regarding the Wyoming corporation, and are they likely to succeed? Explain fully.
- [d] For subsection (d) only, assume that jurisdiction in the federal court is proper and that the federal court has dismissed Game Time’s federal antitrust claim based upon a motion to dismiss; that only the claims in Count II and Count III remain; and that trial is next month. In preparing jury instructions, should the defendants refer to the Virginia Model Jury Instructions or to Federal Model Jury Instructions? Explain fully.

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[a] The U.S. District Court for the Eastern District of Virginia has jurisdiction over Count I, the claim asserting a violation of federal antitrust laws, and Count II, the claim asserting a violation of Virginia antitrust laws, but not over Count III, the claim for breach of the distributor agreement for \$50,000.

Federal courts have subject matter jurisdiction over federal question claims that assert federal law as the basis for the claim and relief sought. See 28 U.S.C. § 1331. Here, the federal district court thus has original subject matter jurisdiction over the first claim, alleging violations of the federal antitrust statutes.

The court has supplemental jurisdiction over the second claim. The plaintiff is a Maryland (MD) citizen. Limited liability companies’ citizenship is determined by the citizenship of each member of the LLC. Here, we are told that the plaintiff, Game Time, Inc., is a MD corporation. We are also told that Imagination of MD, LLC is a MD limited liability company. Without further facts, a fair inference is that at least one of the members of Imagination of MD is a citizen of MD. Thus, there is a lack of diversity of citizenship. There is no independent basis for subject matter jurisdiction over the second claim because it is not a federal question claim, and there is a lack of complete diversity. However, the Supplemental Jurisdiction statute allows federal courts that have jurisdiction based on, for instance, a federal question claim to hear another claim such as the VA one here if the additional claim arises from the same common nucleus of operative facts as the main, jurisdiction-invoking claim.

The federal antitrust claim and the VA antitrust claim are based on pricing and meet the test.

It was possible to argue that the third count (for breach of the distributorship agreement) satisfied or failed to satisfy the common-nucleus-of-operative-facts-test required for supplemental jurisdiction. The third claim lacks an independent basis in subject matter jurisdiction because (1) there is a lack of complete diversity, and (2) the claim is for \$50,000, less than the amount in controversy requirement for diversity claims (more than \$75,000). Because supplemental jurisdiction would be required for the third claim to stay in federal court, applicants were expected to work with the facts to analyze whether there was a common nucleus of operative facts. A well-reasoned answer reaching either conclusion (that Count III met or did not meet the common nucleus test) would be given credit.

[b] The defendants will not succeed in “removing” the case from the U.S. District Court for the Eastern District of Virginia to a Virginia circuit court. The removal statutes provide only for removing a case filed in state court. See 28 U.S.C. § 1441(a). Under the statute, therefore, the only way that a case could be sent to state court is (1) if the case originated in state court, (2) had been removed to U.S. District Court, and (3) was then remanded because of some defect in the removal process. However, even that is not called “removal” (instead called “remand.”) Defendants will fail in their effort here.

[c] Defendants might (1) bring a motion to dismiss under Federal Rule of Civil Procedure 12 for the failure to include an indispensable party and/or (2) bring a third-party complaint against the Wyoming Company. Under Rule 12, a defending party can move to dismiss for failure to join an indispensable party. If the plaintiff has failed to sue a person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction, that person *must be joined as a party* if:

- [i] In that person’s absence, the court cannot accord complete relief among existing parties, or
- [ii] That person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person’s absence may impair or impede that person’s ability to protect the interest, or leave an existing party subject to a substantial risk of incurring multiple or inconsistent obligations because of the interest.

Here, the facts state that the Wyoming corporation is the entity that is *primarily responsible* for the conduct complained of by Game Time. Thus, it appears that the Wyoming corporation is an indispensable party and is so integral to the lawsuit that the action cannot proceed without it. Under Rule 12, a motion to dismiss for failure to raise an indispensable party is not waivable and can be raised at any time up until and including the trial.

Another action the defendants might reasonably take is to serve a third-party complaint under Federal Rule of Civil Procedure 14. That Rule provides that a defending party may, as a third-party plaintiff, serve a complaint on a non-party who is or may be liable to it for all or part of the claim against it. Here, the facts tell us that the Wyoming corporation is primarily responsible for the conduct complained of by Game Time, so a third-party complaint might also serve the defendants’ purposes here.

[d] In preparing jury instructions, the Federal Court should use Virginia Model Jury Instructions to instruct the jury on substantive law elements and requirements. As to procedure and the federal court’s practice in proceedings, it would still be appropriate to use Federal jury instructions, so long as they do not address substantive state law. In diversity cases and, more to the point, cases in which the federal court has supplemental jurisdiction over state-law claims, settled principles of federalism (most often associated with the *Erie* doctrine) require that the federal court apply state substantive. In a jury trial, that would mean to give instructions on Virginia substantive law. Here, the substantive law instructions on, for instance, the Virginia antitrust claims should be based on Virginia law. Nevertheless, federal courts are not required to change their procedures or practices for handling cases and trials so long as they do not impinge on state substantive law.

28 U.S.C. §§ 1331 & 1367; 28 U.S.C. § 1441; *Majek Fire Protection, Inc. v. Carusone Construction, Inc.* 2006 U.S. Dis. LEXIS 3931, 2006 WL 1704562 (E. D. Pa. 2006); Fed. R. Civ. P. 12; Fed. R. Civ. P. 19; *Kerr v. Marshall University Board of Governors*, 824 F.3d 62 (4th Cir. 2016); *McLaughlin v. Arco Polymers, Inc.*, 721 F.2d 426 (3d Cir. 1983)].

4. [02.22] [Professional Conduct & VCVF] Martha and Fred divorced after 18 years of marriage. At the time of their divorce, Martha and Fred had three living children and one grandchild. Their children Adam (age 17), Brandon (age 14), and Cherry (age 10), live with Martha in Clover, Virginia. A fourth child, Debbi, died while giving birth to their grandson, Garrett, who is now 5 years old. Fred now lives down the street with his son from an earlier marriage, Sam. Martha never adopted Sam, but always thought of him as a son. Garrett also lives with Fred. Since the divorce, Martha, who is employed full-time, has been providing \$1,000 per month spousal support to Fred. Martha’s mother, Betty, lives nearby.

On May 1, 2021, Martha was driving Brandon home from music practice when they were struck by another car, driven by Donald, who had run a stop sign. Donald is unemployed with no assets and very little insurance. Just before they were struck, Martha was using her cell phone and responding to a text message from Betty. Martha and Brandon both died in the crash.

Fred qualified as the personal representative of Brandon's estate. Betty qualified as the personal representative of Martha's estate. Betty and Fred went together to meet with Ann, an attorney, because they wanted to explore wrongful death claims for both Martha's estate and Brandon's estate. Without any hesitation or discussion, Ann agreed to represent both Martha's and Brandon's estates in potential wrongful death actions against Donald.

A few minutes after Betty and Fred left Ann's office, Betty returned alone. She pulled an empty vodka bottle out of her purse and told Ann that when she went to the impound lot to retrieve Martha's personal belongings from the car, she found the bottle underneath Martha's driver's seat. Betty also showed Ann the text from Martha, made around the exact time of the accident. Ann shook her head, glanced at Betty's cell phone and then the trash can and said, "We never had this conversation." They had no further discussion about the text or the bottle, and Martha tossed the bottle into the trash can as she left the office.

- [a] By agreeing to represent both estates, what Virginia Rule(s) of Professional Conduct, if any, did Ann violate? Explain fully.
- [b] Under the Virginia Rules of Professional Conduct, what, if anything, should Ann have done differently when Betty and Fred came to her office together? Explain fully.
- [c] Under the Virginia Rules of Professional Conduct, what, if anything, should Ann have done differently when Betty returned to her office alone? Explain fully.
- [d] After learning that Betty had possession of a vodka bottle that she took from under Martha's driver's seat, and that Martha had been texting Betty just before the accident, can Ann continue to represent Brandon's estate and Martha's estate under the Virginia Rules of Professional Conduct? Explain both fully.
- [e] Who are the proper beneficiaries of a wrongful death claim against Donald for Martha's estate and who are the proper beneficiaries of a wrongful death claim against Donald for Brandon's estate? Explain both fully.

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- [a] The issue is whether Ann can represent both estates since these estates will potentially be co-plaintiffs in a civil litigation matter.

Generally, a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists in two ways, including if there is significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client. Rule 1.7. Simultaneous representation of parties whose interests in litigation may conflict, such as co-plaintiffs, is proper if the risk of adverse effect is minimal and the above-listed requirements are met. Rule 1.7, Comment 23.

Here, Ann agreed to represent both Martha's and Brandon's estates in potential wrongful death actions against Donald. Since this is a civil matter and the estates would be co-plaintiffs, under the rules, Ann would not be barred from representing both parties. Additionally, Fred, who is the personal representative of Brandon's estate, is the ex-husband of Martha and Brandon is Martha's child; and Betty, who is the personal representative of Martha's estate, is the mother of Martha and the grandmother of Brandon. Therefore, the interest of these estates may be aligned and the risk of adverse effect may have been minimal.

Therefore, Ann's agreement to represent co-plaintiffs in a civil matter does not, in and of itself, create a concurrent conflict of interest.

- [b] The issue is what procedures should Ann have followed in order to properly take on the representation since a concurrent conflict of interest may exist when representing co-plaintiffs.

As explained above, a lawyer is not barred from representing co-plaintiffs in a civil litigation matter. Still, a lawyer may only represent a client if each affected client consents after consultation, and: (1) the lawyer reasonably believes that the lawyer

will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and (4) the consent from the client is memorialized in writing. Rule 1.7. The client consultation should include (1) a discussion of any limitations on the scope of the representation made necessary as a result of the common representation (Rule 1.2(b)); (2) that as between commonly represented clients, the attorney-client privilege does not attach (Rule 1.7, Comment 30); and (3) that should a conflict arise, the attorney must withdraw from representation from at least one, if not both, of the parties (Rule 1.9). The lawyer can also decide to decline representation of either or both parties. See also Rules 1.16 and 1.18(d)

Here, without any hesitation or discussion, Ann agreed to represent both Martha's and Brandon's estates in potential wrongful death actions against Donald. Although the estates would be co-plaintiffs in a civil action, and therefore is permitted under the rules, Ann would need to get the consent of each personal representative, and memorialize that consent in writing. Additionally, as explained below, there is a real risk that the interest of the estates will conflict in the future. Therefore, Ann should consider not representing one or both parties. Should she decide to continue with the representation, she should make both clients aware of the limits and risks involved in such a representation.

Therefore, Ann should have consulted with each personal representative and fully explain the potential for a conflict arising, and receive their consent, in writing, for the simultaneous representation.

[c] The issue is what, if anything, Ann should have done differently when Betty returned to Ann's office alone after Ann had agreed to jointly represent both estates.

Even if informed consent can be, and is, obtained at the outset of the joint representation, one or both jointly represented clients may later withdraw this consent. If the client does withdraw consent, then the lawyer must evaluate whether the joint representation can continue and must secure a new informed consent from each client. Rule 1.7 Cmt 19. Additionally, a lawyer shall not obstruct another party's access to evidence or alter, destroy or conceal a document or other material having potential evidentiary value for the purpose of obstructing a party's access to evidence; or counsel or assist another person to do any such act. Rule 3.4. Also, as explained above, lawyer should advise joint clients that, as between them, there is no attorney-client privilege for communications with the lawyer that are related to the joint representation, during the period of the representation. Rule 1.7. This duty of confidentiality extends to all joint clients in the representation and must be reconciled with the lawyer's duty to communicate to keep each client reasonably informed about the status of the matter, and to promptly inform each client of any decision or circumstances with respect to which the client's informed consent is required. Rules 1.6 and 1.4.

Here, Betty came back to Ann's office alone only a few minutes after the initial meeting, which may serve as a sign that Betty does not consent to the joint representation. At that moment, Ann should again follow the process outlined above in part (b). More importantly, Ann should explain to Betty that the attorney-client privilege is not in place, and that she may be under an obligation to reveal what she learned to Fred. Although Ann did not directly tell Betty to destroy evidence, her statement "We never have this conversation," coupled with Betty immediately throwing the bottle away may be sufficient to establish a violation of the rules.

Therefore, Ann should have advised Betty of the issue regarding attorney-client privilege and prevented her from destroying any evidence relating to the case.

Note: We think The BBE should accept the following analysis as proper: Under Rule 3.4(a), "A lawyer shall not (a) Obstruct another party's access to evidence or alter, destroy or conceal a document or other material having potential evidentiary value for the purpose of obstructing a party's access to evidence. A lawyer shall not counsel or assist another person to do any such act." Sitting idly by why Betty attempts to get rid of incriminating evidence (the bottle) clearly violates Rule 3.4. Virginia Rule 1.2(d) further provides, "A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law." The challenge is what Ann must now do with the bottle once Betty has left. She has an obligation to remonstrate with Betty about the need to return the bottle to the scene, if that can be done without altering the evidence or other parties' access to it. Alternatively, she would have to notify Betty of her obligation to turn the bottle over directly to police investigating the incident.]

[d] The issue is whether, despite joint representation being proper on the onset of the representation, can Ann continue to represent both parties when a conflict of interest later arises.

A conflict between the jointly represented clients may arise from developments later in the representation. An impermissible conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. 1.7, Cmt. 23. If such a conflict arises after representation has been undertaken, the lawyer should withdraw from the representation. See Rules 1.7 and 1.16. Most relevant is 1.7(b)(3), which says that joint representation is only possible "where the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal." Additionally, the withdrawing or terminating client then becomes a former client for purposes of Rule 1.9's prohibition against representation of another person in the same or a substantially related matter, if the continuing client's interests in the matter are materially adverse to the interests of the former client. See *also* VA Code Section 8.01-53 (A) (i) and (ii).

Here, what Betty revealed to Ann creates an impermissible conflict, since Brandon's estate may have a claim against Martha's estates. In light of that, Ann must withdraw from representation of both clients. Due to the competing interest of both estates, Ann must withdraw from representation.

Therefore, due to the irreconcilable conflict Ann must withdraw from representing both clients in light of any information that may have been revealed to Ann that could be used against the non-represented former client.

[e] At common law there was no cause of action for the wrongful death of a person. However, Virginia has long recognized such a right under the "wrongful death statute." Virginia Code Section 8.01-53 sets forth the statutory beneficiaries who are entitled to recover for the wrongful death of another. This section defines four classes of beneficiaries which are successive in nature, meaning that no member of a class is entitled to compensation if a member of any of the preceding classes is alive.

Wrongful death of Martha

The statutory beneficiaries entitle to participate are Martha's surviving children, Adam and Cherry, as well as Martha's grandson, Garrett. See Va. Code Section 8.01-53 (A) (i). Since Fred and Martha are legally divorced, Fred is not entitled to participate as a beneficiary. Also, since Martha never legally adopted Sam, he does not qualify as a statutory beneficiary.

Wrongful death of Brandon

Since Brandon leaves no spouse, children or children of a deceased child, one must now look to the second class of statutory beneficiaries. See Va. Code Section 8.01-53 (A) (ii). Brandon's father, Fred and Brandon's two surviving siblings, Adam and Cherry, and half-sibling, Sam, qualify as statutory beneficiaries. See: Wolfe v. Lockhart 195 Va. 479 [1953] [regarding half-siblings]

5. [02.22] [Corporations] In 2010, Owen formed Abingdon Booze Corporation (ABC), a corporation properly organized and validly existing pursuant to the laws of Virginia. ABC obtained an agreement with Argentine Wine, Inc. (Argentine), to be the sole distributor of Argentine's portfolio of bottled wines in the southeastern states of the U.S.

From inception, Owen was the sole shareholder, officer, employee, and director of ABC. The original Articles of Incorporation of ABC included a provision that limited the liability of any officer or director for damages arising out of a breach of fiduciary duty to \$2,000. ABC was properly capitalized and observed all corporate formalities, making all required corporate filings, holding shareholder and board meetings, and keeping proper minutes.

ABC did well for several years. In 2015, Owen sought additional capital. He entered into a stock subscription agreement whereby Isabelle acquired 30% of ABC's stock for \$30,000, and Isabelle guaranteed a bank letter of credit in favor of Argentine that allowed ABC to buy wines on better terms. The subscription agreement also provided that Owen remained the sole employee and manager of the business of ABC. Over time, Owen and Isabelle had a series of disagreements, and they became adversarial.

Without notifying Isabelle, Owen started another corporation, Bristol Booze Company, Inc. (BBC). BBC operated out of the same facility as ABC and used ABC's equipment. BBC did not compensate ABC for use of the facility or equipment. BBC

initially sold cheaper wine than the wine from Argentina. Over time, Argentine became dissatisfied with ABC and threatened to terminate the agreement. Owen then negotiated an agreement between BBC and Argentine so that BBC would replace ABC as the sole distributor of Argentine's products. BBC then started selling only the Argentine Wines and ABC began selling the cheaper wines that BBC originally sold at substantially less profit for ABC.

Isabelle discovered what Owen had done. She sued Owen in the Circuit Court of Washington County, Virginia. Isabelle alleges that Owen breached the fiduciary duty owed to ABC and seeks to recover damages for herself directly from Owen measured by the diminution of the value of Isabelle's 30% interest in ABC. The Complaint asserts that a suit directly against Owen is proper because ABC is a close corporation functioning essentially as a partnership in which Owen is the General Partner.

Owen asserts three defenses to Isabelle's Complaint.

- [a] How should the court rule on Owen's defense that he is protected from liability by the Business Judgment Rule? Explain fully.
- [b] How should the court rule on Owen's defense that his liability is capped at \$2,000 by the provision in ABC's Articles of Incorporation? Explain fully.
- [c] How should the court rule on Owen's defense that Isabelle's claim must fail because it is a corporate cause of action, not a claim accruing personally to Isabelle? Explain fully.

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[a] The court should rule against Owen on his defense that he is protected from liability by the business judgment rule. First, it is not clear that Owen's actions constituted decisions on behalf of ABC, and to the extent that Owen was not making decisions on behalf of ABC, the business judgment rule is inapplicable. Second, in Virginia, the business judgment rule is a good faith standard. In this case, Owen operated BBC out of ABC's facility and used ABC's equipment without paying compensation, and he misappropriated ABC's exclusive distributorship with Argentine for BBC. There is no basis for Owen to argue that he took these actions in the good faith belief that they were in the best interest of ABC. Rather, these actions constituted clear violations of his duty of loyalty to ABC. Thus, he would not be protected by the business judgment rule.

[b] The court should rule against Owen on his defense that his liability is capped at \$2000 by the provision in ABC's Articles of Incorporation. The Virginia Code does allow corporations to cap liability of officers and directors in the articles of incorporation. However, such a cap does not apply to willful misconduct. Here, it is clear that Owen acted intentionally, knowing that his conduct was wrong. His conduct constituted a clear misappropriation of assets from ABC. Thus, the cap in the articles of incorporation does not apply in this situation.

[c] The court should rule for Owen on his defense that Isabelle's claim must fail because it is a corporate cause of action, not a claim accruing personally to Isabelle. Isabelle claims that Owen breached his fiduciary duty of loyalty. That duty is owed to the corporation itself and not to the individual shareholders. Unlike some other states, Virginia does not recognize an exception to this rule in the case of small, closely held corporations. Thus, this action should be brought by the corporation, or as a derivative action on behalf of the corporation, but not by a shareholder individually. Here, the facts indicate that Isabelle sued Owen and that she seeks to recover damages for herself. Thus, Isabelle has improperly brought the claim as a direct action.

6. [02.22] [Real Estate & Torts] In January 2021, Abe entered into a real estate purchase and sale agreement (the Agreement) to buy a residential subdivision lot in Hampton, Virginia (the Home Lot) from Ronnie for \$75,000. The Agreement required Ronnie to convey the Home Lot by general warranty deed subject to then existing utility easements on the property. The Agreement described the utility easements as present along the rear portion of the Home Lot and identified a particular part of the Home Lot on which Abe intended to build a house. In the Agreement, Ronnie warranted that the utility easements would not interfere with the construction of Abe's house in the intended location. The Agreement provided that the closing and settlement of the transaction would occur in March 2021.

In late February 2021, Ronnie was approached by Tidewater Utility (Tidewater) to grant an easement for installation of an electric utility line across the Home Lot. After negotiations with Tidewater, and without telling Abe, on March 1, 2021, Ronnie entered into an agreement granting Tidewater an easement for the power line across the Home Lot. This new easement

ran directly through the part of the Home Lot where Abe intended to build his house. The Tidewater easement was properly recorded in the land records in Hampton on March 5, 2021.

As a part of his due diligence investigation for the property, Abe engaged a local title company to perform a title examination and to handle the closing and settlement. The title company failed to discover the Tidewater easement. The closing and settlement occurred on March 15, 2021. The deed conveying the Home Lot to Abe did not identify the Tidewater easement, but recited that the conveyance was “made subject to all easements of record.”

In June, as Abe was preparing to build his home, Tidewater notified him that it planned to commence installation of a distribution power line on its new easement across the Home Lot. The power line construction would significantly disrupt Abe's homebuilding plans and make it undesirable to build a home there.

Abe has brought an action against Tidewater to prevent the construction of the power line.

- [a] Is Abe likely to succeed in preventing Tidewater from constructing the power line on the easement across the Home Lot? Explain fully.
- [b] In an action for breach of contract by Abe against Ronnie, what defense might Ronnie reasonably raise and who is likely to prevail in the lawsuit? Explain fully.
- [c] In an action for fraud by Abe against Ronnie, what defense might Ronnie reasonably raise and who is likely to prevail in the lawsuit? Explain fully.

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[a] The issue is whether Abe can prevent Tidewater from constructing the power line on the easement across the Home Lot since Tidewater was granted and recorded the easement before Abe was granted title to the property.

On its face, Virginia's recording statute reads as a notice statute. See Va. Code Ann. § 55-96. However, the Virginia Supreme Court has found no error in the trial court's conclusion that Virginia's recording act makes Virginia a race-notice jurisdiction. *Duty v. Duty*, 661 S.E.2d 476 (Va. 2008). Under a notice statute analysis, a subsequent bona fide purchaser that takes without notice will prevail over a prior property interest holder. Notice can occur in three ways, including record notice. Under a race-notice analysis, the subsequent purchaser must take without notice, and must record their interest first.

Here, although Abe entered into an Agreement to purchase the property from Ronnie on January 21, Abe did not become the title holder until March 15. Prior to that on March 1, Ronnie granted an easement to Tidewater. Tidewater then properly recorded this easement on March 5. Although the facts are silent as to when Title Company conducted a search of the record, the facts do read that the Title Company “failed” to discover Tidewater's recording. Thus, it can be inferred that when Title Company conducted the search it could have found Tidewater's recording. Nevertheless, the recording occurred before Abe's closing date.

Therefore, under either approach Abe will not be successful in preventing Tidewater from constructing the power since Tidewater recorded its easement prior to Abe's closing.

[b] The issue is whether Ronnie can successfully defend against a breach of contract claim by Abe since has already accepted the deed.

Under the doctrine of merger, provisions in a contract for sale are extinguished and merged into the deed. Therefore, if a buyer has a claim against a seller, then the basis of the claim must be based on the covenants in the deed, if any, and not on the contract itself. However, provisions which are collateral to the passage of title and not covered by the deed are not merged into the deed and survive its execution. Not all agreements between the parties regarding the purchase and sale of the property are contained in the deed. Such agreements are considered collateral to the sale if they are distinct agreements made in connection with the sale of the property, if they do not affect the title to the property, if they are not addressed in the deed, and if they do not conflict with the deed. See *Woodson v. Smith*, 128 Va. 652 (1920); *Beck v. Smith*, 260 Va. 452, 538 S.E.2d 312 (2000); *Winn v. Aleda Construction*, 227 Va. 304 (1984). If an agreement meets these criteria, it is a collateral agreement, is not merged into the deed, and survives the execution of the deed.

Here, the contract for the sale the Home Lot including a provision that Abe would only take the property subject to then

“existing” easements, and that no easement would interfere with the construction of the home Abe intended to build. At the closing, Abe accepted a general warranty deed that acknowledged that he took “subject to all easements.” Therefore, Ronnie’s best defense is that the terms of the contract merged with the deed, and Abe can no longer sue for breach of contract. However, Ronnie is likely to lose this argument. In this case, the provision in the sales contract regarding the impact of easements is a distinct agreement, and the impact of utility easements on Abe’s intended use of the property was collateral to the transfer of title, was not merged into the deed, and survived the execution of the deed.

Therefore, Ronnie best defense is based on the merger doctrine, but this defense will fail since the impact of the easement was collateral to the transfer of title.

[c] Ronnie may reasonably raise the defense that Abe is charged with imputed knowledge of the Tidewater easement. The issue is whether Abe is entitled to rely on Ronnie’s representation that the utility easements would not interfere with the construction of Abe’s house in the intended location. Based on Abe’s imputed knowledge of the Tidewater easement, Ronnie is likely to prevail with regard to the action for fraud.

To establish fraud, Abe must prove a false representation of a material fact made knowingly by Ronnie, with the intent to mislead and be relied upon by Abe to his detriment. The element of misrepresentation can also be established by proving a concealment of a material fact. Reliance may not be justified, however, when a potential buyer undertakes investigation regarding a matter at issue because the buyer is charged with knowledge that the investigation reveals or knowledge that would have been revealed had the investigation been pursued diligently.

Here, Abe would contend that Ronnie’s failure to notify Abe of the Tidewater easement was a knowing misrepresentation of Ronnie’s knowledge that it would interfere with the location of Abe’s home. Ronnie was aware of Abe’s intended use and conveyed an easement to Tidewater without telling Abe about the easement. However, the local title company that conducted the title exam, as well as the closing and settlement on March 15, should have discovered the Tidewater easement because it was properly recorded in the land records in Hampton on March 5. By engaging the local title company to perform the title exam, Abe is charged with the knowledge of the existence and location of the Tidewater easement. With such imputed knowledge, Abe was in a position to determine whether the easement interfered with his use of the property and is not entitled to rely on Ronnie’s representation that the utility easements would not interfere with the construction of Abe’s house. Thus, Ronnie is likely to prevail.

See *Beck v. Smith*, 260 Va. 452 (2000); *Winn v. Aleda Const.*, 227 Va. 304 (1984); *Van Deusen v. Snead*, 247 Va. 324 (1944).

7. [02.22] [VCVP] In January 2017, Marshall started a local marketing and advertising agency in Henrico County, Virginia. Marshall approached several former co-workers and friends about joining the new company. One long-time friend, Frank, did not want to be an employee, so in February 2017, Marshall hired him as an independent contractor to design and deliver creative content based on specifications provided by Marshall and his clients. Frank was responsible for designing ad campaigns, writing ad copy and marketing strategies.

From the beginning, Marshall was not pleased with Frank’s work product. On June 20, 2017, Marshall sent Frank an email advising him of his disappointment with Frank’s performance. The email detailed several examples of Frank’s work product, accused him of incompetence and demanded immediate improvement. Marshall also told him his submissions to date did not meet the specifications from him or the clients and claimed that Frank was in breach of their contract for his services.

Frank received the email on June 20, 2017, and immediately called Marshall and accused him of breaching their contract by constantly changing the specifications. Frank said, "You agreed to pay me \$300 per hour, and you owe me for the 200 hours of work I've already performed." Marshall denied he had agreed to pay Frank on an hourly basis, stating he had agreed to pay Frank a flat fee of \$20,000 upon delivery of completed work product for each ad campaign.

Frank then sent Marshall a copy of an email he claimed Marshall had sent to him, dated February 15, 2017, which referenced the \$300 hourly rate. Marshall denied writing or sending the email and accused Frank of lying and forging the email. After several heated conversations, Frank delivered the work he had done, although most of it was incomplete.

In April 2018, Marshall was out drinking with several of his and Frank’s mutual friends and Marshall told them about Frank’s poor performance. While at the bar, he forwarded each of them a copy of the 2017 email he had written to Frank accusing Frank of incompetence.

Frank didn't learn that his friends had been given the email until June 27, 2019, when one of Frank's friends told him

she had received the email from Marshall while at the bar.

On June 26, 2020, Frank filed a three-count Complaint against Marshall in the Circuit Court of Henrico County with the following allegations:

- Count I alleges that Marshall breached an oral promise to pay Frank on an hourly basis and seeks \$70,000 in damages.
- Count II, pleaded in the alternative, alleges that Marshall breached a written contract, evidenced by the email dated February 15, 2017.
- Count III alleges defamation and seeks \$200,000 in compensatory damages and \$1,000,000 in punitive damages on the ground that Marshall sent Frank's friends copies of Marshall's June 2017 email that accused Frank of incompetence.

As soon as the trial began, Marshall moved to dismiss all three counts on the ground that the statute of limitations had run, an issue that had been preserved for trial. The court granted Marshall's motion as to Counts I and III and dismissed those counts with prejudice. The court denied Marshall's plea of the statute of limitations as to Count II.

After the jury was empaneled and both sides gave their opening statements, Frank sensed that the jury believed Frank had, in fact, invented the February 15th email on which Count II was based. Frank moved to nonsuit the entire case, including Counts I and III. The trial judge ruled that Frank could not nonsuit Counts I and III but entered the nonsuit as to Count II.

- [a] Did the court err in sustaining Marshall's plea of the statute of limitations as to Counts I and III, and overruling the plea as to Count II? Explain fully.
- [b] Did the court err in refusing to permit Frank to nonsuit Counts I and III, and in permitting him to nonsuit Count II? Explain fully.

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- [a] The court did not err in sustaining Marshall's plea of the statute of limitations as to Counts I and III, but did err in overruling the plea as to Count II. The bar dates for each count depend on when the causes of action asserted in these counts accrued and the governing statute of limitations for each.

Count I

With regard to Count I, alleging breach of Marshall's oral promise to pay Frank on an hourly basis, the statute of limitations under Virginia law is three years. Specifically, in actions upon any unwritten contract, express or implied, the action must be brought within three years after the cause of action has accrued. Va. Code Section 8.01-246(4). Furthermore, the cause of action for breach of contract accrues when the breach occurs. Va. Code Section 8.01-230.

Here, Frank called Marshall on June 20, 2017, after he received Marshall's email in which Marshall demanded immediate improvement from Frank and told Frank his submissions to date did not meet the specifications from him or the clients. In that call, Frank accused Marshall of breaching their contract by constantly changing the specifications. Frank also told Marshall, "You agreed to pay me \$300 per hour, and you owe me for the 200 hours of work I've already performed." In response, Marshall denied he had agreed to pay Frank on an hourly basis, stating he had agreed to pay Frank a flat fee of \$20,000 upon delivery of completed work product for each ad campaign.

Based on these facts, it appears that Frank considered Marshall to be in breach of the oral promise to pay Frank on an hourly basis on June 20, 2017. Thus, his cause of action accrued on that date and the three-year statute of limitations ran on June 20, 2020. Because Frank filed his action on June 26, 2020, the trial court did not err in sustaining the plea of statute of limitations as to this claim.

Count II

With regard to Count II, alleging breach of written contract based on the February 15, 2017 email allegedly sent by Marshall to Frank, the statute of limitations for written contracts under Virginia law is generally five years. Specifically, in actions

on any contract that is in writing and signed by the party to be charged thereby, the action must be brought within five years after the cause of action has accrued. Va. Code Section 8.01-246(2). However, in actions upon a contract that is in writing and not signed by the party to be charged, the action must be brought within three years after the cause of action accrued. Va. Code Section 8.01-246(4). As stated above, the cause of action for breach of contract accrues when the breach occurs. Va. Code Section 8.01-230.

Here, Frank claims that an email dated February 15, 2017, was written and sent by Marshall to Frank referencing the \$300 hourly rate and that this email constitutes a written contract. However, there is no indication that this email was signed by Marshall, who is the party to be charged in this action. In fact, Marshall denied writing or sending the email and accused Frank of lying and forging the email. Accordingly, the three-year statute of limitations should be applicable. As stated previously, it appears that Frank considered Marshall in breach of the agreement to pay an hourly rate on June 20, 2017. Thus, the statute of limitations also ran on this claim on June 20, 2020. Therefore, the court should have sustained the plea of statute of limitations as to this claim as well and erred in overruling it.

Count III

With regard to Count III, alleging defamation, the statute of limitations under Virginia law is one year. Therefore, every action for injury resulting from defamation must be brought within one year after the cause of action accrued. Va. Code Section 8.01-247.1. Furthermore, under Virginia law, the right of action shall be deemed to accrue and the prescribed period begins to run from the date injury is sustained, and not when the resulting damage is discovered. Va. Code Section 8.01-230. For defamation actions, the cause of action accrues on the date the defamatory acts occurred. *Askew v. Collins*, 283 Va. 482 (2012); *Jordan v. Shands*, 255 Va. 492 (1998); *Bass v. E.I. DuPont De Nemours & Co.*, 28 Fed. Appx 201, 2002 WL 27148.

Here, Frank's defamation claim is based on the ground that Marshall sent Frank's friends copies of Marshall's June 2017 email that accused Frank of incompetence. Marshall sent the email to Frank's friends in April 2018 when Marshall was out drinking with these friends at a bar. This is the date the defamatory acts allegedly occurred and, therefore, the date Frank's cause of action accrued. The one-year statute of limitations ran on this claim in April 2019. Although Frank did not learn of the defamatory acts until June 27, 2019, there is no discovery rule for defamation claims in Virginia except where a publisher publishes anonymously or under false identity on the internet. Va. Code Section 8.01-247.1. That exception does not apply here. Because Frank filed his complaint on June 26, 2020, the court did not err in sustaining the plea of statute of limitations as to this court.

[b] The court did not err in refusing to permit Frank to nonsuit Counts I and III, and in permitting him to nonsuit Count II. This question raises the issue of whether Frank could nonsuit claims that had previously been dismissed with prejudice.

Under Virginia law, a plaintiff may take one nonsuit as a matter of right within certain limitations. A party shall not be allowed to suffer a nonsuit as to any cause of action or claim unless he does so before a motion to strike the evidence has been sustained or before the jury retires from the bar or before the action has been submitted to the court for decision. Va. Code Section 8.01-380(A). The term, "the action," in the nonsuit statute refers to the action then pending before the court, which means only the counts or claims remaining in a case at the time the nonsuit request is made. Claims that have been dismissed with prejudice are not part of a pending action. See *Dalloul v. Agbey*, 255 Va. 511 (1998); *Gilbreath v. Brewster*, 250 Va. 436 (1995).

Here, the court dismissed Counts I and III with prejudice after Marshall moved to dismiss the claims on the grounds that the statutes of limitations had run. Subsequently, Frank moved to nonsuit the entire case after opening statements were delivered to the jury. At that time, Counts I and III were no longer pending and were not subject to nonsuit. Not only had they been submitted to the court for decision, the court had made the decision, dismissing both counts with prejudice. Thus, Frank was not entitled to nonsuit claims that had already been decided and the trial court did not err in refusing to permit Frank to nonsuit Counts I and III. See *Khanna v. Dominion Bank of Northern Virginia, N.A.*, 237 Va. 242 (1989).

The action that was properly subject to Frank's nonsuit request was comprised only of Count II, the claim that was still remaining after Counts I and III were dismissed. Furthermore, as to Count II, Frank's request was made after opening statements. As such, no motion to strike had been made and the request for nonsuit was made before the jury retired from the bar. Accordingly, the court did not err in permitting Frank to nonsuit Count II.

8. [02.22] [Personal Property] Paige inherited an antique rug from her great aunt. She took the rug to Daniel's Persian Rugs and Antiques (DPRA) in Salem, Virginia to have it cleaned. When Daniel, the owner of DPRA, unrolled it, he became very excited and stated that the rug was a rare hand knotted silk and wool Isfahan rug from Iran. He commented that it was

very valuable. They both took pictures of the rug. Daniel told Paige to return in four weeks to pick up the cleaned rug because he had a backlog of rugs for cleaning. Daniel gave Paige a ticket for cleaning that stated: "Isfahan rug – blended silk and wool. 4 x 6 feet. Clean for \$200." On the back of the ticket in small writing it stated: "The parties hereto agree that the limit of liability for any services of DPRA is \$1,000." Paige never read the back of the claim ticket and it was not discussed with Daniel.

After Paige left the store, Daniel showed Luther, one of his employees at DPRA, the rug and explained that it was rare and in exceptional condition. He told Luther that Isfahan was the capital of Persia and that the rug was from the early 1700s. He estimated the value at \$25,000. Daniel placed Paige's rug in the section of rugs in his store in line to be cleaned until he could get to it the following week.

The next day, when Daniel was not working, Barry came into the store and asked Luther if they had any "very special rugs." Barry was a wealthy antique collector and had purchased many items from the store over the years. Luther told Barry that there was a very valuable Isfahan Persian rug available for \$15,000. Barry asked to see it and Luther took Paige's rug from the back and unrolled it. Barry agreed to buy the rug and paid with a check for \$15,000. Luther told Barry not to make the check payable to DPRA, because he would stamp the store name on the check. However, after Barry left with the rug, Luther made the check payable to himself. Luther called Daniel the next day to say he would be out for at least a month because he tested positive for COVID-19. Luther cashed the check, but never returned to work and his whereabouts are unknown.

A week later, Daniel searched for Paige's rug as it was next in line for cleaning. He could not find it anywhere and called Paige to tell her that he was very upset, but he had misplaced or lost the rug.

A few weeks later, Paige attended a party at Barry's house. Barry showed the guests the rug he just acquired. Paige looked at the picture of her rug on her phone and realized that this is her missing rug. She explained the situation to Barry in private and he told her that he paid \$15,000 for the rug and it belongs to him. Barry, Paige, and Daniel met the next day at the shop. They involved the police and ultimately learned of Luther's actions. Barry is still in possession of the rug. Paige and Daniel have filed criminal charges against Luther.

- [a] What must Paige prove to establish a bailment and breach of bailment against DPRA for the rug? Explain fully.
- [b] What defense(s) to Paige's bailment action might DPRA reasonably raise, and is it likely to succeed? Explain fully.
- [c] What right, if any, might Barry assert to the rug and is he likely to succeed? Explain fully.

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[a] To establish a bailment, Paige must prove she, the bailor, delivered the goods, the rug, to the bailee, DPRA, and that the bailee accepted the goods. The bailee must have physical control over the property and intent to exercise that control. Here, it is clear that Paige delivered the rug to DPRA and that DPRA accepted it. Additionally, DPRA had physical control over the rug – the rug was left in DPRA's store - and intended to exercise that control – DPRA took possession of the rug to clean it.

To establish breach of the bailment against DPRA, Paige must prove that DPRA failed to exercise ordinary care. The standard of care in a bailment depends on the nature of the bailment. Where the bailment is for the mutual benefit of the bailor and the bailee, ordinary due care is required. Here, the bailment was mutually beneficial. Paige was having her rug cleaned and DPRA was getting paid to clean the rug. Thus, DPRA was required to exercise ordinary due care and Paige will have to prove the DPRA was negligent in its handling of the rug in order to establish a breach of the bailment.

[citation: Morris v. Hamilton, 225 Va. 372 (1983)]

[b] In response to Paige's bailment action, DPRA may raise the defense that it limited its liability to \$1,000; however, DPRA is not likely to succeed on this defense. The limitation of liability is not likely to be considered a contract binding against Paige. To be an effective disclaimer or limitation of liability, the bailor must know of, or should have known of, and assent to the contractual limitation. Here, Paige simply took the claim ticket. Paige never read the back of it and she did not discuss it with Daniel. Thus, DPRA will not likely prevail on a defense that it has limited its liability.

[c] Barry will assert a claim to the rug as a buyer in the ordinary course of from a merchant of goods of the kind, and he is likely to prevail on this claim. Generally, a seller can transfer only the title that he has. Here, DPRA did not have title to the rug. However, under the UCC, as adopted by Virginia, entrusting goods to a merchant who deals in goods of the kind gives

the merchant power to transfer all rights of the entruster to a buyer in the ordinary course of business. A buyer in the ordinary course of business is a person who buys in good faith and without knowledge that the sale to him is in violation of the ownership rights of a third party in the goods. Here, Paige, owner of the rug, entrusted the rug to DPRP, which is a merchant in the business of selling rugs. Additionally, Barry has a viable argument that he was a buyer in the ordinary course of business. Paige may argue that Barry did not act in good faith as he paid substantially less than the fair market value of the rug and because Barry was an experienced collector who may have realized that the price of the rug was lower than its value. However, the difference between the price Barry paid and Daniel's estimate of the value, particularly given that the value of such goods may be hard to determine with precision, likely is not enough to show that Barry did not act in good faith. Accordingly, Barry will likely win on his claim that he has superior rights in the rug.

Comment: Note: Full credit should also be awarded for a well-reasoned answer concluding that Barry will not prevail against Paige on his claim to the rug because the claim of a BFP is good against all but the true owner.

9. [02.22] [Wills & Estates] Manny and Winny, who have never been married to each other, live together in Herndon, Virginia. Manny had two adult children from a prior marriage, Able and Bertha. Able had two children, Edwina and Fiona, before he died in 2015. Winny has a child from an earlier marriage, Cal.

In 1999, Manny executed a valid will leaving "everything I own to Winny, but if Winny predeceases me, I leave everything to my children and their heirs, per stirpes." Winny never executed a will.

In 2001, Manny and Winny had their own child, Dora. Dora has two children, Gwen and Ike.

Manny and Winny are not well off but own a couple of prized possessions. Manny has 12 Beanie Baby collector's toys, each having the same value. Winny owns 20 rare coins. Like the Beanie Babies, the coins each have roughly the same value.

Manny and Winny have a bank account that they hold as joint tenants with right of survivorship with a balance of \$6,000. They have nothing else of material value. They have no debts.

Manny and Winny were struck by lightning on May 1, 2021. Manny died that day. Winny was seriously injured and died on May 3, 2021.

[a] What assets are in Manny's estate? Explain fully.

[b] What assets are in Winny's estate? Explain fully.

[c] Who are the beneficiaries of Manny's estate and what will each inherit? Explain fully.

[d] Who are the beneficiaries of Winny's estate and what will each inherit? Explain fully.

✖✖

[a] The assets of Manny's estate will include his 12 Beanie Baby toys, plus one-half of the \$6,000 bank account. The latter asset passes half as if Manny survived Winny pursuant to Va. Code 64.2-2203, part of the Uniform Simultaneous Death Act (since Winny failed to survive Manny by 120 hours).

[b] The assets of Winny's estate will include her 20 rare coins, plus one-half of the \$6,000 bank account, for the same reason explained in part (a) above. Her estate does not include any assets received from Manny's estate because she failed to survive him by 120 hours.

[c] Manny's estate will pass under his will to his children and grandchildren, one-third to Bertha, one-third to Dora, and one-sixth each to Edwina and Fiona. (That is the effect of a per stirpes distribution under Virginia law.) The distribution of Manny's estate is not affected by the omitted child statute, Va. Code 64.2-420, because his will refers to children generically, not by name; interpreting the will as of the date of Manny's death, Dora takes a share by virtue of being one of Manny's "children," not because of the omitted child statute. The Beanie Baby toys will be split into one-third and one-sixth shares, as will the \$3,000 portion of his bank account.

[d] Winny's estate passes by intestacy one-half to Cal and one-half to Dora. Each will receive 10 coins plus half of the \$3,000 portion of her bank account. Nothing passes to Manny because he did not survive Winny by 120 hours.