

Completed March 24, 2018 (4:10pm)

✖✖ 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. jrjz

### Summary of suggested answers & annotations to the essay part of the February 2018 Virginia Bar Exam

Prepared by the following *attendees*, who were at the post exam meeting with the VBBE: J. R. Zepkin of William & Mary Law School, Emmeline P. Reeves of University of Richmond Law School, Benjamin V. Madison III of Regent University Law School, & C. Reid Flinn who is on the adjunct faculty of William & Mary Law School, Washington & Lee Law School and University of Richmond Law School.

The following, while not attending the meeting, provided us great help with suggested answers in each's particular area[s] of specialty: William H. Shaw, III, John Donaldson & Eric Chason of William & Mary Law School, Samuel W. Calhoun, Robert T. Danforth, Jonathan Shapiro, and Mark A. Williams of Washington & Lee Law School and Bradley P. Jacob, Lynne Marie Kohm, Kathleen A. McKee, Kim Van Essendelft, Louis W. Hensler, III and Jeffrey A. Brauch of Regent University School of Law.

1. [02/18] [Criminal Constitutional] In the early morning hours of December 22, 2017, Officer Wilson saw Jerry walking alone down a street in Wise, Virginia. Earlier that evening, a house in a nearby neighborhood had been burglarized. Several pieces of unique jewelry had been stolen, including two championship rings from Super Bowls I and II. Believing that Jerry could have been involved in the burglary, Officer Wilson parked his patrol car and approached Jerry on foot.

When Officer Wilson approached Jerry, he assumed a friendly demeanor. He asked Jerry what he was doing on the street that night and where he lived. Before Jerry responded, Officer Wilson told him that a nearby house had been robbed and asked if he could search him. Jerry told Officer Wilson, "I didn't do anything, man, but do whatever." He then lifted his hands above his head. Officer Wilson reached into Jerry's pocket and found one of the Super Bowl rings along with a bag containing 50 marijuana cigarettes.

After he found the ring and marijuana, Officer Wilson told Jerry that he needed to speak with him in his patrol car. Jerry walked with the officer to the patrol car and got in the back seat. After Jerry got in the car, Officer Wilson said, "Look, buddy, I'm going to have to take you in for the marijuana that I found in your pocket, but it may help you out later if you tell me where you got that ring." Jerry told the officer that he had stolen it from a house down the road earlier that night.

Jerry was charged with several offenses regarding the theft of the Super Bowl ring and the unlawful possession of marijuana. Before his trial, Jerry timely moved to suppress the evidence that Officer Wilson found in his pocket. Jerry also moved to suppress the statements that he made to Officer Wilson. The Circuit Court of Wise County denied both of Jerry's motions.

- (a) Did the Circuit Court err by denying Jerry's motion to suppress the evidence obtained from his pocket? Explain fully.
- (b) Did the Circuit Court err by denying Jerry's motion to suppress the statements he made to Officer Wilson? Explain fully.

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- (a) No. The Fourth Amendment protection against unreasonable search and seizure was not implicated when Officer Wilson approached Jerry on the street and asked permission to search him. This was neither an arrest (requiring probable cause), nor a stop authorized by *Terry v. Ohio*, (requiring reasonable suspicion). Officer Wilson had neither, but he did not need either one.

This was a consensual encounter. Officer Wilson then asked permission to search Jerry and Jerry granted it by saying, "Do whatever." His consent was voluntary under the *Bustamante* "totality of the circumstances" test. There was no threat made, no accusatory tone, there was no demand to search, there was no form of

restraint employed, and Jerry was free to walk away. The search was legal.

- (b) Yes. Jerry's statements to Officer Wilson should have been suppressed assuming his claim in the Circuit Court was made under authority of *Miranda v. Arizona*. *Miranda* established a two-part test for determining whether statements made without "Miranda" warnings are admissible. First, the defendant must be in custody. Second, the defendant's statements must have been made in response to interrogation.

Both of these requirements have been met. Officer Wilson told Jerry that he was going to have to speak with him in his patrol car. That is equivalent to a statement that Jerry was not free to leave, which is the test for custody. Beyond that, the officer affirmatively told Jerry that he was going to have to take him in – again, sufficient to establish custody.

Officer Wilson then questioned Jerry by telling him it might help him if he told the officer where he got the ring. While not a direct question, the officer should have understood that a reasonable person would understand that to be interrogation. Jerry's statement in response, made without being given his *Miranda* warnings, should have been suppressed.

2. [02/18] [Va. Civil Pro & Creditors Rights] Chris Creditor (Creditor) was awarded judgment against Don Debtor (Debtor) in Henrico County Circuit Court on March 5, 2017, in the amount of \$30,000. Debtor is unemployed, but has the following assets:

- (a) A home in the City of Richmond that he owns with his wife, Wanda, as tenants by the entirety. The residence has a fair market value of \$100,000 and is encumbered by the lien of a first deed of trust securing a note for \$90,000 in favor of Bank 1.
- (b) A bank account at Bank 2 which is titled in the names of both Debtor and Wanda. This account has a balance of \$4,000.
- (c) A 2012 Ford Taurus automobile titled in Debtor's name. The title to the car issued by the Department of Motor Vehicles lists a lien in favor of Bank 3 which resulted from its loan to Debtor to purchase the car. The fair market value of the car is \$9,000.

On July 11, 2017, Creditor took the following actions to enforce his judgment against Debtor:

- He filed an abstract of judgment in the Clerk's Office of the Richmond Circuit Court describing the \$30,000 judgment he had obtained in Henrico County Circuit Court.
- He filed separate garnishment summonses against Bank 2 and Bank 3 in Henrico County Circuit Court seeking "any sums of money in your possession to which Debtor is or may be entitled." These summonses were properly delivered by the Clerk to the Henrico County Sheriff's Office on July 12, 2017.
- He filed a writ of *feri facias* in the Henrico County Circuit Court against the Ford Taurus.

On July 12, 2017, the writ was properly delivered to the Sheriff who levied on the Taurus and towed it to the impound lot on the same day.

When the garnishment summons was received by Bank 2 on July 14, 2017, the Bank put a hold on the \$4,000 in Debtor and Wanda's account and notified them of this action. Bank 2 filed an answer with the Henrico County Circuit Court indicating that the \$4,000 and any additional amounts deposited prior to the return date would be forwarded to the Court on the scheduled return date.

When the garnishment summons was received by Bank 3 on July 15, 2017, Bank 3 determined that it had no money to which Debtor was entitled, but while searching the bank records, Joe Oliver, the bank officer at Bank 3 who oversaw Debtor's account, discovered that Debtor owed a balance of \$7,500 on the loan for the Taurus. Joe could not find any

evidence that Bank 3 had filed a UCC financing statement securing the car loan and hurriedly filed one in the Clerk's office of the Richmond Circuit Court. Joe, on behalf of Bank 3, then demanded that Debtor immediately pay the balance on the car loan.

In response to Creditor's actions to enforce his judgment and Bank 3's demand, Debtor has made the following claims:

- (a) Any value in the marital residence cannot be attached to satisfy the judgment because filing an abstract of judgment is not sufficient to attach a judgment lien on the residence which is in a jurisdiction other than the one in which the judgment was obtained.
- (b) Any value in the marital residence cannot be attached because the residence is owned as tenants by the entirety by Debtor and Wanda.
- (c) Any funds in the account at Bank 2 are unavailable to Creditor because Debtor and Wanda are joint owners of the account and the judgment is only against Debtor.
- (d) Any value in the Ford Taurus should be applied to pay off Creditor rather than Bank 3 because of Bank 3's failure to timely record the UCC financing statement.

Is Debtor likely to prevail on any of his claims? Explain fully.

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- (a) An abstract of judgment from a Virginia court in one jurisdiction, docketed in a Virginia circuit court of another jurisdiction, will create a judgment lien on any real estate owned by the judgment debtor[s] in the jurisdiction where the judgement was recorded. This is subject to (b)
- (b) The home is owned by Don & Wanda as Tenants by the Entirety. Don is the sole judgment debtor. A creditor of just one tenant to a tenancy by the entirety can not reach the property so long as this tenancy continues.
- (c) Debtor's interest in the bank account in Bank 2 is reachable. Under Va. Code §6.2-606, a debtor's interest in a bank account in joint names with another can be reached. The ownership is in proportion to the net contributions by each to the sums on deposit, except that a joint account between persons married to each other shall belong to them equally, and unless, in either case, there is clear and convincing evidence of a different intent.

Attendees thinking: It's not necessary to refer to the Va. Code section by number, but the answer should recognize that the interest of each owner in a joint bank account can be reached to satisfy a claim against just one owner.

- (d) As to liens on motor vehicles, liens are perfected by having the lien noted on the title to the vehicle by registering the security interest with DMV not by filing a financing statement. Va. Code §46.2-638 specifically exempts motor vehicles [when not that part of an inventory] from normal UCC filings. Bank 3 will prevail and has a priority claim of \$7500.00 of the car's \$9000.00 value.

Attendees thinking: An answer that provides a UCC analysis and concludes that b/c the bank's lien is shown on the title to the vehicle, Bank 3 will prevail, is likely to enjoy significant credit.

3. [02/18] [Real Property & Va. Civil Pro] Soon after their marriage Dick and Jane purchased a home on a residential lot in Wythe County, Virginia. They acquired title as tenants by the entirety, with the right of survivorship, as at common law. Jane then built a garage and apartment building next to the residence on the same lot. She paid for the apartment building with funds inherited by her from her Uncle Leo. The building is currently valued at \$90,000. Thereafter, their marriage failed, and a no fault divorce was granted in 2016. The divorce did not address property rights. At the time of the divorce, the house and lot had been fully paid for.

On February 1, 2017, Dick took out a loan at Hometown Bank for \$100,000 secured by a properly executed and recorded deed of trust conveying all his rights, title and interest in the property.

Dick and Jane were unable to agree on how to divide the real estate, so Dick filed a partition suit in the appropriate court seeking a sale of the property.

Jane responded, requesting that if the court ordered a sale that she also be paid for the value of the apartment building.

The real estate had an appraised value sufficient to produce a sale price of \$400,000 for the lot, the residence and the apartment building.

- (a) Do the facts support a prima facie case for partition by sale of the real property? Explain fully.
- (b) Do the facts support Jane's claim to the current value of the apartment building if the property is sold in a court ordered partition sale? Explain fully.
- (c) In the event of a court ordered partition sale of the property for \$400,000, how should the proceeds of the sale be distributed? Explain fully.

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- (a) Yes. After the divorce was granted in 2016, Dick and Jane no longer held the property as tenants by the entirety but instead as tenants in common. Thus, the property was subject to being partitioned. The first question in any partition suit is whether the property can be divided "in kind," i.e., dividing the real property and improvement equally among the tenants in common. Here, the facts say Dick and Jane "purchased a home on a residential lot." Because part of the property had a residence on it, and part did not, partition in kind would be impossible. The law does not contemplate dividing a home in half because that would be impractical. Moreover, by the time of the partition action, a garage and apartment building had been built on the property. That development make the conclusion that the property could not be divided in kind more certain.
- (b) Yes. In *Rutledge v. Rutledge*, 204 Va. 522, 531 (1963), the Supreme Court of Virginia observed that a tenant in common or joint tenant "who places improvements upon common property at his own expense is entitled to compensation in the event of partition . . . ." Here, the facts state that Jane built the garage and apartment with money she inherited from her Uncle Leo and that the value of such improvements at the time of partition was \$90,000. Thus, Jane should be awarded \$90,000 as part of the distribution of proceeds in the partition of the property.
- (c) The \$400,000 partition sale of the property should be distributed as follows. Ordinarily the parties would each receive half of the proceeds. Because Dick, on his own, took out a \$100,000 loan on the property with Hometown Bank, \$100,000 would be deducted from his share of the proceeds. Then \$90,000 would be reduced from his share as a result of Jane's \$90,000 improvement. That would leave \$210,000. Jane would be entitled to \$200,000 as half of the proceeds (plus the \$90,000 as the credit for the improvement). That would leave \$10,000 to be split equally between Dick and Jane.

4. [02/18] [Corporations] Since her graduation from high school eighteen years ago, Lucy Ledger has always been employed as a bookkeeper for Bank of Sterling, Inc. ("BOS"), a Virginia stock corporation. The articles of incorporation and bylaws of BOS restate the standards and requirements of the Virginia Stock Corporation Act, without deviation.

Lucy loved working at BOS, because it was a small, locally owned bank with its focus on her hometown. Lucy so believed in BOS that she herself was a shareholder, owning 18 shares of common stock, which is the only authorized class of stock for BOS.

Lucy is considered an "at-will" employee of BOS under Virginia law because her employment with BOS is not for a fixed duration, Lucy may choose to leave her job at any time, and BOS, as her employer, may terminate Lucy's employment at any time. Lucy has received a rating of "excellent" on all of her job performance evaluations at BOS, and BOS managers have always told Lucy that she is a "model" employee.

In December 2017, BOS executed a merger agreement with a large national banking corporation, Mega Bank, NA ("Mega"), which stipulated that BOS would be merged into Mega, with Mega as survivor, and that each share of BOS would be converted into 10 shares of Mega. Despite the financial benefits, Lucy openly opposed the merger, though she did not campaign at work, nor let her opposition affect the performance of her duties at BOS.

Prior to the BOS shareholders' meeting to vote on the merger, the BOS president privately informed Lucy that, if she did not vote her shares for the merger by completing a proxy card in advance and delivering it to him, her employment with BOS would be terminated.

Fearful of losing her job, Lucy signed the proxy card, voted in favor of the merger, and delivered the proxy card to the president. At the special meeting, the merger narrowly passed, exceeding the requisite threshold by only 12 shares.

Two days after the special meeting, Lucy changed her mind and wrote a letter to the Board of Directors of BOS, with

a copy to Mega's Board, stating that her proxy had been illegally obtained, in her opinion, through intimidation and threats and that her vote was therefore "null and void." Without Lucy's shares voting for the merger, the vote of the other BOS shareholders would be insufficient to approve the merger.

Disturbed by the accusations in the letter, Mega's general counsel called his counterpart at BOS, referenced Lucy's letter and pointed to §13.1-662(A) of the Virginia Code, which states in part that "each outstanding share, regardless of class, is entitled to one vote on each matter voted on at a shareholders' meeting." The BOS attorney replied that he would discuss all of that with the BOS Board of Directors.

On February 6, 2018, the BOS Board of Directors voted to abandon the merger, citing Lucy's letter. Without consulting anyone else, the BOS president notified Lucy that same day that Lucy's employment with BOS was terminated, "effective immediately."

Thereafter, Lucy filed a two-count lawsuit in the Circuit Court of Loudoun County against BOS and the BOS president, seeking money damages. Count 1 is for Lucy's "improper discharge from employment," and Count 2 is for "conspiracy on the part of BOS and the BOS president to interfere with Lucy's employment."

The Circuit Court judge asks you, as her law clerk, the following questions:

- (a) How can Lucy's "at-will" employment status be argued as a defense to Count 1? Explain fully.
- (b) How should the Court rule on Lucy's improper discharge from employment claim? Explain fully.
- (c) How should the Court rule on Lucy's claim of conspiracy by defendants to interfere with her employment? Explain fully.

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- (a) The defendants will argue that Lucy's "at-will" employment status is a legal defense to her claim in Count 1 for "improper discharge from employment." As noted in the question, Virginia is an at-will employment jurisdiction. Under the doctrine of employment-at-will, an employment contract for an indefinite period is terminable at any time, after reasonable notice, by either party for any reason or no reason at all. Thus, the defendants will argue that they could fire Lucy for any reason, and she has no claim for improper discharge from employment.
- (b) The court should rule in favor of Lucy on her improper discharge from employment claim. Although employment-at-will is the law in Virginia, there are exceptions to the doctrine for at-will employees who are discharged in violation of an established public policy. Here, Lucy's firing violated public policy.

Under VA Code § 13.1-32, a shareholder is entitled to one vote, for each outstanding share of stock held, on each corporate matter submitted to a vote at a shareholder meeting. This provision contemplates that shareholders' right to vote shall be exercised free of duress and intimidation from corporate management. To effectuate the statutory goal and public policy, the shareholder must be able to exercise this right without reprisal from corporate management, which happens also to be the employer. Because the right conferred by statute is in furtherance of established public policy, the employer may not lawfully use the threat of discharge of an at-will employee to control the otherwise unfettered discretion of a shareholder to vote freely his or her stock in the corporation.

In this case, it is clear that the BOS president fired Lucy because of her exercise of her rights as a shareholder in BOS. This firing violates public policy, and therefore, falls squarely within the exception to the employment-at-will doctrine. Thus, the court should rule in favor of Lucy in her claim for improper discharge from employment.

- (c) The court should rule against Lucy's claim of conspiracy by defendants to interfere with her employment. Virginia recognizes a tort claim for conspiracy to induce the breach of a contract, and the plaintiff must prove that there was a conspiracy to procure the breach of contract and that pursuant to such conspiracy the contract was breached. However, a conspiracy requires two persons, and a corporation, like an individual, cannot conspire with itself. Here, the only defendants are BOS and the BOS president, who was acting as an agent of BOS. The facts clearly establish that the BOS president fired Lucy without consulting anyone else. Thus, Lucy has failed to state a claim for conspiracy to induce a breach of contract, and the court should rule against her.

Attendees Note: The facts of this question are based on Bowman v. State Bank of Keysville, 331 S.E.2d 797 (Va. 1985).]

5. [02/18] [ Agency] Travelco, Inc. (“Travelco”), is a Virginia corporation that provides passenger bus services along selected routes in Hampton, Virginia. One Friday afternoon in rush hour traffic, Travelco’s employee, Davis, was driving a company owned bus in the far right lane of a 4-lane street in Hampton, Virginia. Directly behind the bus, Paul was properly operating his vehicle on his way home.

Davis had been 30 minutes late to work that morning and was still upset that his supervisor had docked his pay one hour. In order to make a wide right turn at the next intersection, Davis briefly entered the left lane before signaling to turn right. Paul, believing that Davis either was planning to turn left or proceed through the intersection, tried to pass Davis on the right.

Paul was in Davis’ blind spot as Davis began his right turn. Consequently, Davis cut Paul off, striking the front left corner of Paul’s vehicle.

Davis and Paul stopped, promptly exited their vehicles, and an argument ensued in which each blamed the other for the accident. Davis, who was angry at having his driving skills criticized and still upset about having been docked an hour’s pay, lost his temper and struck Paul, breaking his jaw.

Davis then panicked, hopped on the bus, ordered all the passengers off, and fled in the bus toward his home to figure out what to tell his boss. Angry and distraught, Davis ran a red light and struck Winston as he was crossing the street, causing him serious injury.

Paul has sued Davis and Travelco for compensatory and punitive damages arising from Davis’ battery of him.

Winston has sued Davis and Travelco for compensatory damages arising from Davis’ negligence in hitting him with the bus.

- (a) Are Davis and Travelco, or either of them, liable for Paul’s injuries and compensatory damages? Explain fully.
- (b) Are Davis and Travelco, or either of them, liable for punitive damages? Explain fully.
- (c) Are Davis and Travelco, or either of them, liable for Winston’s injuries and compensatory damages? Explain fully.

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- (a) Davis deliberately struck Paul, breaking Paul’s jaw. Intentionally causing unwelcome contact with another satisfies the elements of battery. Davis’s battery was the actual and proximate cause of Paul’s injuries, so Davis is liable to Paul.

Travelco is probably not liable. Respondeat superior normally does not impute liability to an employer for an employee’s intentional tort such as battery. Paul may argue that Davis’s battery was an impulsive act arising from furthering Travelco’s business and was therefore within the scope of Davis’s employment. The facts suggest that Davis’s action resulted from anger at having his pay docked and his driving criticized, however, not from motivation to serve Travelco’s interests.

The facts also do not indicate that Travelco ratified Davis’s battery or derived any benefit from it, or that committing battery was an aspect of Davis’s responsibilities as a driver.

- (b) Neither Davis nor Travelco is liable for punitive damages. Punitive damages may be recovered for “willful or wanton conduct, or such recklessness as evinces a conscious disregard for the safety of others” [Va. Code 8.01-52.5].

Davis lost his temper and struck Paul during an argument. This probably does not justify an award of punitive damages, either directly against Davis or vicariously against Travelco, but it is a question of fact for the jury.

- (c) Davis owed a duty of care while operating the bus, evaluated in the context of professional bus drivers. Running a red light while “angry and distraught” breached Davis’s duty of care. Since Davis’s negligent driving was the actual and proximate cause of Winston’s injuries, Davis is liable.

Travelco is not liable. Davis was no longer in the scope of his employment when the bus hit Winston. Davis had stopped the bus, ordered all the passengers off the bus, and was fleeing toward home. Since Davis was no longer serving any interest of his employer, his negligence is not imputed to Travelco by respondeat superior. Winston may argue that Davis’s negligence was an impulsive act arising from furthering Travelco’s business and was therefore within the scope of Davis’s employment, but the facts suggest Davis’s motives were purely personal.

6. [Va. Civil Pro & Personal Property - Gifts] James, an elderly bachelor, lived in Waverly, Virginia. When he became infirm and at the urging of his sister, Ruth, he moved to the residence of longtime friends, Wilson and Molly. Shortly thereafter, Wilson died. As James grew weaker, Molly continued to care for him and, for all practical purposes, became his personal nurse. Upon being advised by his physician that his death was near, James asked Molly to summon his friend, David, to his bedside. At Molly's request, David arrived within the hour. With Molly present, James said:

*"David, you are holding my stock certificate for 1000 shares of Newport News Shipyard, Inc., which I have endorsed in blank. I want each of you to know that I now give Molly 500 of those shares. Molly has been caring for me as if she was a daughter or sister, and I am most grateful. I want you to arrange for the transfer of the 500 shares to Molly by the issuance of a new stock certificate in her name. The remaining 500 shares are to remain a part of my estate. Additionally, when I die, I want Molly to have my 1989 Mercedes Benz 560 SL."*

Molly graciously accepted his gift. David agreed to carry out James' wishes and departed the residence. That night, and before a new stock certificate was issued, James died intestate leaving his sister Ruth as his only heir. Ruth demanded that Newport News Shipyard, Inc. issue the 1000 shares to her and that the Executor of James' estate transfer the Mercedes to her. Molly also made a demand on the Newport News Shipyard, Inc. that she be issued the 500 shares. Molly also demanded that the Executor transfer the Mercedes to her.

- (a) What is the most appropriate legal action for Newport News Shipyard, Inc. to file to avoid being sued by Ruth or Molly? Explain fully.
- (b) How should the 1000 shares of stock be distributed? Explain fully.
- (c) Is Molly entitled to the Mercedes? Explain fully.

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- (a) The most appropriate legal action is to file a complaint in Circuit Court requiring the claimants to interplead their claims pursuant to Va. Code 8.01-364. The Court may thus "enter its order restraining all claimants from instituting or prosecuting any proceeding in any court of the Commonwealth affecting the property involved in the interpleader action until further order of the court." Ruth, Molly, the personal representative, and David [as holder of a stock certificate endorsed in blank and/or trustee of an inter vivos trust – see part (b)] should be named as defendants.

Attendees thinking – An argument for a declaratory judgment may earn partial credit. Also, an applicant correctly discussing an interpleader action, but not identifying it by its specific name, should get substantial credit.

- (b) Assuming that Molly's arguments are unsuccessful (see below) and that the stock remained in James's estate after paying the costs of administration and debts (unspecified), the personal representative (who has title and possession of intestate personalty during estate administration) should distribute all 1,000 shares to Ruth. The facts stipulate that James died intestate and that Ruth was James's sole heir (*i.e.*, that James left no surviving spouse, descendants, parents, or other siblings), so Ruth takes by intestate succession [Va. Code §64.2-200 *et seq.*].

Molly may argue that James created an inter vivos trust, whereby she was the beneficial owner of 500 shares. However, there was neither a present transfer of trust property nor intent to create a trust [Va. Code §64.2-720(a)(2)], which in the case of an oral trust requires clear and convincing evidence [Va. Code §64.2-725]. Ruth could also assert that any authority David had to act for James was merely as an agent (not a trustee) and thus terminated upon James's death.

Molly may also argue that 500 shares should be distributed to her as a gift *causa mortis*. However, if David did not transfer the stock certificate to Molly, the attempted gift fails for lack of delivery. The attempted gift was made in contemplation of imminent death (James had been told by his physician that his death was near); James's statement demonstrated present donative intent ("I now give Molly 500 of those shares"); James had endorsed the certificate in blank, creating bearer paper, so no further signatures were necessary for negotiation [Va. Code 8.3A-301 and -304]; and the facts stipulate that Molly "graciously accepted his [James's] gift." However, delivery requires more than a deathbed utterance. If David did

transfer the certificate to Molly, the gift would be valid, but this is not made clear.

Attendees thinking – a full analysis would include discussion of an inter vivos trust.

- (c) No. James's statement ("when I die, I want Molly to have my 1989 Mercedes Benz 560 SL") was ineffective either as an inter vivos gift or as a testamentary gift. An inter vivos gift requires present donative intent, but James's statement shows his intent to pass title only at his death. A gift intended to take effect at death can only be accomplished by will, which must be in writing, but James's statement was oral. The Mercedes thus remained in James's estate. The facts stipulate that James died intestate and that Ruth was James's sole heir, so Ruth takes the Mercedes by intestate succession.

7. [02/18] [Domestic Relations] Wilma and Harvey were high school sweethearts in Bristol, Virginia. Harvey was the all district high school quarterback and Wilma was the captain of the cheerleading squad. After they both graduated high school, they decided that college could wait and moved into a small apartment together. Harvey proposed to Wilma just a few weeks after they moved in together and Wilma said yes.

They made their plans to marry as soon as possible, but Wilma was secretly having second thoughts about never being with anyone but Harvey. Wilma met their classmate, the running back on Harvey's team, one night on "Lover's Lane" and had sex with him. Harvey never found out about the infidelity.

A few days later, on Valentine's Day, 2007, Harvey and Wilma obtained a marriage license from the Circuit Court Clerk in Bristol, Virginia, and discovered that there was a wedding chapel just across the street where they could get married fast. They hurried to the chapel, said their vows, and spent a weekend honeymoon in Pigeon Forge.

Times got hard quickly. Harvey struggled to keep a job and started night classes at the local community college. Wilma told Harvey she was pregnant. She assumed it was Harvey's baby and a result of the honeymoon. Harvey Jr. was born on October 14, 2007, and Harvey's name was put on the birth certificate. Harvey proved to be a good father and worked hard to provide emotional and financial support for his family while Wilma stayed home with Harvey Jr. Eventually, Harvey completed his undergraduate degree and got a job as a highway engineer making \$50,000 a year.

The couple moved from Bristol to Charlottesville where Wilma enrolled in college classes after Harvey Jr. entered school. Wilma finished college with her bachelor's degree in architecture and obtained an entry-level job earning \$50,000 per year. Harvey continued to work for the highway department which required him to be away from home for weeks at a time. While Wilma and Harvey pursued their careers, their marriage suffered. On November 1, 2016, Harvey moved out to another apartment in Charlottesville and told Wilma he wanted a divorce. No child or spousal support was paid by either spouse during the separation. Although Harvey and Wilma were separated, Harvey occasionally texted Wilma and asked her if they could see each other to talk about Harvey Jr. On three different occasions, Harvey met Wilma at a craft brewery in Charlottesville where they had some drinks and returned to his apartment for sex. The last time Harvey remembered meeting Wilma and having sex with her was Valentine's Day 2017.

Harvey now wonders whether Harvey Jr. is his child, because Harvey Jr. looks very much like the running back on his high school football team. Harvey knew his teammate once had a crush on Wilma and he always suspected that Wilma liked the teammate. Harvey also wants a divorce as quickly as possible because he has met someone new and wants to remarry.

- (a) When can Harvey file for a divorce from Wilma? Explain fully.
- (b) Should Harvey be able to obtain a no fault divorce? Explain fully.
- (c) Should Harvey have to pay child support? Explain fully.
- (d) In what court should Harvey file for divorce? Explain fully.

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- (a) Harry can file a divorce from Wilma on or after November 1, 2017, on no fault grounds. The sexual encounters do not postpone the permitted filing date, unless they any of them constituted a resumption of cohabitation, requiring an intent to do so along with the sexual encounters. Here, the fact pattern suggests no such intent or effort to resume cohabitation. He has no other grounds upon which to file.
- (b) Yes, a no fault divorce may be granted if the parties lived separate and apart for a period in excess of one



year without cohabitation and without interruption, with the intent of at least one of them that the separation be permanent. This intent may be proven by evidence that a party intended to get a divorce. The intent must coexist at the start of the separation and therefore defines the start date. Here, Harry formed the requisite intent when he left on November 1, 2016. Since the parties have lived separate and apart without cohabitation and without interruption, then Harry should be able to obtain a divorce on no fault grounds after November 1, 2017.

- (c) Harry will have to pay child support unless and until a court relieves him of the obligation because he was married to Wilma when the child was born, raising a presumption that the child is his, and as a separate reason, his name is on the birth certificate. Harry may however challenge his paternity under the Virginia statutes, 20-49.1 et seq., (allowing for genetic testing to determine paternity) since no court has determined paternity, the presumptions or related acts do not bar his challenge.
- (d) Harry should file for divorce in the circuit court of the county or city where he and Wilma last cohabited together as husband and wife or in the city/county where Wilma resides in Virginia. Here the choice is in either case is Charlottesville, so Harry should file in the circuit court of the city of Charlottesville.

8. [02/18] [Va. Civil Procedure & Contracts] All Countertops Corporation (“ACC”), a Virginia corporation with its showroom and office in Leesburg, Virginia, manufactures and sells high-end countertops for kitchens and bathrooms. Elite Homes, Inc. (“Elite”), a Delaware corporation, with its only office and other facilities in Hartford, Connecticut, builds and sells luxury homes exclusively in the tri-state area of Connecticut, New York, and New Jersey. Elite is not qualified by the Virginia State Corporation Commission to do business in Virginia and does not maintain a registered office (or any office) in Virginia.

Riles Plumlee, a resident of Washington, D.C., works for himself as a commission salesman representing a number of manufacturers, including ACC. Riles called on Elite at its office in Hartford. During the meeting, Elite placed and signed a contract on a form supplied by Riles for ACC to furnish \$200,000 worth of granite countertops, to be shipped F.O.B. Leesburg to Elite’s warehouse in Hartford. After leaving Elite’s office, Riles transmitted Elite’s order to ACC, which promptly worked to fulfill the order.

On December 6, 2017, the ACC countertops were received in Leesburg by a common carrier which, in due course, delivered them to Elite’s warehouse in Hartford. On that same day, ACC invoiced Elite in the amount of \$200,000. However, Elite declined to pay, alleging that some of the countertops had been damaged in transit. ACC then filed a Complaint against Elite in the Circuit Court of Loudoun County, Virginia, reciting the above facts and seeking payment of its invoice and its attorneys’ fees.

- (a) Is the Loudoun County Circuit Court authorized to exercise personal jurisdiction over Elite? Explain fully.
- (b) Which party bore the risk of damage to the countertops? Explain fully.
- (c) Assuming the Loudoun County Circuit Court is authorized to proceed, on what basis, if any, might the Court award attorneys’ fees to ACC? Explain fully.

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- (a) No. For the Court to exercise personal jurisdiction over Elite, both Virginia’s Long-Arm Statute (VA Code § 8.01-328.1) and Due Process would each have to be satisfied. Because Elite could be considered to have transacted business in Virginia, one of the grounds in the Long-Arm statute for satisfying that requirement, the Court could have personal jurisdiction under the Long-Arm Statute. As noted, however, even if the Long-Arm statute is satisfied, the Court’s exercise of personal jurisdiction must not offend principles of due process. The test to determine whether a court can exercise jurisdiction over a nonresident consistent with due process hinges on the well-known “minimum contacts” test articulated by the United States Supreme Court in *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). On facts virtually identical to those in this question, the Supreme Court of Virginia held that the minimum contacts test would not be satisfied and, thus, due process would be violated by the exercise of personal jurisdiction under that test. See *Danville Plywood Corp. v. Plain & Fancy Kitchens, Inc.*, 218 Va. 533 (1977).

Attendees comment: There was some discussion whether the doctrine of minimum contacts had advanced such that the *Danville Plywood* case might not be as representative of minimum contacts law as it was in 1977. Attendees thinking is that the above answer is the preferred one.

- (b) Elite bore the risk of loss. The countertops are goods because they are movable at the time of identification to the contract [Va. Code §8.2-105(1)]. Article 2's risk of loss rules therefore apply. Va. Code §8.2-509 controls because the parties' agreement does not allocate the risk of loss and there was no prior breach of contract.

The FOB term triggers §8.2-509(1) by requiring the seller to ship the goods by carrier. Under §8.2-319(1)(a), FOB Leesburg makes this a shipment contract, under which the seller must at that place ship the goods in the manner provided in §8.2-504. Shipment contracts are governed by §8.2-509(1)(a), under which the risk of loss passes to the buyer when the goods are duly delivered to the carrier. Assuming that ACC complied with §8.2-504 in contracting with the carrier, the risk of loss passed to Elite on December 6 when the carrier received the countertops from ACC. Any damage during transit therefore occurred after the risk of loss had shifted to Elite.

- (c) The Loudoun County Circuit Court has no basis on which to award attorneys' fees. The American Rule is that each party in a case bears his or her own attorneys' fees. The exception is when a statute shifts attorneys' fees or the parties provide in a contract for one party to pay attorneys' fees. Here, no statute exists that would justify shifting attorneys' fees. Moreover, the contract does not support the award of attorneys' fees.

9. [02/18] [Local Government] The City of Roanoke was served yesterday with a Complaint filed January 23, 2018, in the Circuit Court for The City of Roanoke by Sara alleging negligence and gross negligence against the City. The Complaint stated that on May 1, 2017, Sara was playing tennis on 1 of 12 courts at the River's Edge Tennis Complex, owned and operated by the City. Sara alleges that she had just started warming up when she slipped and fell on the tennis court, causing her injuries. After the fall, she observed a dark green, slimy, moldy substance that covered an area approximately 5 feet by 5 feet on the court behind the baseline with a visible skidmark from her shoe. She alleges that the slimy area that she observed caused her to slip and had "obviously been on the court for a significant period of time." She further alleges that after she fell, other nearby tennis players told her that the courts were "notoriously slippery" and that the City never cleans or maintains the courts.

This is the first notice the City has received about Sara's accident and claim.

The Director of Parks and Recreation was asked to investigate the allegations in the Complaint. The investigation was memorialized in a Roanoke City internal memorandum. That memorandum includes the following information:

*After searching records, a parks and recreation supervisor found a record of a voice mail left on the Citizen Complaint Hotline from a T. Topspin on March 2, 2017: "The courts at River's Edge are in terrible condition and need attention. Someone is going to get hurt." An email was generated as a result of the call and sent to the Director of Parks and Recreation. No request for inspection or work order was ever created. The complaint was automatically closed on September 2, 2017, due to lack of activity.*

*The supervisor also found two complaints relating specifically to the River's Edge tennis courts.*

*One was made in March 2015 and related to a broken net. Another was made in August 2015 and related to kids skateboarding on and damaging the courts.*

*The supervisor advised that the courts are power washed and evaluated for repairs every September. He further stated that if there is a specific repair request, they will respond within 14 days. There have been no specific repairs made to the courts since they were completely resurfaced in October of 2014.*

- (a) What affirmative defenses, if any, should the City raise in response to Sara's Complaint? Explain fully.
- (b) What specific defenses might the City reasonably raise, if any, to the ordinary negligence claim? Explain fully.
- (c) What other defenses might the City reasonably raise, if any, to the gross negligence claim? Explain fully.

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- (a) Assumption of the risk. A 5 foot by 5 foot alleged defect was open and obvious. The Plaintiff may be prevented from seeking monetary damages because she voluntarily "assumed the risk" of injury by stepping into that area. Open and obvious defects do not give rise to municipal liability. *Town of Hillsville v. Nester*, 215 Va. 4, 5, 205 S.E.2d 398, 399 (1974)

Lack of notice of defect on public property. A municipality must have actual or constructive notice of a defect on public property in time to remedy the defect before liability attaches. *City of Va. Beach v. Roman*, 201 Va. 879, 883, 114 S.E.2d 749, 752-53 (1960).

A plaintiff must show more than that a defect on public property has come into being and caused plaintiff's injury. If the defect has been present long enough, there may be constructive notice. When a defect is such that it might have developed recently and suddenly and evidence to the contrary is lacking, constructive notice will not be inferred. *Erle v. City of Norfolk*, 139 Va. 38, 123 S.E. 364 (1924). Existence of a defect for one or two days does not constitute constructive notice as a matter of law. *Shamlee v. City of Richmond*, 7 Va. Cir. 157 (City of Richmond 1982).

The plaintiff may allege the March 2, 2017 voicemail constitutes notice, and the facts state no inspection was undertaken. The voicemail simply stated that the tennis courts were generally "in terrible condition and need attention." There is, however, a City policy in place that if the City receives a request that specific repairs are needed, the City will respond to the request within 14 days. The City can point out that none of the prior complaints about the tennis courts specifically mentioned the presence of a moldy substance on the courts. The 2015 complaints dealt with a broken net and skateboarding, and the 2017 complaint was of general nature that did not mention specific defects.

Contributory Negligence. The facts describe that the plaintiff only saw the alleged defect "after the fall." The City should raise the defense that the presence of the moldy substance on the tennis court of such a size and location that it was open and obvious, and Sara's failure to observe the moldy substance before the fall therefore constituted contributory negligence. In *Virginia Beach v. Starr*, 194 Va. 34 (1952) and *Town of Hillsville v. Nester*, 215 Va. 4 (1974), citizens tripped and fell as a result of depressions in public sidewalks. The Virginia Supreme Court held that the citizens were contributorily negligent and could not recover for injuries as a result of failure to see conditions that were open and obvious, and by the exercise of ordinary care could have and should have been seen.

- (b) Statutory immunity under Va. Code 15.2-1809. The City should file a plea in bar of statutory immunity under 15.2-1809. This code section provides counties, cities, and towns immunity from simple negligence in operation of beaches, pools, parks, playgrounds, skateboard facilities, and recreational facilities. The facts state that the tennis courts are owned and operated by the City. Since tennis courts are a recreational facility, the City should be protected from the plaintiff's ordinary negligence claim.

Notice of claims requirement under Va. Code 15.2-209. The City should file a plea in bar on the grounds that Sara did not provide the City with written notice of her claim within six months of her accident as required by Va. Code 15.2-1809. Every claim cognizable against any locality for negligence is barred unless the claimant files a written statement of the nature of the claim, including the time and place at which the injury is alleged to have occurred, within six months after such cause of action accrued. The statement must be filed with the county, city, or town attorney or with the chief executive or mayor of the county, city, or town.

The notice is deemed filed when it is received in the office of the official to whom the notice is directed. The burden of proof is on the claimant to establish receipt of the notice. The provisions of this procedural statute are mandatory and are to be strictly construed. Here, the facts state that the accident occurred May 1, 2017, and suit was filed January 23, 2018. More than six months passed since the date of the accident without the required written notice being given to the City, and the facts do not indicate that the City or its insurer had actual notice of the claim.

- (c) As a matter of practice, in its responsive pleading, the City should make all three affirmative defenses applicable to both the ordinary and gross negligence claims.

The City can also demur on the basis that the facts as given and in Sara's complaint do not rise to the level of gross negligence. In *Frazier v. City of Norfolk*, 234 Va. 388 (1987) the Supreme Court defined gross negligence as "that degree of negligence that shows an utter disregard of prudence amounting to complete neglect of the safety of another, a heedless and palpable violation of the legal duty respecting the rights of others, and a want of even scant care and amounts to the absence of slight diligence."

The facts alleged in the complaint do not rise to the level of egregious conduct that can be classified as gross negligence. The City has an annual inspection program in place under which the tennis courts are power washed and evaluated for repairs every September. Also, there is a City policy in place that if the

City receives a request that specific repairs are needed, the City will respond to the request within 14 days. None of the prior complaints the City received about the tennis courts specifically mentioned the presence of a moldy substance on the courts; the 2015 complaints dealt with a broken net and skateboarding, and the 2017 complaint was of general nature that did not mention specific defects.

In its memorandum in support of its pleading, the City can argue that this situation is similar to *City of Lynchburg v. Brown*, 270 Va. 166, (2005), in which Lynchburg had no actual notice of an alleged defect (a damaged bleacher) and had a policy of recording reports of damage to city property and equipment. The Supreme Court held that under such fact there was no evidence of deliberate conduct or a total disregard of all precautions by city employees, the hazard was open and obvious, and the claimant failed to establish that the city was grossly negligent.