

Last Revision Date: **August 15, 2020 (9:59am)**

✖✖ After each bar exam, the Virginia Board of Bar Examiners, for years, has invited the Deans [or the Deans' designees] of all Law Schools located in Virginia, to meet with the Board. Representatives from 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 2020 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 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

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

Prepared by the following who collaborated to prepare the suggested answers for the VBBE: J. R. Zepkin & William H. Shaw, III of the Adjunct Faculty of William & Mary Law School, Professor Emmeline P. Reeves of University of Richmond Law School, Professor Benjamin V. Madison III of Regent University Law School, Professor Cale Jaffe of University of Virginia Law School & Adjunct Professor C. Reid Flinn of Washington & Lee Law School (also a member of the adjunct faculty at William & Mary Law School and University of Richmond Law School), Professors Amanda Compton & Mike Davis of George Mason Law School, Professor Rena Lindevaldsen of Liberty University Law School and Professor Laura Wilson of Appalachian School of Law.

The following, provided us great help with suggested answers in each's particular area[s] of specialty: From Washington & Lee Law School: Dean Brant Hellwig; Profs. Carliss Chatman, Robert Danforth, Douglas Rendleman, and Adjunct Profs. Neil Birkhoff and Mark Williams; Walter Erwin, Lynchburg City Attorney; Jim H. Guynn, Jr., Esq., Guynn Waddell Carroll & Lockaby; From Regent University Law School: Professors James J. Duane, Louis W. Hensler III, Bradley P. Jacob, Lynne Mare Kohm, Kathleen A. McKee, S. Ernie Walton & Assoc. Dean Kimberly R. Van Essendelft; From the University of Virginia School of Law: Professors Rachel A. Harmon and Richard C. Schragger.

1. [UCC - Secured Transactions + Creditors Rights] RVA Golf Carts, Inc. ("RVA Carts"), a golf cart dealership and service center with places of business in both the City of Richmond and Chesterfield County, Virginia, obtained a \$30,000 loan from Manchester Bank ("Bank"). As collateral for the loan, RVA Carts executed a security agreement granting Bank a security interest in a new computer-controlled industrial machine used in its business for manufacturing custom fittings for golf cart motors. A financing statement specifically describing the machine, and naming RVA Carts as the debtor and Bank as the secured party was prepared. Although the financing statement was not signed by the president of RVA Carts, it was promptly filed by Bank with the Clerk of the State Corporation Commission in Richmond.

Several months later the machine failed, and it was taken to Ed's, a local mechanic shop, for repairs. The damage was extensive, requiring the machine to be rebuilt at a cost of \$15,000. Ed, the mechanic, following the advice of his attorney to always check for liens before making high dollar repairs, checked with the Circuit Court Clerks' Offices in Richmond and Chesterfield and confirmed that there were no recorded financing statements in those locations in RVA Carts' name describing the machine. Thereafter, Ed agreed to repair the machine, with payment by RVA Carts upon completion of the repairs.

Upon completion of the repairs, RVA Carts failed to pay the bill as agreed. Ed advised RVA Carts that he would retain possession of the machine and sell it to recover the amount due for the repairs.

Additionally, RVA Carts had fallen behind on loan payments to Bank, and while considering its options for repossessing the machine, Bank discovered Ed was holding it. Bank notified Ed that it held a security interest in the machine as collateral for its loan to RVA Carts. Ed demanded proof of the security interest, and Bank gave him a copy of the financing statement. Bank then tendered \$1,000 to Ed and demanded possession of the machine for the purpose of selling it to enforce its security interest.

[a] Does Bank have an enforceable security interest in the machine? Explain fully

[b] What rights, if any, does Ed have against Bank to retain the machine and to be paid for the repair charges? Explain fully.

✖✖

[a] Yes. The interest is properly created, the collateral is properly attached, and the interest is perfected.

To create a security interest, the secured party must [i] give value; [ii] the debtor must have sufficient rights in the collateral; and the secured party must [iii] either possess the collateral pursuant to agreement (pledge) or the debtor must have authenticated a security agreement. (§8.9A-203, Comment 2).

§8.1A-204(1) provides that in the case of a loan, the secured party has actually given value by promising to make the loan, before the loan is ever extended. The Bank gave value when it promised to make the loan to RVA Carts.

The third requirement is that the debtor have either authenticated a legally sufficient security agreement or that the secured party have possession of the collateral pursuant to the parties' agreement. The facts state that the security agreement granting Bank the security interest is executed. Therefore, the parties have properly created a security interest and attached the collateral.

Perfection puts the world on notice of the security interest. The equipment is tangible property, and not a fixture. For tangible property that is not perfected outside of Article 9, such as motor vehicles, filing is the default means of perfection. To perfect the interest in the machine, the Bank must file the UCC-1 financing statement in the jurisdiction where the debtor, RVA Carts, is located. RVA Carts is located in both the City of Richmond and Chesterfield County.

The machine does not appear to be subject to any exceptions that would require filing where the collateral is located. Because RVA Golf Carts is a corporation, it is located in the Commonwealth of Virginia. Therefore, the Bank can record with the State Corporation Commission anywhere in Virginia. The Bank UCC-1 does not need to be signed by the debtor. It is created to put others on notice of the security interest.

For these reasons, the Bank properly perfected the security interest and has priority over all subsequent creditors.

[b] Ed is a mechanic's lienor pursuant to Va. Code §43-33 and thus has priority up to \$1,000.

2. [Federal Practice & Procedure + Torts] Jewell Jones, a resident of Fairfax, Virginia, sustained physical injuries after slipping and falling in the main interior walkway of Fairfax Shopping Mall ("Mall"), while on her way to shop for something to wear to her retirement party. Jewell was the first customer to enter the Mall that morning.

Jewell did not see any foreign material on the Mall's floor prior to her fall, but afterward she saw that she had slipped on a small glob of ketchup, about three inches in diameter. The edges of the ketchup were dried to the floor, and the top was crusty except where Jewell's shoe had slid through the ketchup. The Mall's restaurants in that area (though not yet open on the morning when Jewell fell) were open daily for lunch and dinner, at which times they also sold take-out food, to include condiments such as ketchup.

No one knows who spilled the ketchup, and there is no evidence that the Mall's owner actually knew about the ketchup on the floor. In fact, no one who worked at the Mall or in one of its stores had seen the ketchup on the floor prior to Jewell's fall.

Jewell's fall resulted in a dislocated arm and broken hip. She filed, in good faith, a Complaint in the Circuit Court of Fairfax County against the Mall's owner, American Mall Corporation ("AMC"), seeking \$200,000 in money damages. AMC owns shopping malls throughout the United States and is a Delaware corporation which maintains offices in Tysons, Virginia and in Charlotte, North Carolina. The Tysons office houses AMC's advertising group of 20 employees and AMC's vice president of marketing. All other AMC employees and officers work in AMC's Charlotte office, including its chief executive officer, chief financial officer, general counsel, chief operating officer, and other vice presidents, as well as AMC's board of directors, where they make all corporate policy and company-wide decisions.

AMC timely filed a notice of removal to the United States District Court for the Eastern District of Virginia (which includes Fairfax) on the basis of diversity of citizenship. Jewell opposed removal and requested a remand to the Circuit Court, on the ground that complete diversity of citizenship was lacking, since AMC has a Virginia office and AMC owns the Mall which is located in Virginia. The District Court overruled Jewell's objections and denied her Motion to Remand.

A month later, and with the consent of AMC, Jewell timely filed in the District Court an amended Complaint, with the sole change being her good faith reduction of damages sought from \$200,000 to \$74,000. Jewell also filed a Motion to Remand since the Amended Complaint stated an amount in controversy which no longer complied with the statutory requirement for diversity jurisdiction. AMC immediately filed an Answer to the Amended Complaint but opposed Jewell's request for a remand to the Circuit Court of Fairfax County. Jewell explained that she had reduced the damages because \$126,000 in damages originally claimed were attributable to what her medical expert has determined to be a preexisting condition of degenerative joint disease which existed prior to her fall at the Mall.

- [a] In overruling Jewell's first request for remand, did the District Court properly find subject matter jurisdiction of the original Complaint based on diversity of citizenship? Explain fully.
- [b] How should the District Court rule on Jewell's second request for remand to the Circuit Court of Fairfax County following her filing of the Amended Complaint? Explain fully.
- [c] Upon what grounds should Jewell base her claim for liability on the part of AMC for her injuries resulting from the slip and fall at the Mall (including the substantive legal theory or theories based upon the facts), and is she likely to prevail? Explain fully.

xx

- [a] Yes, the District Court correctly denied the first motion to remand. Diversity of citizenship exists. Plaintiff, a citizen of Virginia, sued AMC, a Delaware Corporation with its principal place of business in Charlotte, North Carolina. Although AMC had an office in Fairfax, Virginia, all its high-ranking officers and its board of directors are located in the Charlotte office and "they make all corporate policy and company-wide decisions" there. Under *Hertz Corp. v. Friend*, 559 U.S. 77 (2010), a corporation with offices in more than one state is deemed to have its principal place of business where the corporation's officers direct, control, and coordinate the corporation's activities. The amount in controversy exceeded \$75,000 exclusive of interests and costs because of the nature of the injuries (a dislocated arm and broken hip) and the amount demanded in the Complaint (\$200,000) The Federal Court determines jurisdiction at the time of removal.
- [b] The District Court should deny Jewell's second request for remand. Federal courts have long held that if diversity jurisdiction exists when a case is removed, the plaintiff after removal, by stipulation, by affidavit, or by amendment of the pleadings to reduce the claimed amount below the amount-in-controversy threshold does not deprive the federal court of jurisdiction.
- [c] Plaintiff should base her claim for liability on premises liability of a business owner to an invitee, who owed a duty to keep the premises in a reasonably safe condition. A business owner with constructive notice of the ketchup on the mall floor breaches its duty to exercise ordinary care in maintaining its property. The facts suggest that Plaintiff could make a good case for constructive notice. Plaintiff was the first customer in the Mall on the morning of her fall. The edges of the ketchup were dried to the floor and the top was crusty "except where Jewell's shoe had slid through the ketchup." These facts indicate the ketchup would have likely been on the floor since at least the prior day and one could expect the Mall to have seen and/or inspected and cleaned the floor prior to the opening the day of the fall.

(In a case describing an almost identical ketchup patch on the Spotsylvania Mall floor, Judge Ledbetter upheld a jury verdict on the ground that such evidence provided constructive notice to the Mall, see *Davis v. Spotsylvania Mall*, 41 Va. Cir. 390 (Spotsylvania Cir. Ct. 1997)). Whether Plaintiff should prevail is a jury question, but the facts support Plaintiff's case and certainly should at least go to a jury.

3. [Corporations + Partnerships] In 2016, Victor purchased for \$300,000 an abandoned warehouse located in the City of Roanoke, Virginia, with the intent to renovate the building and create four condominium units (the "warehouse project"). Victor financed the warehouse project by taking out a loan from Big Bank. Victor decided to partner with Mark, an experienced contractor. The oral understanding between them was that Victor would handle the financing and

“money matters,” and Mark would handle the renovation work. During the same timeframe when Victor and Mark were renovating the warehouse project, they also began working on several similar renovation projects in Roanoke.

Later that year, Mark contracted with RB Roofers (“RB”) to install a new roof to the warehouse building. The new roof quickly developed several serious leaks and Mark asked RB to make repairs to the roof in both 2017 and 2018. In early 2019, Mark contacted RB again and told them that the roof continued to leak, and he wanted it replaced. RB Roofers never responded to this request and Mark failed to take any further action regarding the roof leaks.

In March 2019, Victor and Mark contacted Cleo, an attorney, to seek advice on the warehouse project. They were concerned about liability they might incur to eventual condominium purchasers because of the leaking roof, but they did not disclose the roof problem to Cleo. In discussing their business options, they asked Cleo whether it was advisable for them to continue operating as informal partners or whether some other form of entity would be better. Cleo advised them they “would have decreased liability to third parties if they formed a corporation.” Shortly after the meeting with Cleo, Victor and Mark, using an online service in order to save money, created a corporation named Prosperity, Inc.

Prosperity, Inc., created Articles of Incorporation declaring that Victor and Mark were the sole officers, directors and shareholders, and adopted corporate by-laws. There were 100 shares of stock issued, with Victor and Mark taking 50 shares each. They kept minutes of shareholder meetings, filed annual reports and corporate tax returns, and, facially at least, observed corporate formalities. Victor immediately conveyed the warehouse project to Prosperity, Inc., in exchange for the corporation assuming his personal debt on the warehouse project. The warehouse project became the sole asset of Prosperity, Inc.

Victor maintained a personal checking account designated by him as the “renovation” account which served as the deposit and payment account for the warehouse project as well as the other properties that he and Mark were renovating. None of the other renovation projects were owned by Prosperity, Inc., but were directly controlled by Victor. Victor maintained separate check registers for each project for which funds were deposited and disbursed from his personal account, but Victor made no other efforts to segregate the funds in the account. Prosperity, Inc. had no bank account of its own and all funds received from the sale of the individual condominium units were deposited into Victor’s “renovation” account. Neither Victor nor Mark had ever taken any steps to establish a reserve fund for Prosperity, Inc.

All four condominium units sold in the fall of 2019, with no mention being made to the new owners about the ongoing roof leaks. The roofing problems were never resolved, even though it was clear that the roof contained major structural defects, and all four units soon suffered significant damage due to the leaks. Complaints were made to Victor and Mark by the individual unit owners, but they were ignored. The owners then filed a Complaint in the Circuit Court for the City of Roanoke to recover damages against Prosperity, Inc. and against Victor and Mark individually as the corporation’s sole stockholders.

- [a] Did Cleo provide sound legal advice to Victor and Mark regarding potential liability to third parties if they form a corporation? Explain fully.
- [b] What arguments should the owners make to impose personal liability on Victor and Mark, what arguments should Victor and Mark make in response, and how is the Circuit Court likely to rule? Explain fully.

✖✖

- [a] Yes, Cleo generally provided sound legal advice to Victor and Mark regarding potential liability to third parties if they form a corporation. Partners in a general partnership have unlimited personal liability for the debts of the partnership, whether such debts arise from contract or tort. On the other hand, shareholders in a corporation, as a general rule, enjoy limited liability and are not personally liable for the debts of the business.

Here, Victor and Mark were initially operating their business as a partnership. A partnership is an association of two or more persons to operate a business for profit as co-owners. There is no filing or formal agreement necessary to form a partnership. The warehouse project and their similar renovation projects appear to be a business for profit, and although the facts provide few details on Victor and Mark’s business relationship, they seem to be operating their business as co-owners (e.g. sharing profits and control). Accordingly, Victor and Mark were partners in a general partnership.

In short, because shareholders generally enjoy limited liability, whereas partners do not, Cleo’s legal advice was sound. However, she should have advised Mark and Victor that limited liability for shareholders is not absolute and that there

are several ways, including piercing the corporate veil, in which shareholders may become personally liable for the debts of the corporation.

- [b]** To impose personal liability on Victor and Mark, the owners should ask the court to pierce the corporate veil. As noted above, shareholders generally are not personally liable for the debts of the corporation. Where, however, shareholders have controlled or used the corporation to evade a personal obligation or perpetrate a fraud or crime, to commit an injustice or to gain an unfair advantage, the court may pierce the corporate veil and hold shareholders liable for the debts of the corporation. In Virginia, piercing is an extraordinary remedy rarely applied; however, piercing the corporate veil is justified when the unity of interest is such that the separate personalities of the corporation and the individual no longer exist and to adhere to that separateness would work an injustice.

Victor and Mark will argue that the corporate veil should not be pierced because they observed corporate formalities: elected directors, adopted bylaws, kept minutes of shareholder meetings, filed annual reports and corporate tax returns.

The owners will argue that Victor and Mark clearly formed the corporation to avoid personal liability for problems with the roof of the building and that there was a clear unity of interest and ownership between the shareholders and the corporation. Although they did follow some corporate formalities, the shareholders did not treat the corporation as a separate entity. Specifically, the corporation's finances were run through a bank account held by a shareholder personally; the corporation's funds were commingled with those of shareholders' other business ventures (not owned by the corporation); and the shareholders deliberately never capitalized the corporation.

Because of the egregious facts in this situation, the owners will likely be successful in their effort to pierce the corporate veil and hold the shareholders personally liable on this debt.

Facts based on Klaiber v. Freemason Assoc., Inc., 266 Va. 491 (2003).

- 4.** [VA Criminal Procedure] Officer Quigley of the Roanoke, Virginia Police Department was on traffic patrol near the Valley View Mall one Saturday afternoon. The area is populated with fast food and family restaurants as well as small businesses. Tom and three of his friends were driving around socializing, with no particular destination in mind.

Officer Quigley was traveling in the opposite direction of Tom. He saw Tom fail to stop for a red light. Officer Quigley activated his blue lights and stopped Tom's car. He intended to issue a summons to Tom for the traffic infraction. Tom was driving the car and his friend Steve occupied the right rear passenger seat.

Soon after the traffic stop, Officer Carr arrived to serve as backup. Officer Carr was a narcotics officer and had a certified narcotics detection dog named Murphy with him. Murphy was certified in the detection of the odors of marijuana, cocaine, heroin and methamphetamine. Although Murphy is certified in detection of the odors, he cannot determine whether the odor is from the current possession of narcotics, or whether the odor is from previous possession.

After the stop, but while the driver and passengers were still inside the vehicle, Officer Carr walked Murphy around the vehicle. At the driver's door, Murphy alerted by sitting. Murphy is trained to sit if he detects the odor of narcotics at his head height or above, and to lie down if the odor is ground level.

Officer Quigley directed the driver and three passengers to exit the vehicle. Officer Quigley searched the vehicle and found nothing inside the vehicle. Officer Quigley noticed Tom was nervous and perspiring, and he continually put his hand in his pocket. Officer Quigley suspected that Tom either had a weapon or drug paraphernalia. Without asking permission, Officer Quigley searched Tom and found two syringes and a bottle cap with a powdery residue in his pocket.

After searching Tom, Officer Quigley searched Steve, without asking his permission, and found syringes and a bottle cap containing a similar powdery residue in an inside pocket of Steve's jacket.

The items found on both Tom and Steve were taken as evidence, and then submitted through the proper chain of custody to the Division of Forensic Science for analysis. After the analysis, a certificate was returned to the Roanoke Police Department indicating that residue of heroin was found in the syringes and bottle caps. After the certificate of analysis was received, both Tom and Steve were indicted in the City of Roanoke for possession of heroin, which is a Schedule I controlled substance.

- [a] [Did Officer Quigley have probable cause to stop Tom's car? Explain fully.
- [b] Did Officer Quigley have probable cause to search the vehicle and to search Tom? Explain fully.
- [c] Did Officer Quigley have probable cause to search Steve? Explain fully.
- [d] What motions should be filed on behalf of Tom and on behalf of Steve to prevent introduction of the syringes and bottle caps and the resulting certificate of analysis? What would be the basis of any such motion and what is the probable outcome of each? Explain fully.

xx

- [a] Quigley had probable cause to stop Tom's car because Tom had committed a traffic violation in Quigley's view.
- [b] Quigley had probable cause to search Tom. Murphy, qualified as a drug-sniffing dog, alerted on his side of the vehicle. After getting out of the vehicle Tom was nervous and perspiring and put his hand in his pocket, all properly considered by Quigley as factors supporting probable cause to search him. See Illinois v. Caballes, 543 U.S. 405 [2005].
- [c] Quigley did not have probable cause to search Steve. Murphy alerted on the vehicle but not necessarily anyone who was in the vehicle. The occupants were ordered out of the vehicle. Before searching anyone, the officers searched the vehicle and found nothing. When drugs were found on Tom, probable cause to search the others did not exist. Steve gave no indication by gestures, statements or appearance that would support probable cause to search him. See Whitehead v. Com. 278 Va. 300 [2009]
- [d] Tom and Steve could each file a motion to suppress on the grounds that the search was illegal because the traffic stop was prolonged to allow for the dog-sniffing after the duration of the traffic stop had been completed, at which time the officers had no reasonable articulable suspicion to extend the duration of the stop. Rodriguez v. United States 575 U.S. 348 [2015] The issue is whether the dog sniffing occurred before Quigley concluded or reasonably should have concluded the traffic stop. The chronology is not clear. Their motion may indeed prevail.

5. [Local Government + VA Civil Procedure] Pop Owens was the owner of The Diner, a small restaurant in Norfolk, Virginia. The Diner had been operating at the corner of Granby Street and Brambleton Avenue for over twenty years. Business was steady and profitable until the City of Norfolk began construction on Granby Street. The City closed Granby Street and dug a huge hole in front of The Diner in order to repair the sewer and water lines that serviced the downtown area of the City, including The Diner and several other nearby restaurants. The closure of the street prevented access to The Diner's parking lot and made pedestrian access to the front door of The Diner nearly impossible. The street in front of The Diner was closed for four months during this construction.

Shortly after Granby Street was reopened, the City closed a portion of Brambleton Avenue for a period of ten months during the construction on Brambleton Avenue of a large new hotel in the national chain known as Slumber Inn. In addition to some underground utility work for the Slumber Inn, the general contractor for the hotel was permitted to park a large construction crane on Brambleton Avenue. The crane created major traffic congestion at the intersection near The Diner and caused much of the eastbound traffic turning from Brambleton Avenue onto Granby Street to avoid the intersection entirely. As a result, most vehicular traffic traveled a block past Granby to a parallel roadway, thus avoiding The Diner.

Pop and several others who owned businesses on Granby Street were furious with the City and complained to the City Council; however, the City Council refused to provide them with any relief, financial or otherwise. Pop hired an attorney who filed an action in the Norfolk Circuit Court claiming inverse condemnation and violation of Virginia Code §1-219.1 A, which provides in part:

The right to private property being a fundamental right, the General Assembly shall not pass any law whereby private property shall be taken or damaged for public uses without just compensation.

The Complaint alleged that the City closed Granby Street for the purpose of the construction or repair of public utilities and that it prevented access to The Diner during the closure. It also alleged that the City closed Brambleton Avenue to accommodate the construction of the Slumber Inn, and that both actions entitled Pop to just compensation.

The City filed a Demurrer in proper form. The Demurrer was argued before the Circuit Court and the judge sustained the Demurrer and dismissed the entire action. Pop wants to appeal this ruling.

- [a] Was the Circuit Court correct in sustaining the Demurrer and dismissing the Complaint? Explain fully.
- [b] Is the ruling of the Circuit Court in sustaining the Demurrer appealable, and if so, to what court? Explain fully.
- [c] Assuming the Circuit Court's ruling is appealable, what standard should the appellate court apply in its decision? Explain fully.

✖✖

The question appears to be based on the 2009 and 2011 *Close v. City of Norfolk* cases in the Circuit Court of the City of Norfolk. *Close v. City of Norfolk* 82 Va. Cir. 636 [2009] & *Close v. City of Norfolk* 2011 Va. Cir. Lexis 101 [2011]

[a] A strong argument can be made that the Circuit Court was correct in sustaining the City's Demurrer and dismissing the Complaint. Article I, Section II of the Constitution of Virginia confers on a property owner a right to just compensation from the government when the government takes or damages the owner's property for public use. *Rich Meade, L.P. v. City of Richmond*, 267 Va. 598, 601 (2004). Further, the Supreme Court of Virginia has held that when the government fails to condemn private land taken for public purposes, the landowner's recourse is to file an action for inverse condemnation based on the implied contract between the government and the landowner. *C & O. Ry. C'o. v. Ricks*, 146 Va. 10, 18, 135 S.E. 685, 688 (1926).

A cause of action for inverse condemnation is a specific type of proceeding based on a constitutionally created right connected to the "taking" or "damaging" of property by the government. Taking or damaging property in the constitutional sense means that the governmental action adversely affects the landowner's ability to exercise a right connected to the property. *Bd. of Supervisors of Prince William County v. Omni Homes*, 253 Va. 59, 72 (1997).

To prevail on a claim for inverse condemnation, then, a property owner must establish that: (i) the property owner owns private property or has some private property right; (ii) the property or a right connected to that property has been taken or damaged by the government; (iii) the taking or damaging was for "public use," and, (iv) the government or condemning authority failed to pay just compensation to the property owner. *Close v. City of Norfolk*, 82 Va. Cir. 636, 640 (2009).

To invoke Va. Code §1-219.1 A, which states that "the General Assembly shall not pass any law whereby private property shall be taken or damaged for public uses without just compensation," a property owner would also need to allege that the City's action was made pursuant to a state law enacted by the General Assembly.

In the current case, the actions alleged a taking for a public use, (with the possible exception of closing Brambleton Avenue to accommodate the construction of the Slumber Inn), and that the City did not pay the property owner compensation for such actions. So only two of the four inverse condemnation elements are presently at issue: (i) the nature of Pop's private property rights; and, (ii) whether any such rights were taken or damaged by the City.

As an abutter of a public right of way, Pop has a common law "right of ingress and egress, into and from his property." *Nusbaum v. Norfolk*, 151 Va. 801, 805 (1928). So, the key question is whether the City's actions unreasonably limited Pop's ability to access his property. Not every infringement on a property owner's access constitutes a compensable taking. "A landowner is only entitled to reasonable access to his property." *Close v. City of Norfolk*, 82 Va. Cir. 636, 645 (2009). "An abutting landowner's right of access to a public road is subordinate to the police power of the state reasonably to control the use of streets so as to promote the public health, safety, and welfare." *State Highway Comm'r v. Easley*, 215 Va. 197, 203 (1974). "[T]he owner of property abutting a public road has no right to compensation when the state, in the exercise of its police powers, reasonably regulates the flow of traffic on the highway." *Id.* As such, "a partial reduction or limitation of a direct access easement in the interest of public safety is a non-compensable exercise of a legislature's police power," while unreasonable reduction or limitation of an access easement is a compensable taking or damaging. *Close v. City of Norfolk*, 82 Va. Cir. 636, 646 (2009). Unless Pop presented sufficient evidence to show that the City took any unreasonable actions with regard to his property, the City should prevail.

In the current case, there was clearly a need for traffic and pedestrian limitations in light of the excavations and construction taking place near Pop's property, and it appears that the limitations were reasonable in light of the nature and magnitude of the City's work. While the limitations on access may have been inconvenient, the limitations do not appear to have been unreasonable in light of the hazardous nature of the excavation and pipe installation taking place on Granby Street. As long as there was still access to his property, Pop failed to state a claim for inverse condemnation.

✖✖ Comment - While we think it very unlikely the VBBE are looking for the following information to be part of the answer to this question, we also recognize that faced with a real factual situation such as posed in the problem, it becomes important.

It should be noted that the question did not specify when the actions giving rise to Pop's Complaint took place. In 2012, the Virginia Constitution was amended to add Article I, Section 11 the following language: "That the General Assembly shall pass no law whereby private property, the right to which is fundamental, shall be damaged or taken except for public use. No private property shall be damaged or taken for public use without just compensation to the owner thereof. No more private property may be taken than necessary to achieve the stated public use. Just compensation shall be no less than the value of the property taken, lost profits and lost access, and damages to the residue caused by the taking. The terms "lost profits" and "lost access" are to be defined by the General Assembly. A public service company, public service corporation, or railroad exercises the power of eminent domain for public use when such exercise is for the authorized provision of utility, common carrier, or railroad services. In all other cases, a taking or damaging of private property is not for public use if the primary use is for private gain, private benefit, private enterprise, increasing jobs, increasing tax revenue, or economic development, except for the elimination of a public nuisance existing on the property. The condemnor bears the burden of proving that the use is public, without a presumption that it is."

However, if the actions giving rise to Pop's Complaint took place prior to the adoption of the 2012 amendment to the Virginia Constitution and the subsequent implementing legislation, the 2012 amendment would not apply in this case.

It should also be noted that a reasonable argument can be made that the demurrer should not be sustained. The standard for review of a demurrer is whether, taking the facts alleged in the Complaint as true and viewed in the light most favorable to the plaintiff, a cause of action has been stated.

An examinee might reasonably consider review of the Court's action based on the question's description of the Complaint's allegation of facts. After the background facts, the question states that, "The Complaint alleged that the City closed Granby Street for the purpose of the construction or repair of public utilities and that *it prevented* access to the Diner during the closure." (emphasis added)

Therefore, an argument could also be made that the demurrer should not be sustained because the allegations in the Complaint, while they may not withstand the evidence at trial, at the pleading stage establish the elements of an inverse condemnation claim as noted above under the applicable standard. The real issue in the question is the sufficiency of the pleading and without knowing the actual content of the pleading, it is very difficult to make a conclusive determination.

- [b]** Yes, it's an appealable order. Under Rule 1:1 since the judge not only sustained the demurrer, the judge also dismissed the Complaint it was a final order under Rule 1:1, this being a civil action, not domestic relations, appeals go by petition to the Supreme Court of Virginia. See 8.01-670(3)
- [c]** The judge's ruling on the demurrer is a ruling of law, not fact, and the appellate court will review that ruling *de novo*, without any deference to the lower court's ruling.

6. [Wills] Claire Davis, a widow, died in June 2020 in a nursing home in the City of Newport News, Virginia. She was survived by her two sons, Delk and Ron, and a daughter, Wilma.

Until January 2018, when she was admitted to the nursing home, Claire lived at Phoebus House, the home she and her deceased husband had occupied on the Chesapeake Bay in Hampton, Virginia for many years. Phoebus House sits on 25 acres of land overlooking one of the widest, most accessible parts of the bay and was a prime location for development. Over the years, many developers approached Claire about buying the house and land, but Claire refused to sell the house and land even though she lacked the resources to support herself.

Claire's children respected her decision not to sell, and in 2009, the children and Claire entered into a written agreement that:

- Phoebus House and the adjoining land would not be sold prior to Claire's death; and
- the children would advance Claire money to support herself; and
- each of the children would contribute such amounts as they were able, and
- after their mother's death, Phoebus House and the surrounding land would be sold, the advances that the children made would be repaid to them, and the balance distributed equally among the three children.

Over the next ten years, each of the children made various cash contributions to their mother's support. The children recently had the house and land appraised at approximately \$4.5 million dollars.

After Claire's death, a Will signed on December 1, 2017 by Claire and attested before two officers of a local bank was found in Claire's safe deposit box at the bank. The Will contained provisions disposing of various articles of tangible personal property, leaving Phoebus House and the adjoining land to Delk, and the remainder of Claire's property consisting of stocks and investment accounts equally to her three children. The stocks and investment accounts were maintained in a brokerage account in Richmond, Virginia. The Will did not have self-proving provisions, and it named Wilma, now a resident of Baton Rouge, Louisiana, as the Executrix.

Delk found the Will and submitted it for probate in the Circuit Court Clerk's Office in Newport News, claiming Wilma could not legally qualify as Executrix. Claire's other children objected to Delk's actions.

- [a] Where should Claire's estate be administered? Explain fully.
- [b] What is the effect of the written agreement among Claire and her three children on the disposition of Phoebus House and on the December 1, 2017 Will? Explain fully.
- [c] May Wilma qualify as Executrix of Claire's estate? Explain fully.
- [d] Is the 2017 Will entitled to probate, and if so, what steps should be taken to admit the Will to probate and enforce the 2009 agreement? Explain fully.

✖✖

- [a] Under §64.2-443, the will should be admitted to probate in the jurisdiction where the decedent had a place of residence. For a patient in a nursing home, the place of legal residence is rebuttably presumed to be the same as it was before he or she became a patient. The appropriate jurisdiction in this case would therefore be Hampton, not Newport News.
- [b] The written agreement has no effect on the admission of the will to probate. Rather, the written agreement gives the signatories a separate cause of action in contract against the estate. Both the estate and Delk would be named as defendants.

The written agreement is a loan from Claire's three children to her. The loan appears to have been unsecured, as there is no deed of trust or other security instrument. Thus, as the real estate does not secure the debt, neither Delk nor the personal representative of the estate need to address the issue of nonexoneration. Assuming the estate has sufficient assets to pay all debts and claims, the order of payment is not critical except to the extent that specific bequests and devises are preserved, if possible. As real estate specifically devised to Delk, Phoebus House would be the last asset to be used to pay the debt. As an unsecured debt of the estate, the debt is to be paid first out of the remainder of the estate, to the extent there are sufficient assets. If the debt in issue exceeds the value of the estate's assets under the

personal representative's control, then debts are paid in the following order: [i] expenses of administration, [ii] family and homestead allowances, [iii] funeral expenses, debts and taxes with priority under federal law, [iv] medical and hospital expenses, [v] debts and taxes due Virginia, [vi] debts and taxes to localities, and [vii] all other claims.

A contract action is an action at law, accompanied by a right to trial by jury. Assuming that the plaintiffs can prove their cause of action, since the terms of the will breach the terms of the written agreement, an issue that would need to be resolved is whether any contract claims would be offset by amounts received by the beneficiaries under the will.

Comment: If the Board was seeking discussion of imposing a constructive trust on Phoebus House, we hope a discussion of the written agreement as an unsecured loan should receive full credit.

In July 2010 A very similar, but not exact fact pattern, was presented. Again, we hope that full credit for this part should be given for recognizing the issue and reaching either conclusion because the difference is so subtle difference.

*Both approaches are premised on recognizing the breach of contract. The July 2010 question is worded a bit differently ("Myrtle **would provide** at her death"), which suggests **present intent to contract** as to the disposition of a probate asset. This summer's [2020] question just says, "after their mother's death, Phoebus House and the surrounding land would be sold...." So that earlier question does indicate a contract to make a will, whereas this one is a loan agreement.*

[c] Yes, assuming Wilma is over the age of 18 and legally competent. The Court or Clerk of Court must find that Wilma is "suitable" to serve, but as the decedent's daughter she seems suitable. However, under §64.2-1426 a nonresident fiduciary must (i) appoint a Virginia resident or the Clerk of Court to receive service of process on his or her behalf, and (ii) post a surety bond, unless a resident qualifies at the same time or the clerk waives surety under the provisions of §64.2-1411 (which does not seem to apply in this case, because of the value of the estate).

[d] The 2017 Will was signed by the decedent and attested by two witnesses, and therefore appears to be valid for probate. Any interested party, but typically the person named as personal representative, in this case Wilma, would take the original of the Will and a certified death certificate to the Clerk of the Hampton City Circuit Court for probate. Because the Will was not "self-proving," at least one of the two witnesses must appear before the Clerk to verify the decedent's signature and validity of the execution of the Will (note that this would be quite unusual for a will executed before bank officers). The proponent of the Will must also pay the appropriate fees, and if the proponent intends to qualify as personal representative of the estate, the proponent must provide a bond, in this case if Wilma, a bond with surety. Further, certain forms must be provided to the Clerk, namely, a Memorandum of Facts (about the decedent), a Probate Tax Return, and a List of Heirs.

The terms of the 2009 agreement would be established in a separate cause of action against the estate and against Delk. To enforce the 2009 loan agreement, the children must make a claim with the personal representative against the estate. The personal representative then must verify the debt, and other debts of the estate by specific statutory processes, marshal the assets of the estate, and pay the debts of the estate as described above.

7. [VA Civil Procedure] On April 1, 2017, Paul, a plumber, was working on a project to renovate a high school in Roanoke County, Virginia. Dave, a roofer, was also working on site. While Paul was walking to his truck to get more tools, he passed Dave, who was pushing a cart stacked high with metal roofing pieces. The load was unstable, and Paul saw that a heavy saw was on the top of the cart, about 6 feet above the ground. The cart jerked and the saw began falling to the ground. Paul reached out to grab the saw and the blade stuck him on his right thumb and smashed his thumb and hand on the pavement. Paul's hand sustained obvious serious injuries; however, Paul refused Dave's offer to call the rescue squad. Paul said that he was an EMT and would leave and go immediately to the Emergency Room. Unbeknownst to Dave, Paul went home and did not seek medical treatment for 5 days. By then, the infection in his thumb was so advanced his right thumb was amputated.

On June 1, 2019, Paul filed a Complaint against Dave in the Circuit Court for Roanoke County. On July 1, 2019, Dave was personally served with the Complaint which alleged that Dave was negligent in transporting work materials and that his negligence caused a permanent injury to Paul, including amputation of his thumb, past and future medical expenses, past and future pain and suffering, permanent deformity, lost wages and a loss of earning capacity because he could not return to work using his hands in construction. The Complaint seeks \$2.5 million dollars in compensatory damages.

On July 19, 2019, Dave, by his attorney Alvin, mistakenly filed an Answer to the Complaint in the Circuit Court for Franklin County. The Answer denied any negligence on the part of Dave but did not include any affirmative defenses.

On July 25, 2019, Alvin received a call from the Franklin County Circuit Court Clerk's Office asking about the case because that office did not have any such case docketed in its court. Alvin realized the mistake, checked the Roanoke County online case information website, and discovered that Paul had just the day before filed a Motion for Default Judgment in Roanoke County. On July 26, 2019, Dave filed in the Circuit Court for Roanoke County a Motion for an Extension of Time to File a Responsive Pleading and attached the Answer he had filed timely on July 19, 2019, but in Franklin County instead of Roanoke County.

A month later, the Roanoke County Circuit Court heard Dave's Motion for an Extension of Time to File an Answer and Paul's Motion for Default Judgment. Upon consideration of the written motions and the argument of counsel, the Court granted Dave's Motion, contemporaneously filed his (original) Answer to the Complaint and denied Paul's Motion for Default Judgment.

Dave then learned for the first time in discovery that on the date of the accident Paul did not go to the ER but went home and failed to seek any medical treatment until 5 days later.

In advance of the trial, Dave timely exchanged with Paul proposed jury instructions, which included a proposed instruction on the defense of Failure to Mitigate Damages. Dave contemporaneously filed a Plea of the Statute of Limitations.

Paul filed a Motion *In Limine* to exclude Dave's defense (and corresponding jury instruction) of Paul's failure to mitigate his damages, and a Motion to Strike Dave's Plea of the Statute of Limitations because Dave failed to plead these affirmative defenses in his Answer, and they were therefore waived.

- [a] Was the Circuit Court of Roanoke County correct in granting Dave's Motion for an Extension of Time to File an Answer and in denying Paul's Motion for Default Judgment? Explain fully.
- [b] What arguments should Paul and Dave each make on Paul's Motion In Limine to exclude Dave's defense of failure to mitigate damages, and how should the Court rule? Explain fully.
- [c] How should the Court rule on Paul's Motion to Strike Dave's Plea of the Statute of Limitations? Explain fully.

xx

- [a] Under Rule 1:9, the trial court's given the discretion to permit the late filing of responsive pleadings, including when the time for filing responsive pleadings has passed. Under Rule 3:19, the trial court's given the authority, for good cause shown, to grant relief from a default. The circuit court was correct.
- [b] Paul should argue that "mitigation of damages" is an affirmative defense which should be pleaded by Dave. Even if it was not required to be pleaded by Dave, the court should recognize that raising the defense now is unfair to Paul, as it comes too late in the litigation process, and Paul is now prejudiced by not having the opportunity to conduct discovery, or present evidence, expert or otherwise to address the issue.

Dave should argue that although "mitigation of damages" is an affirmative defense, in Virginia it need not be raised in a responsive pleading, as the defense is not dispositive of the action. See *Monahan v. Obici Medical Management Services, Inc.*, 271 Va. 621 (2006). The court should deny Paul's Motion in Limine for the reasons set forth in Dave's argument above. If the evidence supports the instruction, it should be a defense to be considered by the jury.

- [c] Rule 3:8(a) requires responsive pleadings to be filed within 21 days of service on the defendant. It further specifies that a *plea* is a responsive pleading. Va. Code §8.01-235 specifies that the issue of failing to file within the applicable statute of limitations can be raised only as an affirmative defense and set forth in a responsive pleading and prohibits the s/l being raised by demurrer. There's no limiting requirement that the s/l defense be raised only in an answer.

8. [UCC - Sales] Bud is the owner of a retail shop in Culpeper, Virginia, that sells a large variety of outdoor furniture, tents, cooking grills and yard equipment. Anticipating the summer season, Bud placed an order on March 4, 2020, for five

hundred (500) grill covers from Wayne's Wholesale, Inc. ("Wayne's") in Virginia Beach, Virginia, for the total purchase price of \$50,000. Bud used a simple purchase order form on the front of which he typed the following additional language: "Grill covers shall be forest green; color shall not fade from exposure to sun or outdoor elements for at least sixty (60) days from first use." The entire purchase order form was printed on the front and back of a single piece of paper in the same black color, size and font with one exception on the back of the form. One of the fifteen conditions found on the back was printed in red ink and read as follows: "Purchaser may reject any defective goods within thirty (30) days of delivery."

Wayne's received and processed the order on March 12, 2020, and on the same day Wayne's faxed to Bud a form titled "Wayne's Wholesale, Inc. Order Confirmation." This Order Confirmation form was printed on one page, front and back, using the same color, size and font throughout. The Order Confirmation included the following printed provisions: "Any objection to goods shipped must be made within fourteen (14) days of receipt of the goods," and "Wayne's gives no warranties of any nature, either express or implied."

Bud received the grill covers on April 23, 2020, and stocked its store with the grill covers the same day. Ten covers were sold the first week. Two weeks later, six customers returned the grill covers because they had already faded badly in the sun. Bud called the other customers that purchased the covers and found that their new grill covers had also faded. Bud determined that the grill covers were not suitable for outdoor use and sent Wayne's an email on May 20, 2020, advising Wayne's that he rejected the entire order as being defective. Bud promptly returned the unsold covers to Wayne's. Wayne's refused to accept the returned grill covers, telling Bud that the agreement required him to reject the covers within fourteen (14) days of receipt.

Bud filed suit in the Circuit Court of the City of Virginia Beach and properly served Wayne's. Bud alleged that the covers were unfit for the purpose for which they were designed and were not merchantable. He asked for judgment in the sum of \$50,000 and for an award of attorney's fees.

In its Answer, Wayne's argues in defense that:

- [a] Under the terms of the agreement, Bud was required to reject the grill covers within fourteen (14) days of receipt, and he failed to do so.
- [b] Wayne's gave no warranties, either express or implied.
- [c] The Court does not have authority to award attorney's fees.

How should the Court rule on each of Wayne's defenses? Explain fully.

✖✖

- [a] Wayne's defense that the covers must be returned within 14 days fails. Under §8.2-207, because Wayne's Order Confirmation is not conditional, and because both parties are merchants, Wayne's Order Confirmation is an acceptance with additional inconsistent terms. Bud's Purchase Order constitutes an offer to purchase. Wayne and Bud are merchants because they deal in goods of the kind or by their occupation hold themselves out as having knowledge or skill peculiar to the goods involved in the transaction. The additional terms, waiver of all warranties and objection within 14 days of receipt, are proposals for additions to the contract with Bud.

Under §8.2-207(2)(b) when terms materially alter the agreement, they do not become a part of the contract. Terms materially alter the agreement if there is hardship through significant shifting of the burden or surprise. Because the 14-day requirement is vastly different from Bud's 30-day rejection requirement found in the original Purchase Order, and the disclaimer of warranties differs from the express warranty that the merchandise will not fade for at least 60 days, and both shift the burden and risk of loss to Bud, these terms materially alter the agreement. The terms are not added to the contract. The parties performed, and such performance confirms acceptance. The Court should apply the knockout rule to find that there is a contract, eliminating the inconsistent material terms. These terms are replaced with UCC gap-fillers. In this case, the relevant gap fillers are a buyer's right to reject or revoke acceptance of non-conforming goods, and all UCC implied warranties.

Under the UCC, a buyer may reject non-conforming goods that substantially impair the value, or if the impairment is discovered after the goods are accepted, may revoke acceptance if the non-conformity was reasonably induced by

the difficulty of discovery at the time of acceptance. Because the defect could not be discovered until after the covers were out in the sun, Bud could revoke his acceptance when he discovered they were not suitable for outside use.

- [b]** As discussed above, §8.2-207(b)(3) would apply the knock-out rule, eliminating Wayne's warranty disclaimer. We therefore apply the implied UCC warranties: fitness for a particular purpose and merchantability. Under the UCC's definition of "merchantability," goods must be at least of average quality, properly packaged and labeled, and fit for the ordinary purposes they are intended to serve. The application of the implied warranty of merchantability is limited to a seller of "goods of that kind," meaning the kind of goods the seller usually sells in the marketplace. The implied warranty of fitness for a particular purpose applies if the seller knows or has reason to know that the buyer will be using the goods he is buying for a certain purpose. If the seller knows the purpose for which the goods are to be used, the seller impliedly warrants that the goods being sold are suitable for that specific purpose. Grill covers are intended to be used outdoors, and the Purchase Order puts Wayne on notice of the particular purpose: Bud notes that the covers should not fade from exposure to sun or elements for at least 60 days.

If the warranty disclaimer was not knocked out by the operation of §8.2-207, Bud would still have the right to revoke his acceptance of the goods due to their non-conformance. Buyers always have the right of inspection, and to revoke acceptance if a defect cannot be discovered upon inspection, which then gives the seller the opportunity to cure.

It is also debatable whether Wayne properly disclaimed the warranty of merchantability. Although Wayne's disclaimer is conspicuously written, it does not include the word merchantability, nor does it use the words "as-is."

Note that the stipulation in the purchase order as to the color and weather-resistance of the grill covers, would probably not be an express warranty under §8.2-313(1)(b), just a product description that explains the purpose and establishes the parameters of what makes it merchantable. An express warranty can include descriptions of goods and samples, but in this case it's the buyer's description rather than the seller's.

- [c]** The general rule (the American Rule) is that each side pays its own fees, unless otherwise provided by contract or statute, or in the Court's discretion for fraud. No such facts appear in the question.

9. [Agency + Torts] Jim Johnson ("Johnson") owned and operated a milling business in Appomattox, Virginia. He had several employees, including David. David had worked for him for many years. David lived near Appomattox in Farmville, Virginia. At the close of business one day, David was permitted by Johnson to use a milling business truck to transport a large bag of flour that David had bought from Johnson's business to David's home in Farmville. David drove to Farmville and delivered the flour to his home. He began the journey back to Appomattox to return the truck. David stopped at Acme Barbecue on the way. While there, he ate dinner and started drinking beer.

David finished drinking and started to drive Johnson's truck back to the business. On the way, he lost control of the truck, crossed the center, and struck another vehicle. Peter, the driver of the other car, was seriously injured. David fled the scene and returned to his home in Farmville. The police were given a description of the truck, contacted Johnson and found David at his home in Farmville. David was charged with driving while intoxicated and leaving the scene of an accident. He pleaded guilty to driving while intoxicated.

The injured driver, Peter, then filed a civil lawsuit for personal injury against David and Johnson seeking damages for his personal injuries under theories of respondeat superior and negligent entrustment.

During discovery, Peter obtained the following evidence through depositions:

- On the day of the accident, two witnesses had been present for the conversation between David and Johnson. The witnesses confirmed that Johnson agreed to let David borrow the truck to take the flour home but that he was told not to drive anywhere else and to bring the truck immediately back to Appomattox.
- Johnson admitted that the truck loaned to David was often used in his business to make deliveries. He admitted that David had purchased the flour from the milling business and was therefore a customer entitled to delivery.

- David testified that he had consumed three shots of liquor while he was at his house when he dropped off the flour. He also testified that he had four beers at Acme Barbecue, immediately before the accident. All of the alcohol had been consumed within less than two hours of David leaving the milling business.
- David admitted that he regularly drank beer and liquor but stated that he never got drunk.
- David admitted that he had been in other accidents but denied that any had to do with alcohol.
- David denied that he was drunk when this accident occurred, and only pleaded guilty to driving while intoxicated as part of a plea deal. His Blood Alcohol Content two hours after the accident was still over the legal limit.
- The server at Acme Barbecue testified that he served David four beers but thought he was getting tipsy, so he refused to serve him any additional beer. The server testified that David regularly came in and drank four or five beers. This was the first time that the server was concerned about his ability to drive. The server testified that he had seen Johnson come in the restaurant while David was there drinking.
- Conrad was an employee at Johnson's milling business. He testified that David routinely drank on the job and regularly was drunk by the end of the day, and that Johnson knew that David was a drunk and had been in several accidents.
- Johnson testified that he had never seen David drink alcohol, and that he did not allow any of his employees to drink while on the job. He claimed not to know that David had been in other accidents or that David regularly drank alcohol. He testified that he had allowed other employees to deliver flour from his mill using his truck. He gave all of them the same instructions that he gave David. They were to go directly home, deliver their flour, and return the truck immediately without stopping.

[a] What arguments should Peter make in support of his claim under a theory of respondeat superior, what defenses might Johnson assert, and who is likely to prevail? Explain fully.

[b] What arguments should Peter make in support of his claim under a theory of negligent entrustment, what defenses might Johnson assert, and who is likely to prevail? Explain fully.

xx

[a] Under the doctrine of respondeat superior, an employer is liable for the torts of his employee committed within the scope of employment. Here, it is given that David is an employee of Johnson, and thus, the only issue in the respondeat superior claim is whether David was acting within the scope of his employment when he caused the accident.

The plaintiff will argue that David was driving a vehicle that belonged to Johnson and thus, there is a rebuttable presumption that the employee was acting with the scope of his employment. Additionally, the plaintiff will argue that this conclusion is further supported by the fact that David used the truck to take home a large bag of flour that he had purchased from Johnson. In this instance, David was both Johnson's customer, entitled to delivery of his purchase, and Johnson's employee making the delivery. Accordingly, the plaintiff will argue, David was acting within the scope of his employment when he made the delivery and when he was returning the truck after the delivery.

On the other hand, Johnson will argue that David was outside the scope of his employment when the accident occurred. Virginia courts have held that if the employee steps aside from his employer's business and is engaged in an independent venture of his own, the employee is no longer acting with the scope of his employment. Johnson instructed David not to drive the truck anywhere else and to immediately return it to Appomattox. David completely departed from his employment when he stopped at Acme BBQ and consumed four beers.

Because of his significant departure from his employer's business, a court will likely find that Johnson is not liable for David's tort based on respondeat superior.

[b] To prevail on a negligent entrustment claim in a motor vehicle case, the test of liability in Virginia is whether the owner of the vehicle knew, or had reason to know, that he was entrusting his vehicle to an unfit driver, likely to cause injury to others. In motor vehicle cases involving the intoxication of the defendant driver, the plaintiff must prove that the owner

knew or had reason to know that the person to whom the vehicle was entrusted is addicted to intoxicants, or has the habit of drinking. In short, the owner must know, or should have known, that the driver's habits are such that he is likely to drive while intoxicated.

The plaintiff will argue that Johnson knew or should have known that David was likely to drive while intoxicated based on evidence in the case. The server at Acme BBQ testified that he had seen Johnson come in the restaurant while David was there drinking. Another mill employee testified that David routinely drank on the job and regularly was drunk by the end of the day, and that Johnson knew that David was a drunk and had been in several accidents.

Johnson, on the other hand, will argue that he did not have reason to know that he was entrusting his vehicle to an unfit driver or that David would likely drive while intoxicated. Specifically, Johnson will rely on his testimony he had never seen David drink alcohol, that he did not allow any of his employees to drink while on the job, and that he did not know that David had been in other accidents or that David regularly drank alcohol. Johnson will further point to David's testimony that none of his previous accidents had to do with alcohol and to his denial that he was drunk when this accident occurred.

The plaintiff is likely to prevail on the negligent entrustment theory. Although there is conflicting evidence as to how much David drinks and whether Johnson was aware of David's drinking, Johnson relies solely on testimony of interested parties, himself and David. Plaintiff, on the other hand, has presented testimony from independent witnesses, a server at the restaurant and of a co-worker, tending to prove that Johnson was well aware of David's heavy drinking. Further, David's testimony that he was not drunk at the time of the accident is undermined by his BAC above the legal limit two hours later. Thus, the court will likely conclude that the plaintiff has carried his burden to prove that Johnson knew or should have known of David's proclivity to drive while intoxicated and that Johnson is therefore liable for negligent entrustment.

Facts based on McNeill v. Spindler, 191 Va. 685 (1950).