

## July 2023 - Virginia Bar Exam - Essay Questions

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

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The following, provided us great help with suggested answers in each's particular area[s] of specialty: Mark Williams of Washington & Lee Law School, Walter Erwin, Ret. & Jim Guynn of Guynn Waddell, P.C., and Professor Jeremy W. Hurley of Appalachian School of Law.

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1. [07/23] - [Local Government + VCPV] A pedestrian was crossing Main Street in the City of Chesapeake (City) when she was struck and seriously injured by a speeding automobile. In response to a call from a witness to the accident, the City dispatched a rescue squad ambulance operated by the City Fire Department. The ambulance was driven by Danny Youngblood, who had recently been hired by the City for that purpose. When he turned onto Main Street, Youngblood saw a crowd of people gathered in the street where the accident had occurred. Nonetheless, he approached the scene of the accident at a very high speed with flashing lights and siren sounding. Mr. Jones, one of many curious passersby, was standing in the street taking a video of the accident scene, when Youngblood ran into him with the ambulance. Mr. Jones was struck to the ground and rendered unconscious. He remained unconscious in the hospital for several weeks but eventually recovered. He suffered a concussion, broken leg and other extensive injuries.

Mr. Jones is considering filing a lawsuit against Youngblood and the City to recover money damages for his medical bills and pain and suffering from his injuries.

- (a) How long does Mr. Jones have to perfect his claim against the City? Explain fully.
- (b) How long does Mr. Jones have to perfect his claim against Youngblood? Explain fully.
- (c) What defenses, if any, does Youngblood have to Mr. Jones' claim? Explain fully.
- (d) What defenses, if any, does the City have to Mr. Jones' claim? Explain fully.

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- (a) (i) Notice of Claims Requirement Under Va. Code §15.2-209. Every claim 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. If Mr. Jones does not give the required notice to the City within six months of the date of the accident, his claim against the City would be barred. If Mr. Jones files and serves his lawsuit within six months of the accident, he can argue that the filing and service of the lawsuit satisfies the notice requirement because the City had an opportunity to investigate the incident and gather the evidence within six months of the alleged negligence by the City.

However, there is a possible savings provision in Under Va. Code §15.2-209(A), that, while a written statement is the proper way of providing notice; however, “provided that the attorney, chief executive, or mayor...or any insurer or entity providing coverage or indemnification of the claim, had actual knowledge of the claim...within six months,” the claim would still be able to proceed

(ii) *Statute of Limitations Under Va. Code §8.01-243.* Because the meaning of “perfect his claim” in the question is not clear, the examinee may also wish to include in this answer that, unless Mr. Jones is a minor or a person under a disability, Mr. Jones is also required to file his actual personal injury lawsuit against Mr. Youngblood within the Statute of Limitations in Va. Code §8.01-243. Under §8.01-243, Mr. Jones must file suit within the first two years after the accident. The statute of limitations can be tolled in certain circumstances. For example, the statute may be tolled for the time that Mr. Jones was unconscious in the hospital. If Mr. Jones is a minor, he would be a person under a disability, and the tolling provision of Va. Code § 8.01-229 could also apply.

- (b) The examinee should recognize that the Notice of Claims Requirement under Va. Code §15.2-209 applies only to Mr. Jones’ claim against the City, not to Mr. Jones’ claim against Mr. Youngblood, an individual City employee.

(i) *Statute of Limitations Under Va. Code §8.01-243.* As noted in the response to question 1(a), if “perfect his claim” in question 2(b) is referring to Mr. Jones filing a personal injury *lawsuit* against Mr. Youngblood, under §8.01-243, Mr. Jones must file suit within the first two years after the accident. The statute of limitations can be tolled in certain circumstances. For example, the statute may be tolled for the time that Mr. Jones was unconscious in the hospital. If Mr. Jones is a minor, he would be a person under a disability, and the tolling provision of Va. Code § 8.01-229 could also apply to his claim.

- (c) (i) *Sovereign Immunity.* The Supreme Court of Virginia has long recognized that sovereign immunity applies to the discretionary acts of government employees. See, e.g., *Linhart v. Lawson*, 261 Va. 30 (2001) (school bus driver); *Nationwide Mutual Ins. Co. v. Hylton*, 260 Va. 56 (2000) (state trooper); *Stanfield v. Peregoy*, 245 Va. 339 (1993) (snow plow driver); *Colby v. Boyden*, 241 Va. 125 (1991) (police officer); *Lentz v. Morris*, 236 Va. 78 (1988) (high school teacher/coach); *Messina v. Burden*, 228 Va. 301 (1984) (director of public works and building superintendent). Under the four-part analysis articulated in *Messina* and *James v. Jane*, 221 Va. 43 (1980), a court determining whether a government employee is entitled to sovereign immunity must consider: (1) the nature of the function the employee performs; (2) the extent of the government’s interest and involvement in the function; (3) the degree of control and direction exercised over the employee by the government; and (4) whether the act in question involved the exercise of discretion and judgment. Within this analysis and the well-established case law affirming the immunity of government employees engaged in vehicular operation, Mr. Youngblood is entitled to sovereign immunity. Ambulance service is a governmental function in which the agent is entitled to immunity. *Andrews v. LogistiCare Sols. L.L.C.*, 78 Va. Cir. 45 (Fairfax Cnty. 2008).

At the time of the accident, Mr. Youngblood satisfied the first three factors under the *Messina* analysis since he was responding to the scene of an accident which is clearly a governmental function. Mr. Youngblood’s actions also required the exercise of judgement and discretion because at the very least, he had to decide how quickly he had to get to the scene of the accident, what route to take, what action was needed to protect the public, and whether to alert the general public of his approach by employing his flashing lights and siren. Further, Mr. Youngblood was not guilty of gross negligence because he had activated his lights and siren as required by Virginia Code §46.2-920.

(ii) *Contributory Negligence.* Because the facts state that Mr. Jones was standing in the street taking a video of the accident scene when the ambulance ran into him, Mr. Youngblood may also be able to establish a defense based on Jones’ contributory negligence. In the context of a slip and fall claim, the Supreme Court of Virginia has held that when a plaintiff knows of the existence of a condition but without reasonable excuse forgets about the condition and falls into, off of, or over it, he is guilty of contributory negligence as a matter of law. *Scott v. City of Lynchburg*, 241 Va. 64, 399 S.E.2d 809 (1991). Similarly, Youngblood could argue that Jones failed to take

reasonable care by stepping into the street while videoing the accident scene and remaining in front of an oncoming ambulance with lights flashing and siren sounding.

- (d) (i) *Sovereign Immunity*. As the Supreme Court of Virginia noted in *Messina v. Burden*, 228 Va. 301 (1984) the doctrine of sovereign immunity is “alive and well” in Virginia, and a city enjoys sovereign immunity for claims arising out of the performance of its governmental functions. Governmental functions are those functions that are tied to protecting the health, welfare, and safety of citizens. It is well established that the organization and operation of a fire department is a governmental function. *City of Richmond v. Va. Bonded Warehouse*, 148 Va. 60 (1927). In addition to operating as part of the fire department, the operation of an ambulance service is directly tied to the health, welfare and safety of citizens and is a governmental function. *Edwards v. City of Portsmouth*, 237 Va. 167 (1989). Virginia courts have specifically determined that ambulance service is a governmental function. *Andrews v. LogistiCare Sols. L.L.C.*, 78 Va. Cir. 45 (Fairfax Cnty. 2008).

Even if it can be argued that Mr. Youngblood was guilty of gross negligence in approaching the scene at high speed, a city does not lose its sovereign immunity because its employee may be guilty of intentional conduct or gross negligence and a city cannot be held vicariously liable for an employee’s gross negligence. *Niese v. City of Alexandria*, 264 Va. 230 (2002).

(ii) *Contributory Negligence*. The City may also be able to establish a defense based on Jones’ contributory negligence, as set forth in answer (ii) to question 3(c) above.

2. [07/23] [VCVP] Paula and Dennis are neighbors in Fairfax County, Virginia. Paula agreed to sell Dennis a rare baseball card, but then changed her mind and refused to sell it.

Six months later, coincidentally, Paula and Dennis were involved in a car accident when their two cars collided in an intersection in their neighborhood. Paula was injured in the accident.

Paula properly filed suit in Fairfax County against Dennis claiming that Dennis’ negligence in the crash caused Paula to suffer personal injuries. Dennis filed a counterclaim against Paula, claiming that Paula breached her agreement to sell the baseball card to Dennis earlier that year.

Paula moved to dismiss the counterclaim on misjoinder grounds. The Court denied her motion.

As the case neared trial, Paula had a family emergency and asked the Court to grant a continuance of the trial. Over Dennis’ objection, the Court granted the continuance. Six months later, the case proceeded to trial.

At trial, Paula admitted that she was on her cell phone at the time of the collision. At the close of Paula’s case, Dennis moved to strike Paula’s claim because she admitted facts that show contributory negligence as a matter of law. The judge made clear that he agreed with Dennis and that he was inclined to grant Dennis’ motion. When he asked Paula if she had anything else to say before he ruled, rather than make any additional argument, Paula requested a nonsuit.

Dennis moved to deny Paula’s nonsuit on three separate grounds:

First, Paula’s nonsuit request came too late because she waited until Dennis moved to strike her claim and after the Court had indicated that it would grant Dennis’ motion.

Second, Dennis’ pending counterclaim barred the taking of a nonsuit.

Third, Paula could not take a nonsuit because she had earlier sought and been granted a continuance of the trial.

- (a) Did the Court correctly deny Paula’s Motion to Dismiss the counterclaim? Explain fully.
- (b) How should the Court rule on Dennis’ claim that Paula’s nonsuit request came too late because she waited until Dennis moved to strike her claim and after the Court had indicated that it would grant Dennis’ motion? Explain fully.
- (c) How should the Court rule on Dennis’ claim that the pending counterclaim barred the taking of a nonsuit? Explain fully.
- (d) How should the Court rule on Dennis’ claim that because Paula had earlier sought and been granted a continuance of the trial, she could not take a nonsuit? Explain fully.

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- (a) The Court correctly denied Paula's Motion to Dismiss the counterclaim. The issue presented by Paula's motion is whether Dennis' counterclaim must arise out of the same transaction identified in Paula's complaint.

Under Virginia procedural rules, counterclaims are permissive. More specifically, a defendant may plead as a counterclaim any cause of action the defendant has against the plaintiff whether or not it arises out of the same transaction that is the subject of the plaintiff's complaint and whether it is in tort or contract. While a counterclaim arising out of the same transaction identified in plaintiff's complaint will relate back to the date the complaint was filed for purposes of statute of limitations, there is no requirement that defendant's counterclaim relate to the plaintiff's complaint.

Here, Paula filed a tort action against Dennis for damages arising from the injuries she sustained in a car accident. Dennis asserts a counterclaim against Paula based on contract, claiming that Paula breached her agreement to sell the baseball card to Dennis earlier that year. Paula moved to dismiss the counterclaim on misjoinder grounds. Applying the applicable rules, Dennis was permitted to assert his claim for breach of contract against Paula even though it does not arise out of the same transaction as her tort claim. This is not a misjoinder of claims. Therefore, the court correctly denied Paula's motion to dismiss the counterclaim.

- (b) The Court should rule against Dennis on his claim that Paula's nonsuit request came too late. The issue presented is whether the motion to strike made by Dennis had been sustained before Paula made her motion for nonsuit.

Under Virginia procedural rules, a party may take a nonsuit during trial before a motion to strike the evidence has been sustained or before the jury retires from the bar.

Here, Dennis moved to strike Paula's case after she presented her evidence based on facts she admitted, which arguably showed contributory negligence. While the judge indicated he agreed with Dennis' position and was inclined to grant the motion, he asked Paula if she had anything else to say before he ruled. Paula moved for the nonsuit before the judge ruled. Therefore Dennis' motion to strike had not been sustained and the Court should rule that Paula's nonsuit request did not come too late. Facts taken from: **Berryman, Admin. v. Moody** 205 Va. 516 [09/64]

- (c) The Court should rule against Dennis on his claim that the pending counterclaim barred the taking of the nonsuit. The issue is whether the counterclaim can be adjudicated independently of Paula's claim.

Under Virginia procedural rules, a party cannot nonsuit a cause of action, without the consent of the adverse party who has filed a counterclaim, if the counterclaim arises out of the same transaction or occurrence as the claim of the party seeking to nonsuit. This rule does not apply if the counterclaim can remain pending for independent adjudication by the court.

Here, there are two reasons Dennis' claim is without merit. First, his counterclaim for breach of contract does not arise out of the same transaction or occurrence as Paula's claim for personal injuries in connection with the car accident. Second, it is clear the counterclaim, which is based on Paula's broken promise to sell the baseball card, can be adjudicated independently from Paula's tort action. Therefore, the court should rule against Dennis on this argument.

- (d) The Court should rule against Dennis on his claim that Paula could not take a nonsuit due to her earlier trial continuance. The issue is whether a continuance of trial implicates a plaintiff's right to a nonsuit.

Under Virginia procedural rules, a plaintiff has one nonsuit as a matter of right if done so timely. While the court has discretion with additional nonsuits, there is no language in the nonsuit statute qualifying the right to a nonsuit based on a trial continuance.

Here, when Paula's case neared trial, Paula had a family emergency and asked the Court to grant a continuance, which it did. The case later proceeded to trial. The continuance does not affect Paula's right to nonsuit. A continuance of the trial is not the same as a nonsuit (voluntary dismissal). Therefore, the trial continuance does not affect Paula's right to take a nonsuit and the court should rule against Dennis on this argument.

See Supreme Court of Virginia Rules 3:9; Va. Code 8.01-233; Va. Code 8.01-380

3. [07/23] [Creditors' Rights + VCV] David and Suzy married in 2015. They resided in Suffolk, Virginia, in a home that had been given to David as a gift from his grandfather in 2014, prior to meeting Suzy.

David and Suzy owned a lakefront vacation home near Roanoke, Virginia, which they purchased in 2019 after their marriage. Title to the vacation home was held by David and Suzy as tenants by the entireties.

In July 2021, David's business failed due to the COVID outbreak. David had no liquidity and became unable to pay his debts. He stopped making payments on his loans from his primary lender, Lender Servicing Co. (Lender). These loans were based on personal guarantees that David provided to fund his business ventures prior to his marriage to Suzy.

In an effort to protect his home in Suffolk from creditors, David transferred the home to Suzy's name alone and recorded a deed in the Suffolk Circuit Court in September 2021. The deed recited that it was given in consideration of David's natural love and affection for Suzy.

Lender properly filed a Complaint against David in the Circuit Court of the City of Suffolk based on nonpayment of the Lender's loans. David was served with the Complaint on November 1, 2021.

In December 2021, David inherited a farm in the City of Chesapeake, Virginia, from his father.

Lender obtained a judgment for \$200,000 against David on January 10, 2022, which was promptly docketed in the Clerk's office of the Circuit Court of the City of Suffolk.

On February 2, 2022, David conveyed the Chesapeake farm in fee simple to John Smith (Smith) in full satisfaction of a \$50,000 debt he owed Smith. Smith promptly recorded the deed after the closing.

In March 2022, Lender's lawyer recorded duly authenticated abstracts of its judgment against David in the office of the Clerk of the Circuit Court of the City of Chesapeake and in the office of the Clerk of the Circuit Court of the City of Roanoke.

Does Lender have a right to enforce its judgment against the following:

- [a] The home in Norfolk. Explain fully.
- [b] The farm in Chesapeake? Explain fully.
- [c] The vacation home in Roanoke? Explain fully.

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(a) The lender likely has a right to enforce its judgment against the home in Suffolk. The issue is whether the Lender can enforce its judgment given that David transferred the property to Suzy, his spouse, after defaulting on the Lender's loan, but before the judgment was obtained.

Pursuant to Virginia law, any gift, conveyance, assignment, or transfer made with the actual intent to hinder, delay, or defraud creditors is considered fraudulent. Transfers between an indebted husband and his wife are presumed to be fraudulent and are voidable at the suit of either existing or future creditors. This presumption of fraudulent intent can be rebutted if the wife shows that she gave consideration for the transfer or that the transfer was a bona fide gift.

Applying these rules, David's transfer of the home to his spouse Suzy could be seen as fraudulent, given certain badges of fraud. He made this transfer when he was insolvent and facing legal action from the Lender. The transfer was between family members (David and Suzy), another badge of fraud. David retained an interest in the property, which is evident from the fact that he continued to live in the house even after transferring it to Suzy, contributing another badge of fraud.

As the Lender was a present creditor at the time of the transfer, Lender can file a motion to set aside the transfer as fraudulent or voluntary. They need to establish clear, cogent, and convincing evidence of David's fraudulent intent through these badges of fraud. If successful, the title to the property will be restored to David.

If Suzy cannot rebut the presumption of fraud by showing either that she gave consideration for the transfer or that the transfer was a bona fide gift, the Lender should be able to set aside the transfer and enforce the judgment against the home in Suffolk. See Va. Code Ann. § 55.1-400; 55.1-401; Fox Rest Associates, L.P. v. Little, 282 Va.277 (2011).

(b) The Lender may not have a right to enforce its judgment against the Farm in Chesapeake if David conveyed that property in satisfaction of pre-existing indebtedness. The issue is whether David conveyed the property to Smith as payment for a debt, before the Lender recorded its judgment in Chesapeake.

According to Virginia law, a conveyance or transfer may be avoided for the benefit of any creditor unless the conveyance is made to a bona fide purchaser who pays a fair consideration without notice or knowledge of the fraudulent intent of the grantor.

Here, Smith was arguably a bona fide purchaser, who paid fair value for the farm without any knowledge of David's fraudulent intent or insolvency, and in satisfaction of the \$50,000 debt. There is a good argument that Lender may not void the conveyance. David inherited the farm in December 2021 and conveyed it to Smith in February 2022. The abstract of judgment was not recorded in Chesapeake until March, 2022. Essentially, the enforceability of the judgment against the farm in Chesapeake hinges on whether Smith was a bona fide purchaser or was aware of David's fraudulent intent or insolvency. See Va. Code Ann. § 55.1-400.

(c) The Lender likely cannot enforce its judgment against the vacation home in Roanoke. The issue is whether the judgment against David can reach property owned jointly by David and Suzy.

Under Virginia law, property held as tenancy by the entireties can only be used to satisfy joint debts of the husband and wife. An individual spouse's debt cannot be enforced against property held as tenancy by the entireties.

Since the debt to the Lender is solely David's and not jointly owed with Suzy, the Lender cannot enforce its judgment against the vacation home in Roanoke. This is in line with the rule that property held as tenancy by the entirety cannot be subjected to the creditor's process for a debt owed only by one spouse. Thus, the Lender is likely unable to enforce its judgment against the vacation home in Roanoke, Va. Code Ann. § 55.1-400

**4.** [07/23] [UCC Sales] Bob, an accountant from Danville, Virginia owns a cabin in Smith Mountain Lake in Pittsylvania, Virginia.. Recently, Bob went to Joe's Used Trucks in Danville and told Joe that he was looking for a used truck. Bob told Joe that the truck would be used exclusively at his cabin for towing his boat and trailer from a storage shed on his property to the lake. Bob said that he did not want to pay more than \$1,000 for the used truck.

Joe told Bob that he had no trucks at that price. He told Bob, "I don't deal in anything other than used trucks, but a couple of weeks ago I took as a trade-in a small tractor with a trailer hitch on it. It has been sitting here on my lot for two weeks, and no one has made an offer. It might work for you, and I can let you have it for \$750." Bob started the tractor and drove it in the parking lot. After he got off of the tractor, he looked it over and was satisfied with how it looked and ran. He purchased the tractor for \$750.

The next day, Bob used the tractor to tow his boat and place it in the water. Later that day, when Bob was pulling the boat out of the water, he heard a clanking noise. The tractor stalled, and it turned out that the transmission of the tractor had failed. Bob had a mechanic inspect the tractor, and the mechanic found that a seal in the transmission had

rotted allowing the fluid lubricant to leak out. The mechanic said the leak should have been obvious even before the failure because there were oily spots on the transmission housing and there would have been a puddle of fluid lubricant on the ground wherever the tractor had been parked. When Bob checked the shed where he had parked the tractor overnight, he saw the puddle of lubricant fluid.

The old transmission cannot be repaired. A rebuilt transmission will cost \$850. The value of the tractor in its current condition is \$100 for its parts.

Bob sued Joe for damages asserting claims that Joe made and breached (i) an express warranty, (ii) a warranty of fitness for a particular purpose, and (iii) a warranty of merchantability.

- (a) What arguments should Bob make to support a claim for breach of express warranty? What arguments should Joe make in response? Who will likely prevail? Explain fully.
- (b) What arguments should Bob make to support a claim for breach of warranty of fitness for a particular purpose? What arguments should Joe make in response? Who will likely prevail? Explain fully.
- (c) What arguments should Bob make to support a claim for breach of warranty of merchantability? What arguments should Joe make in response? Who will likely prevail? Explain fully.
- (d) In such a suit, what is the measure of damages and what amount might Bob recover? Explain fully.

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[a] Joe will likely prevail in defending against Bob's claim that there was a breach of express warranty.

Bob should argue that Joe's statements about the "small tractor with a trailer hitch" that "might work for you" are sufficiently factual to create an express warranty under Va. Code § 8.2-313(1). Under such statute, "(a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise. (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description." Further, Va. Code § 8.2-313(2) provides that "[i]t is not necessary to the creation of an express warranty that the seller use formal words such as 'warrant' or 'guarantee' or that he have a specific intention to make a warranty."

In this case, Joe told Bob that he would sell the tractor to him for \$750. That this tractor had been sitting on his lot for two weeks, and that it "might work for [Bob]." These could be argued to create the express basis of the bargain that the tractor should conform to the description. The fact that the transmission had failed the next day, and that there was a puddle of lubricant on the ground that anyone would have been able to see, could be said to not conform to the description.

However, Joe should argue that his statements did not rise to the level of affirmations of fact or promises within the meaning of the statute. Rather, Joe merely articulated his opinion that the tractor might be adequate, and Va. Code § 8.2-313(2) provides that "a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty."

Here, the fact that Joe first led by indicating that he doesn't "deal in anything other than used trucks" and that he said that he thinks that "it might work for you..." indicate that there was no factual basis for believing that the statements were anything other than Joe's opinion.

Therefore, Joe likely will prevail against the claim for breach of express warranty.

[b] Joe will likely prevail against Bob's claim for breach of warranty of fitness for a particular purpose.

Bob should argue that he clearly communicated to Joe that he wanted a used truck for no more than \$1,000 to be used "exclusively at his cabin for towing his boat and trailer from a storage shed on his property to the lake." Bob should assert that Va. Code § 8.2-315 thus applies: "Where the seller at the time of contracting has reason to know any particular

purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section [Va. Code § [8.2-316](#)] an implied warranty that the goods shall be fit for such purpose."

In this case, Bob's words were very clear to indicate the specific need for the vehicle to be used for towing a boat and a trailer, so the vehicle would need to be able to support such weight. Further, Joe had acknowledged recognition of such need because the tractor had a trailer hitch. Such exchange indicates that Joe was very aware of the particular needs that Bob has for the vehicle (tractor or truck).

However, Joe should argue firstly that Bob was not relying on his skill or judgment in selecting that tractor, as required under Va. Code § 8.2-315. Further, the warranty has been disclaimed pursuant to Va. Code § 8.2-316(3)(b): "When the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him."

In this case, Joe had first led by indicating that he doesn't "deal in anything other than used trucks" and used very loose language of "it might work for you..." These statements would cause a reasonable person not to rely on his skills or judgment in selecting the tractor. Therefore, there would not have been an implied warranty of fitness for a particular purpose created in the first place.

However, even if Bob succeeds in arguing that the warranty was created in the first place, Joe would be able to argue that it had been disclaimed pursuant to an inspection under Va. Code § 8.2-316(3)(b). Bob started the tractor, drove it in the parking lot, looked it over, and was satisfied with how it looked and ran. Further, the mechanic told Bob the leak should have been obvious and would have left a puddle of lubricant fluid, and Bob in fact did then observe such a puddle of fluid beneath the tractor. These facts show that Bob not only inspected the tractor but there would have been inquiry notice that there were defects to the tractor.

Therefore, Joe likely will prevail against Bob's claim that there was a breach of a warranty of fitness for a particular purpose.

[c] Joe will likely prevail against Bob's claim for breach of warranty of merchantability.

Bob will argue that under Va. Code § 8.2-314 Joe was a merchant of goods of the kind. Merchant, under Va. Code § 8.2-104 "means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill."

Since Joe sold commercial hauling vehicles, which would include tractors, and the tractor was unfit for its ordinary purpose so as to pass without objection in the trade because the transmission could not be repaired, thereby rendering the vehicle inoperable. Further, Joe should have been on inquiry notice that the tractor was not going to be fit for its ordinary purpose because of the large puddle of fluid on the ground underneath it.

Joe will argue that he made clear to Bob that he was a merchant solely of used trucks, not tractors. Joe will also argue that, as explained in part (b) above, Bob's inspection of the tractor effectively disclaimed the warranty pursuant to Va. Code § 8.2-316(3)(b).

Therefore, Joe likely has the better argument to succeed against Bob's claim that he breached the warranty of merchantability.

[d] Bob may recover some damages in a suit against Joe, should he be successful in his suit for any of the breach of warranty claims.



Assuming Bob has given timely notice of breach to Joe and is successful in his suit, Bob may recover damages under Va. Code § 8.2-714 measured by “the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted” as well as incidental damages under Va. Code § 8.2-715: “damages resulting from the seller's breach include expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach.”

Here, the first measure would be the price of the tractor, \$750 less the sale price of the tractor for parts, \$100. The incidental damages would be whatever costs were incurred in the mechanic's inspection (the facts do not specify a dollar amount for such inspection).

Therefore, should Bob be successful in any of his breach of warranty claims, he would recover both direct and incidental damages.

✖✖ It's our thinking that the Virginia Board of Bar Examiners would likely view discussion about contract formation or statute of frauds as not relevant for any of these subsections because the questions themselves were limited to inquiring about express and implied warranties provided under the Uniform Commercial Code as adopted by Virginia. Therefore, such tangential discussions would not be awarded points.

5. [07/23] [Domestic Relations] Harold and Willa were legally married on August 1, 2021, in Charlottesville, Virginia, Harold's hometown. Both are in their early 20's, have comparable entry level jobs and live rent-free in a garage apartment owned by Harold's parents. On June 15, 2022, Harold confessed to Willa that the week before he and Willa were married, he “made a drunken mistake” and had sex with his old girlfriend, who gave birth to a son on April 1, 2022. Harold's paternity was confirmed, and the Court ordered him to pay child support. Devastated, Willa immediately told Harold that they “were over,” moved out of the garage apartment and returned to live with her parents in Virginia Beach.

Willa was unemployed after leaving Charlottesville. Harold and Willa never shared a joint bank account. Willa's parents supported her financially after she came to live with them. On April 1, 2023, Willa bought a single lottery ticket. A few days later, she learned she won the lottery. Willa promptly posted her \$5 million lump-sum lottery winning news on social media. Harold was thrilled to learn his wife was now a multi-millionaire.

Willa's parents hired a family law attorney to assist Willa in getting out of her marriage. Willa told the attorney that, in addition to Harold's infidelity resulting in him having a child with another woman, he was convicted of a felony when he was 18 years old. Willa was embarrassed about the felony and had told her sister about it but made her promise never to tell anyone. She did not disclose to the attorney the fact that she was aware of the felony prior to their marriage.

On July 1, 2023, a Complaint for Annulment of the marriage was filed in the Circuit Court for the City of Charlottesville on behalf of Willa. Harold filed an Answer to the Complaint denying any valid grounds for the annulment.

- (a) What arguments might reasonably be made on behalf of Willa in support of annulment of the marriage? Explain fully.
- (b) What arguments might Harold reasonably make in opposition to annulment of the marriage? Explain fully.
- (c) How should the Court rule on the Complaint for Annulment? Explain fully.
- (d) *Assume for subpart (d) only that on July 1, 2023, Willa filed a Complaint for Divorce from Harold on the ground that she and Harold had lived separate and apart for more than one year.* What claims could Harold make with regard to the lottery winnings and is he likely to prevail? Explain fully.

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(a) Willa can argue that she is entitled to an annulment based on Harold's having conceived a child with another woman and based on his felony conviction.

Willa's best argument is that at the time of marriage, without her knowledge, Harold had conceived a child who was born to someone other than his spouse within ten months of the date of the solemnization of the marriage. Va. Code § 20-89.1(B). Here, Harold conceived a child with his old girlfriend before he married Willa, Willa did not know this fact before the solemnization of the marriage, and the child was born within ten months of the date Harold and Willa legally married. Specifically, in late July 2021, Harold engaged in sexual relations with his old girlfriend, which resulted in the girlfriend's pregnancy. Harold and Willa married on August 1, 2021. Then, Harold's child was born on April 1, 2022, which is only eight months after the date Harold and Willa's marriage was legally solemnized.

Willa could also argue she is entitled to an annulment because Harold had been convicted of a felony prior to the marriage. Va. Code § 20-89.1(B). As discussed below, however, she fails on a key element – that she was not aware of the felony conviction at the time she married.

There are no facts supporting a claim to fraud or duress as a basis for annulment.

(b) Harold will argue that Willa is not entitled to an annulment based on the felony conviction because the statute only applies when the other spouse was not aware of the felony conviction prior to the marriage. Here, the facts state that Willa was aware of the felony conviction at the time she married Harold, although she failed to tell her attorney that information.

In addition, §20-89.1(C) states that an annulment cannot be granted on any grounds set forth in § 20-89.1(B) if the parties cohabited together after learning of the facts constituting grounds for an annulment. Here, the facts state that she was aware of the felony prior to the marriage, decided to marry him anyway, and resided with him for nearly a year. Thus, she is not entitled to an annulment on the grounds of the felony conviction. Harold would not be successful in arguing that Willa cohabited with him after learning of the child born to his old girlfriend. The facts state that she immediately left the marriage, told Harold they "were over," went to live with her parents, and did not cohabit with him again.

(c) The court should deny the annulment based on the felony conviction because Willa knew about the conviction before she married Harold. However, the court should grant the annulment based on the fact Harold conceived a child prior to the marriage, Willa was not aware of that fact, the child was born within ten months of the date Willa and Harold were married, and Willa did not cohabit with Harold after learning of the child.

(d) Harold would argue that the lottery winnings should be treated as marital property, but he is unlikely to prevail. Harold would argue the lottery winnings should be treated as marital property because (i) he and Willa were still married when she won the lottery on April 1, 2023, and (ii) neither Harold nor Willa had yet filed for divorce at the time Willa won the lottery. In fact, Willa filed for divorce three months later after she won the lottery. He would argue that because they were still married the funds used to purchase the single lottery ticket constituted marital property and, thus, the lottery winnings are marital property. He could separately argue that even if the funds used to purchase the ticket were not marital funds, she won the lottery before she filed for divorce and before the divorce was final. As a result, he would argue the lottery winnings should be treated as marital property.

Harold is unlikely to prevail because, pursuant to § 20-107.3, marital property is determined as of the date of the last separation of the parties. *Dietz v. Dietz*, 17 Va. App. 203 (1993). Here, the parties separated on June 15, 2022. The facts stated that she immediately left the marital home in Charlottesville, told Harold as she was leaving that they "were over," went to live with her parents in Virginia Beach, and did not rely on Harold for financial support. Thus, June 15, 2022, should be determined to be the date of last separation. As a result, property acquired after the date of last separation should be treated as separate property. Here, Willa purchased the ticket and won the lottery nearly nine months after the parties separated.

The court should also reject the argument that the funds used to purchase the ticket were marital and, thus, the winnings are marital. The facts state that the parties did not have a joint bank account and that Willa relied on her parents for all of her financial support after she left Harold. As such, the funds used to purchase the lottery ticket were separate

funds. The funds given to Willa by her parents that were then used to purchase the lottery ticket also could be characterized as a gift to Willa, making those funds separate property. Either way, the lottery winnings should be treated as Willa's separate property.

Finally, Willa did not attempt to hide the lottery winnings from her husband or the court. She promptly posted on social media that she had won \$5 million. Thus, there is no basis to treat the funds as marital due to fraud or concealing assets. In conclusion, the lottery winnings should constitute separate property because she purchased the ticket with separate funds and won the lottery after the date of the last separation.

6. [07/23] [Personal Property] Elizabeth's grandfather was a multiple-event Olympic Athlete from Newport News, Virginia. While Elizabeth was visiting her grandmother (Grandmother) in Newport News, Grandmother showed her the Olympic medals which her grandfather won during the 1968 Olympics in Mexico City. The medals were very valuable and each was inscribed with the family's last name.

As Elizabeth admired the medals, Grandmother said, "Elizabeth, I want you to have the gold medal, so take it with you. The silver medal is for your sister, Helen, in Atlanta. I'm giving it to you to take to her. I intend to give the bronze medal to your brother, Jackson, who is coming here to see me next week."

Elizabeth thanked Grandmother and took the gold and silver medals as requested. In a rush to catch her flight at the Newport News-Williamsburg Airport, Elizabeth inadvertently left the silver medal in the back seat pocket of the ride-share vehicle she had taken to the airport.

The ride-share driver (Driver) who transported Elizabeth to the airport was an employee of the company which owned several vehicles used for ride-share transportation services. Driver found the silver medal as he was cleaning out the vehicle at the end of his shift. Driver told Vehicle Owner, who owned the car and the car service company, that he had found the silver medal and that he was going to keep it for himself. Vehicle Owner, thinking he recognized the medal as belonging to Grandmother, took it from Driver and, over the objection of Driver, returned it to Grandmother's house and put it in her delivery box with a note requesting that Grandmother return the medal to him if it did not belong to her. He also told her that, if that was the case, he was going to keep the medal for himself.

Grandmother died unexpectedly three days later. In her valid will, she specifically left all three of the medals to the New Baptist Church of Newport News. The bronze medal, which she had intended to give to Jackson, and the silver medal, which Elizabeth had taken to give to Helen but left in the ride-share vehicle, were found in Grandmother's home at the time of her death.

- (a) As between Elizabeth and the New Baptist Church, who is entitled to the gold medal? Explain fully.
- (b) What respective rights, if any, do Driver and Vehicle Owner have in the silver medal? Explain fully.
- (c) As between Helen and the New Baptist Church, who is entitled to the silver medal? Explain fully.
- (d) As between Jackson and the New Baptist Church, who is entitled to the bronze medal? Explain fully.

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- (a) As between Elizabeth and the New Baptist Church (NBC), Elizabeth is entitled to the gold medal.

A will is construed in light of the circumstances as they existed at the execution, but the will does not take effect until the death of the testator. When the testator makes a specific bequest, and the identified property is not part of the testator's estate at her death, the gift is adeemed, and the beneficiary receives nothing. Only in limited circumstances can other property be substituted for the adeemed property. A specific bequest disposes of an identified item of property owned by the testator. Ademption by extinction can occur by an intentional act of the testator, including when an inter vivos

gift of the property is made to another. An inter vivos gift occurs when there is (1) donative intent; (2) delivery; and (3) acceptance. Once this occurs, absolute title to the property passes to the donee.

Here, Grandmother died leaving a valid will in which she specifically left all three of the medals, including the gold medal, to the NBC. However, prior to her death, Grandmother made an inter vivos gift the gold medal to Elizabeth. This is evidenced by the fact that Grandmother said "Elizabeth, I want you to have the gold medal, so take it with it." This shows Grandmother's donative intent. Elizabeth thanked Grandmother and took the gold medal. Therefore, the gold medal was also delivered and accepted.

Because there was a valid gift made of the gold medal before Grandmother died, the bequest adeemed by extinction, and NBC is not entitled to the gold medal.

(b) Driver has no rights in the silver medal and Vehicle Owner is entitled to possession against all except the true owner.

Vehicle Owner has a superior claim to possession of the silver medal over Driver for two reasons. First, the owner of the locus in quo has a superior claim over the finder to mislaid property. Property is mislaid when the owner intentionally places it in a particular spot and subsequently forgets it. On the other hand, property is lost when the owner accidentally and unknowingly loses possession of the item. Here, the silver medal was mislaid, rather than lost, because clearly Elizabeth deliberately placed the medal in the seat back pocket of the car but then left it there in her rush to catch her flight. Thus, Vehicle Owner, as the owner of the place where the mislaid property was found, has a superior claim to possession of the medal over the finder, ie Driver.

Additionally, if an employee finds an item in the course of his employment, the employer has the right to possess the item. Here, Driver found the medal while working – driving a ride share car – for Vehicle Owner. Thus, Vehicle Owner has a superior claim to possession of the silver medal for that reason as well.

(c) Although it is a close call that could be argued either way, the preferred conclusion is, as between Helen and the NBC, Helen is entitled to the silver medal.

As discussed in part (a) above, a specific bequest in a will adeems if the testator makes an inter vivos gift of the item. Additionally, a third party intermediary is presumed to be acting for the donee, unless the facts show otherwise.

Here, Grandmother made an effective inter vivos gift of the silver medal to Helen. Donative intent is clear as Grandmother said "the silver medal is for your sister, Helen...." The medal was delivered and accepted when Grandmother gave the medal to Elizabeth to give to Helen.

There is, however, support under Virginia law for the proposition that a donee cannot accept a gift that she is unaware of. Accordingly, NBC will argue that the inter vivos gift was not complete because it was not accepted by Helen.

Although the issue of whether the silver medal was given to Helen prior to Grandmother's death could be argued either way, the preferred conclusion is that the inter vivos gift was completed. Thus, the silver medal was not in Grandmother's estate when she died, the bequest to NBC adeemed, and Helen is entitled to the silver medal.

✘✘ We think that full credit should be awarded for a well-reasoned answer reaching either conclusion on this point, i.e. whether there was an inter vivos gift of the silver medal to Helen prior to Grandmother's death.

(d) As between Jackson and NBC, NBC is entitled to the bronze medal. Although Grandmother indicated that she intended to give the medal to Jackson in the future, there was no inter vivos conveyance to Jackson because she did not have present donative intent – she planned to give it to him the following week - and she did not deliver the medal to him. Thus, the bronze medal was in Grandmother's estate at her death and passes to NBC under her will.

7. [07/23] [Wills, Trusts & Estates] Wanda and Harry were married in June 2000, shortly after they graduated from college. They settled in Lynchburg, Virginia, where Harry purchased a small business which became very successful and

profitable. At Wanda's urging, they bought a horse farm outside the city, and Wanda tried her hand at raising horses. Their marriage was quite happy until Wanda fell in love with one of the horse trainers. When Harry learned of their relationship, Wanda moved to Kentucky with the trainer and the two of them started their own ranch.

Wanda left Harry with their son, Jack. They never divorced because Harry hoped there would be a reconciliation, but after a few years of separation, Harry started dating Sally, an old college friend. Their relationship quickly blossomed, and Sally moved to the farm with Harry. Their friends and family believed that Harry and Sally were married because Wanda had not been seen or heard from in many years and Sally was like a mother to Jack.

After Wanda left, Harry engaged a lawyer to prepare an estate plan. He advised the lawyer that he wanted to ensure that nothing was left at his death for Wanda and her horse trainer. His estate was to be used to care for Jack; however, he did not want Jack to have control of his estate because he feared that he would give the assets to Wanda. The lawyer prepared a will and a revocable trust. After making provisions at his death for administrative expenses and taxes, the will, which was properly executed, provided that the remainder of Harry's estate would be transferred at his death to the trust. The trust, a separate instrument, was signed by Harry and notarized at the same time as the will. The trust provided that the income and principle of the trust would be distributed by the named trustee to Jack, solely at the discretion of the trustee, as needed for his education, health and support as long as Jack lived. The trust then provided that the remainder of the trust after the death of Jack was to be distributed to the Lynchburg Boys and Girls Club.

Harry died in 2022. The will and trust that Harry's lawyer prepared were found in his safe deposit box. His estate included the farm in Lynchburg that was titled in Harry's name alone valued at \$3 million; a beach house in his name in Virginia Beach valued at \$1 million; and \$2 million in marketable securities in Harry's name. Shortly after Harry died, his lawyer probated his will.

Wanda, hearing about Harry's demise, returned to Lynchburg and is claiming an interest in Harry's estate. Sally also seeks an interest in Harry's estate. Jack claims that the trust is not valid and he is entitled to his share of the estate outright.

- (a) Upon what grounds might Wanda base her claim to Harry's estate, and what might she be entitled to receive? What steps does she need to take to pursue these claims, and is she likely to be successful? Explain fully.
- (b) What rights, if any, does Sally have in Harry's estate? Explain fully.
- (c) Is Jack's claim that the trust is not valid and that he is entitled to his share of the estate outright likely to succeed? Explain fully.
- (d) Assume for purposes of subpart (d) only that Wanda and Harry reconciled before his death, but Harry did not change his will and trust. What rights, if any, does Wanda have to Harry's estate? Explain fully.

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(a) The issue is upon what grounds might Wanda base her claim to Harry's estate, what might she be entitled to receive, and what steps does she need to take to pursue these claims. The surviving spouse of a testator who dies domiciled in the Commonwealth may claim an elective share in the spouse's augmented estate. The surviving spouse of a testator who dies domiciled in the Commonwealth has a right to take an elective share amount equal to 50% of the value of the marital property portion of the augmented estate. The claim must be made within six months from the time of the admission of the will to probate. If the surviving spouse exercises their right to election, the surviving spouse's homestead allowance, exempt property, and family allowance, if any, are in addition to the elective share. These claims must be made within one year of the death of the testator. To make a claim of an elective share, the surviving spouse must either make the claim in person before the court having jurisdiction the estate, or in writing admitted to the record. If a surviving spouse willfully deserts her spouse and such desertion continues until the death of the spouse, the party who deserted the deceased spouse shall be barred of all interest in the estate of the other by intestate succession, elective share, exempt property, family allowance and homestead allowance. § 64.2-308.4.

Here, Wanda and Harry were married in June 2000, but separated sometime after that. Despite Wanda moving away with the horse trainer and Harry's desire that they one day reconcile, they never divorced. The facts also state that when Harry met Sally, they too started living together, and Sally assumed the role of being a mother to Jack. Despite all of this, Harry and Wanda never legally divorced. Wanda is Harry's surviving spouse and would be entitled to her elective share of his estate. Still, there are no other facts to support that Wanda was in either Harry's or Jack's life once she moved away. To the contrary, it seems that she did not come back around again until Harry died in 2022. Since these facts support that Wanda abandoned Harry, she would be barred from bring an elective share claim.

Therefore, although Wanda is still married to Harry, because she deserted him she would be barred to making a claim for an elective share, exempt property, family allowance and homestead allowance.

(b) The issue is whether Sally has any rights to Harry's estate since Harry is still legally married to Wanda. Virginia prohibits a marriage entered into prior the dissolution of an earlier marriage of one of the parties. Virginia also does not authorize common law marriage. With the exception of a spouse, a testator has the right to disinherit or not account for someone in their estate.

Here, Wanda and Harry were married in 2000. They never divorced before Harry's death in 2022. Wanda's desertion may bar her from collecting under Harry's estate, but it does not mean that the two are legally divorced. Therefore, if Sally's claim is that she is entitled to a portion of Harry's estate because she is his surviving spouse, this is not true since their subsequent marriage would be invalid. Additionally, even if Wanda and Harry were divorced, Sally and Harry are not legally married. Although Sally and Harry have lived together for several years, their friends and family believe them to be married, and Sally is like a mother to Jack, these facts cannot be used to establish a marriage since Virginia does not recognize common law marriages. Finally, while it is not clear from the facts when the will was executed in relation to when Harry and Sally started living together, if the will was executed after this date, this would be further evidence that Harry did not intend for Sally to inherit from his estate.

Therefore, Sally has no rights to Harry's estate since Harry is still married to Wanda and Virginia does authorize common law marriages.

(c) The issue is whether the trust is invalid and Jack can receive his share of the estate outright. A will that adds property to an existing trust is known as a pour over trust. In order to create a pour over trust, it must be in writing, identified under the will, and executed before or concurrently with the will. The trust does not need to be executed in accordance with the same formalities as a will. §64.2-720. A trust is created when (1) the settlor has capacity to create a trust; (2) the settlor has the intent to create a trust; (3) the trust has a definite beneficiary (or is an honorary or charitable trust); (4) the trustee has duties to perform; and (5) the same person is not the sole trustee and sole beneficiary. A pour over trust can also be revocable and unfunded at the time it is created. In a support trust, the trustee can only distribute so much income as is necessary per the terms of the trust, which may include those needed for the beneficiary's education, health and support.

Here, a properly executed will included language that the remainder of Harry's estate would be transferred at his death to the trust. The trust was written (in "a separate document"), signed by Harry and notarized at the same time as the will. Therefore, this meets the elements needed to create a pour over trust. The trust is also valid since it also had identifiable beneficiaries (Jack and the Lynchburg Boys and Girls Club), gave the trustee duties to perform, and there are no other facts to call into question the remaining elements. Additionally, since this is a valid support trust, Jack is not entitled to any distributions from the trust unless it is needed for his education, health and support.

Therefore, Jack's claim that the trust is invalid fails. The trust is valid and Jack cannot receive his share of the estate outright.

(d) The issue is what rights, if any, Wanda has to Harry's estate when Wanda, as a surviving spouse, is not included as a beneficiary under the will or trust.

The rules explained in (a) relating to a surviving spouse's elective share apply here. A spouse cannot be

intentionally disinherited from the decedent's estate. The surviving spouse is entitled to increasing percentages from the fifty percent elective share based on the amount of time they were married to the decedent. For a surviving spouse that was married 15 years or longer, she is eligible to receive the full 50% of the elective share of the decedent's estate. The surviving spouse is also entitled to the three allowances explained above. The decedent's augmented estate includes not only the decedent's property and non-probate transfers to others, but also the surviving spouse's property and non-probate transfers.

As explained above, since Wanda and Harry never legally divorced. Since they reconciled before Harry died, Wanda would not be barred from making an elective share claim of Harry's augmented estate, or claiming the other allowances. They were also married for over 20 years, which would entitle Wanda to full 50% elective amount share. Although Harry advised the lawyer that he intentionally wanted to disinherit Wanda, this would not prevent Wanda from successfully making these claims. When Harry died, his estate included the Lynchburg farm (\$3m), a beach house in Virginia Beach (\$1m) and the marketable securities (\$2m). All of these assets were in Harry's sole name. Per the terms of the will, these assets would pour over into the trust. Although this is considered non-probate property, Wanda would still be entitled to her elective share of these assets.

Therefore, Wanda, as a surviving spouse, is entitled to 50% of Harry's augmented estate.

**8.** [07.23 Professional Responsibility + Evidence] Carla hired Lawyer Larry to represent her in a dispute with her neighbor, Ned. Ned claimed that Carla put a fence partially on his property. During their initial meeting, Carla told Larry that when she was building the fence, she found a metal boundary stake in the ground near the fence line and used that stake as the location of the property's boundary. At Larry's request, Carla took a picture of the stake in the ground. Concerned that children might trip over the stake, she later removed the stake from the ground.

After the initial meeting, a private investigator hired by Larry located the prior owner of the property, Olivia, and convinced her to meet with Larry and Carla.

Olivia, Carla and Larry met to discuss the history of the property and the boundary line. While the three of them were discussing the matter, Olivia told Carla and Larry that she had moved the boundary stake years earlier onto Ned's property to expand her own property. After hearing this, Carla told Larry and Olivia that she "must be wrong" about where the true boundary was. At Larry's request, Olivia signed a declaration stating that Olivia had moved the stake onto Ned's property.

Ned filed suit to force Carla to move the fence. After suit was filed, Ned served discovery requests on Carla seeking the identity of everyone with knowledge of the boundary issue, the substance of their knowledge, and all documents and things relating to the boundary issue.

On Carla's behalf, Larry objected to the discovery requests on the basis that the information requested was protected by the attorney-client privilege and/or the attorney work product doctrine.

(a) Can Larry withhold the fact that Carla found a boundary stake in the ground on the basis of attorney-client privilege? Explain fully.

(b) Can Larry protect Carla's statement that she "must be wrong" about the location of the boundary made during their meeting on the basis of attorney-client privilege? Explain fully.

(c) Can Larry withhold the photograph of the stake in the ground on the basis of attorney work product? Explain fully.

(d) Because Olivia was located by an investigator hired by Larry in anticipation of litigation, can Larry withhold disclosure of Olivia's identity on the basis of attorney work product? Explain fully.

(e) Can Larry withhold the signed declaration of Olivia on either the basis of attorney-client privilege or

attorney work product? Explain fully.

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(a) The attorney-client privilege covers (1) a communication (2) made between privileged persons (3) in confidence (4) for the purpose of obtaining or providing legal assistance. Carla told Larry that she found the metal boundary stake. That statement was a “communication” and it was made between only the client and her attorney, in confidence. Finally, Carla shared that information solely for the purpose of obtaining legal advice.

Thus, Carla’s thoughts, comments, and other confidential communications to Larry about the boundary stake are protected by the attorney-client privilege. Indeed, Larry has an ethical obligation to assert the attorney-client privilege to prevent disclosure. See Rule 1.6 of the Virginia Rules of Professional Conduct.

However, the underlying fact that Carla found a boundary stake in the ground is not covered by the Attorney-Client Privilege. Facts of the case are not “communications.” Thus, Larry can’t withhold the fact that Carla found a boundary stake on the basis of attorney-client privilege.

(b) Carla’s statement that she “must be wrong” about the location of the boundary will NOT be protected by the attorney-client privilege. The Supreme Court of Virginia has on many occasions reaffirmed the rule that “the privilege is waived where the communication takes place under circumstances such that persons outside the privilege can overhear what is said.” *Claggett v. Commonwealth*, 252 Va. 79 (1996).

Carla made the statement in front of Olivia, the prior owner of the property. Olivia is not part of the Carla/Larry legal team. Communications made between Carla and Larry in front of Olivia, therefore, have not been made “in confidence” and are not protected by the privilege.

(c) The work-product doctrine applies to (1) documents (2) prepared by a lawyer or the lawyer’s team (3) in anticipation of litigation. The doctrine protects covered materials from discovery unless opposing counsel can show they have substantial need for the materials and cannot, without undue hardship, obtain their substantial equivalent by other means.

The photograph of the stake meets all three of the requirements to be covered by the Work Product Doctrine. It would be considered a document, and it would clearly have been created at the lawyer’s direction in preparation for litigation over the boundary dispute.

However, Carla’s decision to later remove the stake has deprived Ned of the opportunity to document location of the stake for himself. The photograph is the best evidence of the stake’s location and is necessary for Ned to prepare his case. He cannot obtain equivalent evidence by any other means. Thus, the “undue hardship” exception applies. Larry will not be able to withhold production of the photograph.

(d) The private investigator hired by Larry would be considered part of the legal team representing Carla. Thus, communications between Carla/Larry/Investigator would be considered made “in confidence” and thus potentially protected from disclosure.

And at least one Virginia Circuit Court has ruled that “a party may not inquire into the identity of persons that the opposing party’s lawyer or representative has interviewed” on the theory that doing so would reveal the lawyer’s thoughts or strategy about the case. *Lopez v. Woolever*, 62 Va. Cir. 198 (2003).

Furthermore, it is almost certain that the names of prior property owners could be obtained through a title search and review of local property records, which would be publicly available. Thus, Ned cannot use the “undue hardship” exception to overcome the Work Product Doctrine. Ned could obtain Olivia’s name on his own through other means. Accordingly, the better answer here might be that Larry can make a good-faith argument to withhold disclosure of his team’s knowledge of Olivia’s identify by relying on the work-product doctrine.

However, that might not be the only correct answer. Many courts do not treat the mere identity of persons with knowledge of relevant evidence as protected by either the work-product doctrine or attorney-client privilege. The justification for this alternative rule is that the work-product doctrine does not shield “facts” from discovery—only the lawyer’s mental impressions, process, strategy etc. It seems obvious that all parties would want to interview prior owners of the relevant parcels, so none of Larry’s mental impressions or strategy decisions are revealed by disclosing Olivia’s name. A reasonable argument therefore can be made that Olivia’s name should be treated as a “fact” that is non-privileged.



(e) Larry clearly cannot assert the attorney-client privilege because Olivia is not part of the Carla/Larry litigating team and thus communications made between Olivia and Larry regarding Carla's property dispute have not been made in confidence.

However, the declaration is a document that Larry prepared in anticipation of litigation, so Larry can assert work-product doctrine protections related to it. Ned can interview Olivia on his own, so there is no undue hardship imposed on Ned by protecting the Larry-drafted declaration from disclosure.

That said, Olivia is free to disclose the declaration herself and Larry cannot prevent her from doing so if she wishes to independently. Similarly, Olivia is free to share her discussions about the declaration if she so chooses. Simply put, Larry cannot be compelled to turn over his copy of the declaration, but he also cannot prevent Olivia from disclosing any copies she has retained to Ned.

**9. [07/23] [FCVP]** Paige was helping her sister, Ashley, clear small trees from Ashley's yard in Craig County, Virginia. Paige borrowed Ashley's chainsaw to do the work. The instructions for using the chainsaw had been discarded so Paige never read them. She climbed on a stepladder and removed the tip guard from the chainsaw so that she could use it to cut the small trees. Paige was injured when the chainsaw kicked back and struck her left shoulder, causing her to fall off the ladder and resulting in serious and permanent injuries.

Paige retained an experienced product liability attorney to represent her. Having met all requirements for personal and subject matter jurisdiction, Paige timely filed a personal injury suit against the manufacturer of the chainsaw, CS Corporation (CSC), in the United States District Court for the Western District of Virginia – Roanoke Division. The Complaint alleged that the CSC chainsaw was negligently designed and manufactured and CSC breached express and implied warranties. CSC, through counsel, filed an Answer admitting it designed and manufactured the chainsaw in question, and denying all allegations of negligence or breach of any warranties.

CSC took a discovery deposition of Paige. Paige testified to the following: i) she was given the lightly used chainsaw by her sister, Ashley, and had used it a few times before the date of the accident; ii) the warning label on the chainsaw was peeling off, so Paige removed it without reading it; iii) she removed the tip guard after the first use because it got in the way of her cutting down small trees, the whole reason she wanted to use the chainsaw; and iv) she was standing on a stepladder when the accident happened.

Just prior to the close of discovery, CSC filed a Motion to Amend its Answer to add the affirmative defenses of contributory negligence and assumption of the risk based upon unforeseeable misuse (using the chainsaw on a ladder in violation of the warning label) and modification/alteration of the product (the tip guard and warning label were removed).

CSC also filed a Motion for Summary Judgment claiming the deposition testimony of Paige sufficiently established its affirmative defenses to warrant judgment in CSC's favor.

Paige objects to both of CSC's motions.

(a) What arguments should CSC make in support of its Motion to Amend its Answer to add the affirmative defenses? What arguments should Paige make in opposition to the Motion to Amend? How should the District Court rule? Explain fully.

(b) What arguments should CSC make in support of its Motion for Summary Judgment? What arguments should Paige make in opposition to the Motion for Summary Judgment? How should the District Court rule? Explain fully.

**xx**

(a) The defendant should begin by pointing out that Rule 15 provides that the court should freely grant leave to amend a pleading when justice so requires. That means that leave should be given unless there is some special reason not to do so, such as undue prejudice, futility, undue delay, or bad faith. The defendant should emphasize that the plaintiff will not suffer undue prejudice. The defenses do not involve additional incidents or parties beyond those already at issue in the plaintiff's claim. Therefore, the defenses would not make the trial substantially different and probably would not require additional discovery. Prohibiting the defenses, by contrast, would risk that the dispute is not resolved on its true merits, which would frustrate the goals of Rule 15. Further, the defendant should contend that the attempted amendment was made as soon as the grounds for the defenses appeared. Finally, the amendments are not legally futile.

The plaintiff should emphasize that the proposed amendment comes near the end of discovery, risking either prejudice (if no additional time for discovery is allowed) or delay. To the extent possible, the plaintiff should identify

additional witnesses or other lines of discovery that would have been explored had the defenses been asserted earlier. If there was any reason for the defendant to assert the defenses earlier, the plaintiff should so state.

Although the decision depends on some unknowns, based on the information available the court should probably grant the motion. It does not appear that the amendment would complicate the trial or require much additional discovery. The key witness on the defenses is the plaintiff herself, which requires no extension of discovery. On their face, the defenses have some basis, and since there does not appear to be undue prejudice or delay or bad faith, the defenses should be allowed to be asserted in furtherance of the policy of deciding cases on the merits.

✖✖ It's assumed for purposes of subpart (b) that the court has granted leave to amend the answer. Otherwise, the defendant's failure to assert Rule 8(c) affirmative defenses in its answer would ordinarily result in waiver, unless the court finds a reason to excuse the failure, which would require an analysis that largely replicates the prejudice analysis above.

(b) Summary judgment should be granted if the record shows no genuine issue of material fact such that the moving party is entitled to judgment as a matter of law. Under that standard, the defendant should argue that the facts admitted by the plaintiff in her deposition, even taken in the light most favorable to her, show that she failed to behave reasonably to protect her own safety (contributory negligence) and that she appreciated the risks of her actions yet voluntarily proceeded anyway (assumption of the risk), and in so doing she proximately caused her own harm. Her admitted behavior of disabling a safety device and disregarding warnings are conduct that all reasonable minds would have to find establish the defenses. Therefore there is no genuine dispute requiring trial.

The plaintiff should begin by pointing out that these defenses are ordinarily treated as matters of fact. Whether her conduct was unreasonable, her awareness of the dangers, and causation are questions on which reasonable minds could differ. The factual dispute is therefore genuine, making the case inappropriate for summary judgment. The plaintiff need not present additional evidence of her own, but if she can honestly and consistently with her deposition submit an affidavit tending to negate the defenses, that would of course be helpful. The timing of the motion is unclear from the facts, but if it comes before the end of discovery and the plaintiff is still gathering evidence, the plaintiff should ask the court to defer the motion until then.

The application of the summary judgment standard to a particular case is often debatable, but here the court should probably deny the motion. Although the plaintiff's admitted behavior may well lead the fact finder to find in favor of the defendant, the question at this stage is whether all reasonable minds must so find. These are generally jury questions, and moreover the defendant bears the burden on the affirmative defenses, making summary judgment particularly difficult to obtain.