

**Summary of suggested answers & annotations to the essay part of the July 2016 Virginia Bar Exam. Prepared by William H. Shaw, III & J. R. Zepkin of William & Mary Law School, Emmeline P. Reeves of University of Richmond Law School, Benjamin V. Madison III of Regent University Law School, Samuel W. Calhoun, Joshua T. T. Fairfield & Jonathan Shapiro of Washington & Lee Law School & C. Reid Flinn who is on the adjunct faculty of William & Mary Law School, Antonin Scalia Law School at George Mason University, Washington & Lee Law School and University of Richmond Law School.**

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✖✖ After each bar exam, representatives from some of the law schools in Virginia collaborate to prepare suggested answers which we think should be acceptable to the Virginia Board of Bar Examiners. These answers also include cites to some of the case and statutory law for reference even though the VBBE may not expect such specificity in applicants' answers on the exam. jrjz

1. [Torts & Good Samaritan Statute] Adelle's home was located on a five-acre parcel near Carterton, Virginia. Adelle's parcel fronted on a narrow country road. Just inside the property line on Adelle's parcel, there was a very large old oak tree that appeared to be dying and was leaning precariously in the direction of the road. Prompted by a weather service warning of an approaching severe storm accompanied by high winds, Adelle decided she would take the tree down. Using a chainsaw, Adelle began to cut through the 24-inch diameter base of the trunk. With wedges and anchoring ropes, she plotted the cut so as to ensure that the tree would fall back onto her land. When she had cut about halfway through the trunk, the predicted storm hit, accompanied by torrential rain and strong winds. Adelle stopped working and went back to her home to wait out the storm.

Driver, driving his car along the road and blinded by the intensity of the storm, swerved to avoid what appeared to be a flooded spot and crashed headlong into the tree. Driver was rendered unconscious. The force of the collision snapped the anchoring ropes and dislodged the wedges that Adelle had placed in the cut, but the tree remained standing.

Samara, who had been driving in the opposite direction, saw what had happened, pulled over on the shoulder, and rushed to Driver's aid. She pulled the still unconscious, bleeding Driver out of the wreckage, across the road, and into the backseat of her car, intending to take him to the closest hospital. At that moment, a strong gust of wind came up and the tree toppled across the road. It fell onto Samara's car. One of the branches struck Samara and broke her leg and several ribs. The trunk crushed Samara's car, severely injuring Driver. If Samara, instead of moving Driver, had simply ministered to him in his own car, Driver would not have been injured by the falling tree.

The following litigation ensued:

Suit # 1. Driver sued Adelle in negligence for the injuries he sustained when the tree crushed Samara's car. Adelle defends on two grounds: (i) that she breached no duty to Driver and (ii) that her acts were not the proximate cause of Driver's injuries.

Suit # 2. Driver sued Samara in negligence for the injuries he sustained when the tree crushed Samara's car.

Suit # 3. Samara sued Adelle in negligence for the injuries she suffered when the tree branch struck her. Adelle asserts the defense of contributory negligence.

[1] In Suit # 1, is Adelle likely to succeed on each of her defenses? Explain fully.

[2] In Suit # 2, what is Samara's best defense? Explain fully.

[3] In Suit # 3, is Adelle likely to succeed on her defense? Explain fully.

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[1] No. Adele claims she breached no duty to the driver. At common law, a landowner owed no duty to those outside the land "with respect to natural conditions on the land, regardless of the dangerous condition." *Cline v. Dulora South, LLC*, 284 Va. 102 (2012). The court held that the landowner had no duty to "inspect and cut down sickly trees that have the possibility

of falling on a public roadway. However, a duty is owed to refrain from engaging in any act that makes the highway more dangerous than in a state of nature or in the state in which it has been left.” In another decision, *RGR, LLC v. Settle*, 288 Va.260 (2014), a business that owned a lumber yard was held to have breached its duty of care by the manner in which it maintained lumber stacked in a manner such that it blocked the view of a driver at a railroad crossing. The case is consistent with the answer above that because of her actions, Adele owed a duty of care and in fact breached her duty.

Adele engaged in affirmative acts that caused the property (tree) in its natural state to be different. With an oncoming storm, she cut halfway through the tree and left it. Adele can argue that she had the wedges and anchoring ropes to ensure it would fall back on her property, but the test is whether she engaged in affirmative acts that caused the property in its natural state to be different. Here, she clearly did. By implication from the holding in *Cline* she did breach a duty to Driver.

Adele also argues that her acts were not the proximate cause of Driver’s injuries. Proximate cause is a malleable concept:

... [T]he proximate cause of an injury is that act or omission which immediately causes or fails to prevent the injury; an act or omission which immediately occurring or concurring with another, without which the injury would not have been inflicted, notwithstanding the other act . . . . provided such injury could reasonably have been anticipated by a prudent man, in the light of attendant circumstances. . . .

. . . .There is no yardstick by which every case may be measured. . . . In each case the problem is to be solved upon mixed considerations of logic, common sense, justice, policy and precedent . . . .

*Huffman v. Sorenson*, 194 Va. 932 (1953). For the same reason, Samara’s intervention, the wind blowing the tree down, etc. would not be considered superseding causes under Virginia law.

Adele could argue that she could not reasonably foresee that Driver would have swerved to miss water and hit the tree; that she could not anticipate that someone would rescue Driver and take Driver to rescuer’s care; and that the tree would then fall on Driver’s car. However, typically proximate cause is not evaluated in terms of whether the defendant anticipate how events unfold, but rather in terms of whether she could have anticipated that by altering the natural conditions, and leaving a tree by the road half cut through, it could end up falling on someone on the road. In other words, could the defendant reasonably foresee the basic problem of the tree’s falling, rather than the specific way it did so here.

Thus, Adele’s argument that her actions were not the proximate cause of the injuries should be rejected. They were acts or omissions, concurring with others, that led to the injuries.

[2] Samura’s best defense is to rely on Virginia’s Good Samaritan Statute, Va. Code § 8.01-225(1). That statute provides, in part,

In good faith, renders emergency care or assistance, without compensation, to any ill or injured person (i) at the scene of an accident, fire, or any life-threatening emergency; (ii) at a location for screening or stabilization of an emergency medical condition arising from an accident, fire, or any life-threatening emergency; or (iii) en route to any hospital, medical clinic, or doctor’s office, shall not be liable for any civil damages for acts or omissions resulting from the rendering of such care or assistance. For purposes of this subdivision, emergency care or assistance includes the forcible entry of a motor vehicle in order to remove an unattended minor at risk of serious bodily injury or death, provided the person has attempted to contact a law-enforcement officer, as defined in § 9.1-101, a firefighter, as defined in § 65.2-102, emergency medical services personnel, as defined in § 32.1-111.1, or an emergency 911 system, if feasible under the circumstances.

[3] To succeed, Adelle would have to show that Samura failed to exercise the care that an ordinary prudent person would in the circumstances. However, these circumstances were extreme. Holding someone contributorily negligent for taking actions to rescue someone in distress would be antithetical to the Good Samaritan statute; regardless, tort law will not punish someone for taking a reasonable risk in aid of someone in trouble.

The statement that the tree would not have fallen on the Driver if Samura had left the Driver does not change the result. Samura could not have reasonably known that the tree was going to be blown into her car after she took Driver from a wrecked car with the intention of taking Driver to the hospital. Adelle should lose on the argument that Samura did not exercise ordinary care in the circumstances and should be barred from recovery for stopping and helping someone in need.

2. [Partnership] Porter Bass (“Bass”) is the sole general partner of Westover Ale House, LP (“Westover”), a Virginia limited partnership and the country’s fastest growing microbrewery. Westover has several limited partners, none of whom has any role in the business except Sam Stout (“Stout”), Westover’s sales manager.

Last year Bass went on a three-month vacation and left the operation of Westover to Stout. Sales plummeted during Bass’ absence, as Stout’s time was consumed operating the business. In desperate need of operating funds, Stout applied to Craft Community Bank (“CCB”) for a \$600,000 line of credit for Westover. CCB knew that Westover was a limited partnership and that Bass was its general partner, but knowing that Stout was a sales manager who had been temporarily placed in charge, and over Stout’s signature as sales manager, issued the line of credit to Westover.

Upon Bass’ return, CCB demanded repayment of the loan unless Bass signed a personal guaranty of payment. Bass signed a personal guaranty and delivered it to CCB.

To compensate for the risk Bass had assumed by signing the guaranty, Bass prepared and executed a partnership resolution authorizing Westover to pay him a fee for guaranteeing the loan. So far, Bass has caused Westover to pay him over \$30,000 in guaranty fees. The partnership agreement is silent as to Bass’ right to receive a guaranty fee.

The winter of 2015-2016 was harsh for the craft beer business. The loan from CCB is now in default. CCB has filed an action against Westover, Bass, and Stout to recover the balance due on the loan. To make matters worse for Bass, the limited partners are upset that he has paid himself guaranty fees. Bass has countered that no one would have guaranteed the loan unless Westover had agreed to pay a guaranty fee, so it does not matter that Westover paid the fee to him rather than someone else.

- [1] On what bases, if any, is Bass liable to CCB? Explain fully.
- [2] On what bases, if any, is Stout liable to CCB? Explain fully.
- [3] What recourse do the limited partners have against Bass for his receipt of guaranty fees, and what form of action should they employ to effect such recourse? Explain fully.

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[1] First, Bass is liable to CCB as a guarantor on the loan. There is nothing to suggest that Bass’s personal guaranty of the loan was invalid.

Second, Bass also is liable to CCB as a general partner in Westover. General partners have unlimited personal liability for the debts of the partnership. Thus, Bass will be personally liable *if* this loan is a debt of the partnership. A principal is bound by a contract entered into by his agent if the agent had actual or apparent authority or if the principal subsequently ratifies the contract. Here, Stout is only a limited partner in Westover, and accordingly, he does not have agency power based solely on his status as a partner. Thus, the issue is whether Bass conferred agency power on Stout.

Actual authority is based on the agent's reasonable belief from the principal's words and conduct. It's not clear whether Stout had actual authority – Bass left operation of Westover to him for three months, but there is an argument that being in charge of operating the business includes only authorization to do that which is in the ordinary course of business and taking out such a substantial loan may not be in the ordinary course of business.

On the other hand, if the loan was necessary to keep the business afloat, it may have been impliedly authorized. Being in charge of operations may include authority to take extraordinary measures if necessary to save the business. Stout may also have had apparent authority, if there was a manifestation from Westover that he had authority and CCB reasonably believed he was authorized. CCB knew he was “in charge,” so presumably the manifestation element is met.

Again, whether CCB was reasonable in believing that he was authorized will depend on whether the loan was in the ordinary course of business or absolutely necessary to continue the business. Although it could be argued either way, a court would likely find authority based on the facts given. Additionally, Westover clearly ratified the loan. By signing a personal guaranty, Bass, the general partner, approved the loan to Westover. Thus, the loan is a debt of the partnership, and Bass is personally liable as a general partner.

[2] Stout is not personally liable to CCB on the loan. Generally, limited partners are not personally liable for the

debts of the limited partnership. Limited partners can, however, lose their limited liability if they participate in the control of the business and the other party reasonably believes that the limited partner is a general partner. By operating the business during Bass's three month absence, Stout participated in control of the business. But to hold a limited partner personally liable, the other party must reasonably believe that the limited partner is a general partner. Here, the facts state that CCB knew that Bass was the general partner and that Stout was "temporarily" in charge. Thus CCB did not reasonably believe that Stout was a general partner, and therefore, Stout is not liable based on his participation in control, and, as a limited partner, he is not otherwise liable for the debts of the partnership.

[3] The limited partners can pursue a derivative action against Bass based on his breach of his fiduciary duty of loyalty and they can force him to disgorge his profits. General partners owe a fiduciary duty of loyalty to the partnership. By contracting on behalf of the partnership with himself and causing the partnership to pay himself fees, Bass has engaged in self-dealing and has breached his duty of loyalty to the partnership. A court would likely reject Bass's defense that the transaction was fair to the partnership because it would have had to pay a fee to any guarantor. When a fiduciary breaches his duty, disgorgement of profits is generally the appropriate remedy.

3. [Professional Responsibility] Warehouse, Inc., a Virginia corporation that develops warehouse properties near port facilities, became interested in purchasing a particular parcel of land in Suffolk, Virginia, but had heard rumors that the Planning Commission was considering a recommendation for an ordinance that would change the zoning to prevent construction of a warehouse in the area. Before the parcel came on the market, Warehouse's president, Paula, consulted Atticus, an attorney who happened to be the Planning Commission's counsel. Paula gave Atticus a \$5,000 retainer to advise Warehouse on the zoning issues and to open tentative negotiations with the owner of the parcel.

Atticus told Paula, "It's not yet public information, so I'm not supposed to reveal it, but there is a major disagreement among the Commissioners, and it is highly unlikely that the ordinance recommendation will pass. I don't think you have to worry about zoning, so you shouldn't delay acquiring the parcel. I'll keep you informed." He also said to Paula, "As far as my participating in negotiations is concerned, I don't think I should get involved because of my position with the Planning Commission. But I'll refer you to my sister, Sue, who is a well-connected real estate broker in town, and she can undertake to identify the parcel owner and commence negotiations."

Atticus did not disclose to Paula that the current owner of the parcel was Atticus' aged stepfather, whose surname was different from Atticus' and whose will, which Atticus had drafted, directed that the parcel would be left at his death to Atticus and his sister, Sue.

Paula contacted Sue and retained her as Warehouse's agent for the purpose of acquiring the property at a 7% commission. Sue did not disclose her stepfather's ownership or that Atticus had secretly told her about the will.

To avoid escalating the price, Paula directed Sue not to disclose Warehouse's identity and to make any offer contingent on a favorable resolution of the zoning issue. Warehouse's in-house property managers believed the parcel was worth between \$350,000 to \$400,000 on the open market, but because of the development potential, it might be worth it for Warehouse to pay as much as \$450,000. Paula told Sue not to budge over \$350,000, however, Warehouse would go as high as \$450,000 if, after very hard bargaining, it appeared necessary.

Sue told Atticus about her retention by Warehouse. They agreed that Sue would share her commission 50-50 with Atticus. Atticus also told Sue "confidentially" that the recommendation regarding the zoning ordinance would fail. For the next few weeks, Sue told Paula she was in negotiations with the owner of the parcel. In fact, she simply met once with her stepfather and got him to agree to sell the property for \$500,000. When Sue felt the moment was right, she met with Paula and reported that the owner was holding out for \$600,000, but she was confident she could bargain him down to \$500,000, but no less. Warehouse authorized her to offer \$500,000 and to disclose that Warehouse was the purchaser. In the meantime, the Planning Commission failed to recommend the zoning ordinance, and the stepfather died. The executor of his estate completed the transaction at the \$500,000 price, and conveyed the parcel to Warehouse. Sue received her \$35,000 commission and transmitted half to Atticus. Eventually, the proceeds of the sale were distributed equally to Atticus and Sue.

Warehouse discovered the duplicity engaged in by Atticus and Sue. Warehouse filed a complaint against Atticus with the Virginia State Bar and sued both Atticus and Sue for breach of fiduciary duty.

[1] What, if any, duties imposed on Atticus by the Virginia Rules of Professional Conduct did he violate? Explain

fully.

- [2] Is Warehouse likely to prevail in its suit for breach of fiduciary duty against both Atticus and Sue and, if so, what damages might Warehouse recover? Explain fully.

**NOTE: Do not discuss the Realtor Code of Ethics**

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- [1] Atticus violated several ethical duties:

By disclosing to Warehouse the zoning-related discussions of the Planning Commission, which was his client, Atticus revealed information protected by the attorney-client privilege [Rule 1.6(a)]. The Planning Commission did not consent to the disclosure, and the exceptions of 1.6(b) and (c) did not apply to these facts, so Atticus breached his duty of confidentiality.

By failing to disclose to Warehouse that his stepfather owned the parcel which Warehouse sought to buy, or that his stepfather's will devised the parcel to Atticus and his sister Sue, Atticus breached his duty of communication [Rule 1.4(c)]. Atticus was obligated to keep Warehouse fully informed of facts relevant to the representation. Atticus' deliberate nondisclosure prejudiced Warehouse's ability to negotiate, and Warehouse would have sought other representation had it known the current ownership or testamentary disposition of the parcel.

Atticus had a concurrent conflict of interest. As a devisee of the parcel, Atticus had a personal interest adverse to that of Warehouse regarding the price of the parcel [Rule 1.7(a)(2)]. Given the directly opposing interests of Warehouse and himself, it was not possible to waive the conflict [Rule 1.7(b)].

Atticus violated the prohibition against interested transactions [Rule 1.8(a) and (b)]. Atticus knew that his own financial interests as a devisee of the parcel were adverse to the interests of Warehouse when he agreed to represent Warehouse, and he then used that information for his own benefit: an inflated selling price and half of Sue's commission.

Atticus had a conflict of interest involving a former client. Atticus' stepfather, whom Atticus represented when drafting his will, had a materially adverse interest to Warehouse in the sale of the parcel [Rule 1.9(a)]. Atticus' stepfather wanted the highest price, while Warehouse wanted the lowest price, and Atticus did not obtain waivers from either party.

All of the unethical conduct discussed above also violated the prohibition against professional misconduct [Rule 8.4(c)]. Atticus' actions were not innocent or unintentional; on the contrary, his conduct was knowingly and deliberately deceitful, and thus reflected adversely on his fitness to practice law.

- [2] Yes, Warehouse is likely to prevail against both Atticus and Sue. As discussed above, Atticus purposefully engaged in self-dealing, unauthorized disclosure of confidential information, and nondisclosure of material facts, all to the prejudice of Warehouse.

As an agent of Warehouse, Sue breached several fiduciary duties to her principal:

Sue was obligated to disclose all material facts to her principal, but she deliberately failed to disclose her stepfather's ownership of the parcel or her own interest as a devisee in his will. Both of these facts were material to Warehouse, since Warehouse would have selected a different real estate agent had it known of Sue's financial self-interest.

Sue was obligated to exercise loyalty to her principal and to follow her principal's instructions, both of which she breached by self-dealing. Sue acted in direct conflict with the interests of her principal: Warehouse wanted to spend no more than \$350,000, but Sue got her stepfather to agree to a price of \$500,000 in order to benefit herself as a devisee in her stepfather's will.

Sue further violated her duty of fidelity by lying about being in negotiations with the owner of the parcel. In fact, Sue only met once with her stepfather, and in that meeting she got him to agree to a price of \$500,000.

The damages Warehouse may recover would be measured by the difference between the parcel's fair market

value and the price Warehouse actually paid.

If the facts of Sue's fraud were properly pled and were proven by clear and convincing evidence, then Warehouse may be able to recover punitive damages from her. Punitive damages would not lie against Atticus, however, since as Warehouse's attorney his relationship was contractual.

4. [UCC - General Provisions & Secured Transactions] Maddie Madison, a resident of Fairfax City, Virginia, went car shopping at Calvin Rowe's Auto Sales ("CRAS") in Sterling, Virginia, on June 1, 2016. Finding an \$18,000 car she wanted to purchase, Maddie completed and signed without negotiation the following CRAS standard form documents: a Credit Application, a Credit Placement Order, and a Retail Installment Sales Contract ("RISC"). Each of the aforementioned documents cross-referenced the others, expressly stated that together they "comprised the entire agreement between the parties affecting this purchase," and subsequently was countersigned by the CRAS sales manager.

One provision of the Credit Placement Order stated:

*[Maddie], as purchaser and legal owner of the vehicle, hereby grants CRAS a security interest in the vehicle being purchased. CRAS shall attempt to place the RISC with a lender that will extend credit for the purchase to [Maddie], but if CRAS is unable to do so within five days, CRAS may cancel the sale and the contract, and [Maddie] will return the vehicle. If [Maddie] fails to return the vehicle, CRAS shall be entitled to repossess the vehicle and shall have all other rights under the Code of Virginia and common law.*

The RISC stated that, "[t]he vehicle will remain the property of CRAS pending approval of a lender, but [Maddie] assumes all responsibility for the vehicle" and required her "to furnish her own Insurance Policy covering the vehicle." The RISC further stated that CRAS "will calculate [Maddie's] Finance Charge on a daily basis at the Annual Percentage Rate as of the date of sale, June 1, 2016."

As a down payment on the purchase of her new car, Maddie traded in her old car and paid CRAS \$1,000 in cash. Thereafter, Maddie drove her new car off the CRAS lot and has not returned. CRAS attempted for over a week to obtain financing for the sale to Maddie, but was unsuccessful. CRAS has been unable to reach Maddie by phone for more than a month. On July 9, 2016, CRAS repossessed the car from Maddie's home and, the next day, sold the car at public auction in Richmond, Virginia, without providing prior notice to Maddie.

Viewing the three documents signed by CRAS and Maddie, there is an inconsistency regarding ownership of the vehicle – that is, between the RISC, which states that the car was to "remain property of CRAS pending approval by lender" and provisions in the other two documents, which treat the car as Maddie's property and are "effective as of the date of sale," which was June 1, 2016. The documents do not contain an "order of precedence" provision.

Maddie retains you as her lawyer and asks the following questions:

- [1] What rule of construction would a Virginia court use to resolve the apparent inconsistency about ownership among the contractual provisions in the three documents signed by the parties, and what is the result of the rule's application on these facts? Explain fully.
- [2] What is the proper characterization of the agreement between Maddie and CRAS pertaining to the car, and was CRAS entitled to repossess the car? Explain fully.
- [3] What rights, if any, does Maddie have under Article 9 of the Uniform Commercial Code as adopted in Virginia as the result of CRAS's repossession and sale of the car? Explain fully.

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- [1] Contractual ambiguities are construed *contra proferendum* – against the party who drafted the contract. *Martin & Martin v. Bradley Enterprises*, 256 Va. 288 [1998]

Applying this rule of construction would suggest that Maddie owns the car. Of the three documents, all of which CRAS

drafted, only the Retail Sales Installment Contract (RISC) refers to CRAS as owner, and the RISC requires that Maddie insure the car, which suggests that she owns it. The RISC also charges Maddie interest as of June 1, 2016, which further suggests that she bought the car as of that date.

Regardless of how the court would construe the ownership issue, CRAS's attempt to reserve ownership is limited to a reservation of a security interest. Va. Code §8.1A-201(a)(35) provides that "retention or reservation of title by a seller of goods notwithstanding shipment or delivery to the buyer under Va. Code §8.2-401 is limited in effect to a reservation of a security interest."

[2] Assuming that Maddie is the owner of the car, she clearly had the "rights in the collateral" necessary to grant CRAS a security interest, and the Credit Placement Order (CPO) explicitly states that she did so.

Upon default, CRAS had the right to repossess per Va. Code §8.9A-609, provided it proceeded without breach of the peace. As to whether CRAS breached the peace, the facts merely state that CRAS repossessed "from Maddie's home." It is not clear whether the car was in her driveway or on the street, or whether she objected.

However, CRAS did not give notice to the debtor as required by Va. Code §8.9A-611(b) and (c)(1) [a secured party that disposes of collateral must send reasonable authenticated notification to the debtor] and Va. Code §8.9A-612 [10 days' notice before disposition of collateral is considered reasonable]. The facts specify that CRAS sold the car the next day after repossession without providing any prior notice to Maddie. *Cappo Mgmt. v. Inc.*, 282 Va. 33 [2011]

[3] As a result of CRAS' failure to provide notice as described in part (b) above, Maddie may recover actual damages under Va. Code §8.9A-625(b) ["the amount of any loss caused by a failure to comply with this title . . . [which] may include loss resulting from the debtor's inability to obtain, or increased costs of, alternative financing"] – on these facts, the \$1,000 in cash plus the value of her trade-in.

Maddie can also recover statutory damages under Va. Code §8.9A-625(c) ["an amount not less than the credit service charge plus ten percent of the principal amount of the obligation or the time-price differential plus ten percent of the cash price"].

✖✖ Comment: It's our view that Va. Code §46.2-1530 may apply in this situation but do not believe the bar examiners were looking for an answer relying on the statute but were looking for a UCC based analysis.

5. [Criminal] Jerry, Bob, Phil, Rick, and Mickey were the members of a rock band that regularly toured around the country. None of them was considered the "leader" of the band, but lately Mickey was acting as if he were the leader, which was creating discord among the band members. It got to the point where Jerry and Phil found it intolerable, so the two of them agreed upon a plan to "get rid of" Mickey: while touring in Lee County, Virginia, they would lure him into the woods and shoot him to death.

Neither Jerry nor Phil owned a gun, but they knew Bob had a pistol he had recently stolen. They approached Bob, told him of their plan to kill Mickey, and asked Bob to let them use the pistol. Bob enthusiastically agreed, saying that he too was getting tired of Mickey trying to "take over" the band and that they would be better off without him. Bob instructed them to throw the pistol into the river after they used it to shoot Mickey.

After their final performance in the area, Bob and Rick went to their homes in different states. Jerry and Phil, who stayed behind in Lee County, induced Mickey to accompany them to the woods on the pretext that they were going to make a buy from a marijuana supplier. In accordance with the plan, Phil stayed with Jerry's van as a lookout and getaway driver. After Jerry and Mickey had walked about one hundred yards into the woods, Jerry shot Mickey in the back of the head and killed him. Jerry and Phil fled the area and drove to Rick's house in West Virginia.

Rick was ignorant of what had happened to Mickey, but when Jerry and Phil arrived at his house they told Rick exactly what they had done and, saying they needed a place to hide out, asked Rick to let them stay in his basement for a while to avoid the ongoing police investigation. Rick expressed shock and said he wanted nothing to do with them, but when Jerry and Phil refused to leave, Rick reluctantly agreed to let them stay for a few days. After a week, Rick had second thoughts and told them to get out or he would call the police and report what had happened. Jerry and Phil departed, and Rick never did report the incident to the police.

Several months later, Bob was arrested on unrelated drug charges. After properly advising Bob of his *Miranda* rights, the police interrogated him about the drugs he possessed. They also asked him if he knew anything about Mickey's murder. Bob cracked and told the police everything he knew. He explained that Phil and Jerry killed Mickey because they wanted him out of the band, that he had provided the gun used in the murder, and that Rick had allowed Jerry and Phil to hide in his basement after the murder.

All four of them – Jerry, Phil, Bob, and Rick – were charged with first-degree murder. In addition, Bob was charged with the drug offense for which he had been arrested. The Commonwealth Attorney sought to try all the charges against Bob in a single trial. Bob's attorney filed a pretrial motion to sever the drug charges and have them tried separately.

[1] Can the Commonwealth make out a *prima facie* case of first-degree murder as to each of the four defendants? Explain fully.

[2] How should the Court rule on Bob's motion to sever the drug charges? Explain fully.

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[1] The Commonwealth can make out a *prima facie* case for first-degree murder as to Jerry, Phil, and Bob, but not as to Rick.

Va. Code §18.2-32 defines murder in the first degree as: "Murder, other than capital murder, by poison, lying in wait, imprisonment, starving, or by any willful, deliberate, and premeditated killing, or in the commission of, or attempt to commit, arson, rape, forcible sodomy, inanimate or animate object sexual penetration, robbery, burglary or abduction . . . "

"Murder" is a killing with malice. "Malice" is that state of mind which results in the intentional doing of a wrongful act to another without legal excuse or justification, at a time when the mind of the actor is under the control of reason. It may result from any unlawful or unjustifiable motive including anger, hatred, or revenge. Malice may be inferred from any deliberate, willful, and cruel act against another, however sudden. "Willful, deliberate, and premeditated" means that the defendant acted with a specific intent to kill, adopted at some time before the killing, but which need not exist for any particular length of time.

Jerry and Phil devised the plan to kill and procured a weapon with which to carry out the crime. The two drove Mickey to the woods with the purpose of killing him.

Jerry shot and killed Mickey, so Jerry is guilty as a principal in the first degree.

Phil drove with Jerry as part of a plan which Phil helped conceive and carry out, and Phil served as the get-away driver. Phil is thus a principal in the second degree (an aider and abettor) and under Virginia law is punishable as if a principal in the first degree [18.2-18].

Both Jerry and Phil acted willfully, deliberately, and with premeditation and malice.

Bob freely and knowingly joined the criminal enterprise and furnished the murder weapon. Bob also instructed Jerry and Phil to dispose of the pistol so as to avoid discovery. Because Bob was not present at the time of the crime, he is an accessory before the fact – one who was not present at the time of the commission of the crime but who encouraged, incited, or aided in its commission, with knowledge of the intent of the principal. As such, Bob is punishable as if a principal in the first degree [Va. Code §18.2-18]. The fact that Bob left the state before the crime was accomplished has no effect on his liability.

Rick was ignorant of the scheme. He learned of the plan and the murder only after the fact. He is therefore neither a principal in the second degree nor an accessory before the fact. His agreement to allow the killers to stay at his house to avoid the police means he may be guilty as an accessory after the fact [Va. Code §18.2-19], or for misprision of a felony, but he is not charged with those crimes. The offense of accessory after the fact to murder is not a lesser included offense of the first degree murder.

[2] The court should grant Bob's motion to sever the charges.

Rule 3A:10(c), which governs the trial of multiple charges against one defendant in a single trial, states:

(c) *An Accused Charged With More Than One Offense.* The court may direct that an accused be tried at one

time for all offenses then pending against him, if justice does not require separate trials and (I) the offenses meet the requirements of Rule 3A:6(b) or (ii) the accused and the Commonwealth's attorney consent thereto.

Rule 3A:6(b) states:

(b) *Joinder of Offenses*. Two or more offenses, any of which may be a felony or misdemeanor, may be charged in separate counts of an indictment or information if the offenses are based on the same act or transaction, or on two or more acts or transactions that are connected or constitute parts of a common scheme or plan.

Here, justice does require separate trials, and the offenses do not meet the requirements of Rule 3A:6(b). Justice requires separate trials because trying the offenses together may create “spill-over” prejudice, since the jury may conclude that Bob is guilty of one of the crimes simply because they have come to believe he is guilty of the other crime. The jury may also wrongfully infer guilt of the drug charge because part of the pretext for the murder scheme involved buying drugs. Additionally, the jury may conclude that the testimony of a drug user (assuming that is the basis of the drug charge) is less credible than other witnesses. If Bob testifies, this may unfairly prejudice him. Finally, it is possible that Bob may wish to testify in his own defense concerning one of the charges, but not the other, something he could not do if tried jointly for both charges.

Moreover, the charges are not properly joined under Rule 3A:6(b). The offenses are not “based on the same act or transaction,” nor are they “[based] on two or more transactions that are connected or constitute parts of the common scheme or plan.” According to the facts, the drug charge is “unrelated.”

Finally, there is no agreement between the Commonwealth and the defense that the charges be tried together.

**6.** [Federal Civil Procedure, State & Local Government & Constitutional Law] Lincoln Insurance Company (“Lincoln”) provided property insurance coverage for real and personal property owned by George Mason University (“GMU”). Lincoln is an Illinois corporation with its executive officers, including its president, chief operating officer and chief financial officer, in Chicago, Illinois. Lincoln’s worldwide advertising office is located in Tysons, Virginia. Lincoln is qualified to do business in Virginia as a foreign corporation, according to the Virginia State Corporation Commission.

GMU is a public (or “state”) university. The Code of Virginia provides that GMU is “subject at all times to the control of the General Assembly” and that the real and personal property of GMU is “the property of the Commonwealth of Virginia.”

In the last week of April 2015, following a storm, rainwater flooded certain buildings on GMU’s campus in the City of Fairfax, Virginia (“City”), causing \$2.5 million in property damage. GMU timely filed an insurance claim of \$2.5 million, which following investigation, was fully paid by Lincoln.

Lincoln, as subrogee of GMU, thereafter sued the City of Fairfax in the U.S. District Court for the Eastern District of Virginia. The complaint alleged that the City’s negligence in the planning, design, engineering, construction and maintenance of its storm sewer system caused the flooding of the GMU campus, and sought to recover the \$2.5 million on two theories: first, that the City by its negligence created a legal nuisance, and second, that the damage resulting therefrom was a compensable “taking” of GMU’s property by the City in violation of Article 1, Section 11 of the Virginia Constitution, which provides that, “[n]o private property shall be damaged or taken for public use without just compensation to the owner thereof.”

The City’s attorneys timely filed an answer, including affirmative defenses, and a motion to dismiss on the grounds that (1) the District Court lacks subject matter jurisdiction, arguing that GMU is an indispensable, real party in interest, the joinder of which would destroy diversity of citizenship, and (2) the complaint’s claims are barred by Section 15.2-970 of the Code of Virginia, which states in part:

Any locality may construct a dam, levee, seawall or other structure or device ... hereinafter referred to as “works,” the purpose of which is to prevent the tidal erosion, flooding or inundation of such locality, or part thereof...

No person, association, or political subdivision shall bring any action at law or suit in equity against any locality because of, or arising out of, the design, maintenance, performance, operation or existence of such works but nothing herein shall prevent any such action or suit based upon a written contract. This provision shall not be construed to authorize the taking of private property without just compensation therefor and provided further that the tidal erosion, flooding or inundation of any lands of any other person by the construction of a dam or levee to impound or control fresh water shall be a taking of such land within the meaning of the foregoing

provision.

The parties have stipulated that the City is a “locality” and that the City’s storm sewer system is a “work” as those terms are used in Section 15.2-970 above. Also, it is undisputed that the City was negligent in the construction and maintenance of its storm sewer system.

The District Court judge asks you, as her law clerk, to answer the following questions:

- [1] How should the Court rule (i) on the merits of the City’s argument that GMU is an indispensable, real party in interest, and (ii) on the motion to dismiss for lack of subject matter jurisdiction? Explain fully.
- [2] On the facts, could Lincoln prove that the City created a legal nuisance, and may Lincoln recover on such a claim? Explain fully.
- [3] On the facts, could Lincoln prove that the damage caused by the flooding was a “taking” of GMU’s property, and may Lincoln recover on such a claim? Explain fully.

✖✖

[1] The Court should reject the City’s argument. The general rule in cases involving an insurance company that has paid fully and become subrogated to the insured’s claim is as follows:

If the insurer has paid the entire claim, it is the real party in interest and must sue in its own name. If no money or enforceable promise to pay money has been advanced, then there has not been any subrogation and the insured remains the real party in interest. This seems sound since it is logical that an insured who has no interest in the outcome of the litigation may not bring suit.

6A Mary Kay Kane, Wright & Miller’s Federal Practice & Procedure § 1546 (3d ed. 2016).

[2] An insured whose claim has been paid in full, as the facts state, would likewise not be an indispensable party. Federal Rule of Civil Procedure 19 asks whether, in the party’s absence, complete relief could be given. The answer would be yes because the subrogee insurance company has all of the rights needed to get relief. Indeed it would be improper to include the insured after it has been fully paid and no longer is a real party in interest.

The fact pattern includes a curve ball on the citizenship of the Insurance Company, providing that its executive offices are in Chicago, Illinois, where its president, COO, and CFO are located. The facts say the “worldwide advertising office is located in Tyson, Virginia.” The test for principal place of business of a corporation is where its “nerve center” is located, i.e. where the chief officers of the company make the central decisions that radiate out to the company. Here that would be Chicago, Ill. Because the company is incorporated and has its principal place of business in IL, it is completely diverse from the City of Fairfax, Virginia. Moreover, the amount in controversy is \$2.5 million, clearly exceeding \$75,000 exclusive of interests and costs.

[3] No. The U.S. and Virginia Constitutions allow government entities to (1) take private property, (2) for public use, (3) with just compensation. The essay makes clear that George Mason University is a state university and that “the real and personal property of GMU is ‘the property of the Commonwealth of Virginia.’” Thus, the property here is public property, not private property. When the property is public rather than private, there can be no taking. In *Continental Cas. Co. v. Town of Blacksburg*, 846 F. Supp. 483 (W.D. Va. 1993)—a later decision in the ongoing litigation between an insurer and the Town of Blacksburg—the U.S. District Court for the Western District of Virginia held that the insurer could not sue the Town for damage to public property.

7. [UCC - Negotiable Instruments & Bank Deposits & Collections] Cassius Ali (“Ali”), CEO of Fight Club International, LLC (“Fight Club”), a franchisor of boxing fitness centers, located in Richmond, Virginia, usually kept the company checkbook on the desk in his private office. All of the checks were imprinted with Fight Club’s name and address and words “Chief Executive Officer” beneath the signature line. The checking account was maintained at RVA Bank.

Sonny Frazier (“Frazier”) was a salesman working for Fight Club. One weekend after working late, Frazier entered Ali’s office and saw the checkbook. He stole a blank check, made it out to himself for \$4,500, and, being familiar with Ali’s signature, carefully signed a reasonable facsimile of it on the signature line.

Frazier purchased and took delivery of a new Apple desktop computer and four Apple iPhones from Computer City, a local electronics dealer, and endorsed the stolen check with his own name. Computer City accepted the check in payment for the computer and iPhones. Frazier then left town, and his whereabouts are unknown. Computer City presented the check to RVA Bank, which paid the check in cash.

When Ali received the next monthly statement from RVA Bank, he noticed the \$4,500 cancelled check. He immediately notified RVA Bank that it was a forged check and demanded that the bank credit Fight Club's account with \$4,500.

[1] Must RVA Bank credit Fight Club's account? Explain fully.

[2] What arguments should Computer City make in response to a suit by RVA Bank to recover the \$4,500 from Computer City? Explain fully.

✖✖

[1] Probably yes. Va. Code §8.4-401 provides that a bank may charge its customer's account only for "properly payable" items. Because of the forged drawer's signature, however, Fight Club's check was not properly payable [Va. Code §8.3A-403(a)]. Since Fight Club met its duty under Va. Code §8.4-406 to report promptly its unauthorized signature to RVA Bank, RVA Bank must re-credit Fight Club's account.

RVA Bank will argue that Fight Club's negligence substantially contributed to the forged signature by leaving the company checkbook on the desk and thus failing to exercise ordinary care. Fight Club likely could have followed more rigorous security measures, such as locking the private office and/or the desk, but the facts do not indicate that failure to do so substantially contributed to the forgery.

RVA Bank does not have a plausible argument for employee fraud based on Va. Code §8.3A-405, since there was no fraudulent indorsement in this case.

[2] Computer City should argue that it did not breach a presentment warranty. Va. Code 8.3A-207(a)(3) provides that a warranty as to the drawer's signature is breached only if the warrantor has no knowledge that the signature of the purported drawer is unauthorized; pursuant to Va. Code §8.1A-202(b), "knowledge" means actual knowledge, which does not exist on these facts. Rather, Computer City was a holder in due course [Va. Code §8.3A-302], since it took the check for value, in good faith, and without knowledge of any claims or defenses.

Computer City could further argue that even if it did breach a presentment warranty, RVA's apparent failure to compare the signature on the check with Ali's signature on file meant that RVA Bank did not pay the check in good faith. This is a weak argument, however. The facts stipulate that the forgery was a reasonable facsimile, so examining the signature card may not have revealed the forgery. Also, as a practical matter, it is very uncommon for banks to check signature cards.

RVA might also try to recover from Computer City under Va. Code §8.3A-418(a) for making a mistaken payment. Although RVA did cash the check, thereby finally paying it under Va. Code §8.4-213(a)(1), doing so does not preclude RVA's ability to recover a mistaken payment. However, Computer City should prevail by arguing under Va. Code §8.3A-418(c) that it in good faith changed position in reliance on the check's payment by selling the computer and iPhones to Ali.

**8.** [Personal Property & Va. Civil Procedure] Scout, an investment banker from Norfolk, Virginia, needed a break from the corporate world and decided to go on a "thru-hike" of the Appalachian Trail, backpacking from Georgia to Maine. Before she left, Scout dropped off her guitar, weight-lifting equipment, and fish tank at her friend Jimmy's house. Jimmy agreed to store the property in his basement at no charge.

Scout signed an enforceable contract with Point to Point, Inc., an automobile transportation company, to ship her car to her grandmother's house in Richmond, Virginia, where Scout intended to pick up the car upon completion of her trip.

Scout delivered the remainder of her personal possessions to Friendly Storage, a local storage facility. Scout entered into an enforceable contract with Friendly Storage and paid in full the storage fees for the upcoming year to avoid the hassle of payment during her trip. With the peace of mind that her possessions were in good hands, Scout embarked on her adventure.

While Scout was traversing the Appalachian Trail, the moisture in Jimmy's basement—as a result of the unpredictably

high rainfall—caused irreparable damage to Scout's guitar.

Instead of delivering Scout's car to her grandmother's house, Point to Point, Inc. delivered the car to the homeless shelter next door. The homeless shelter, believing the car to be a donation, sold it to Morgan (the head of household of a local needy family) for \$1,000, which, consistent with disposal of donated property, was much less than the \$4,000 retail value of the car.

To make matters worse, only a month after Scout paid him, the owner of Friendly Storage mistakenly confused Scout's storage locker for that of a delinquent customer. At a blind bulk auction where potential buyers bid on the entire contents sight unseen, the high bidder paid almost 200% of the value of Scout's possessions.

Having decided to go completely "off the grid" during her trek, Scout was unaware of these happenings until she returned many months later. Upon her return, Scout's feeling of personal accomplishment quickly turned to distress when she realized what happened to her belongings in her absence.

- [1] Is Scout likely to prevail in a suit for negligence against Jimmy to recover for the damage to her guitar? Explain fully.
- [2] Is there an action Scout can file against Morgan in General District Court to recover the car, and is Scout likely to prevail? Explain fully.
- [3] On what theories may Scout state a claim against Friendly Storage to recover for the loss of her personal possessions; is she likely to prevail on each; and how much would she be entitled to recover if she prevails? Explain fully.

xx

[1] No. Jimmy was a gratuitous bailee, since he agreed to store Scout's property at no charge. He was thus obligated to exercise slight care, and would be liable only if grossly negligent. The moisture damage to Scout's guitar was caused by "unpredictably high rainfall" – not by gross negligence on Jimmy's part.

[2] Yes. Scout can file an action for detinue. Detinue requires alleging and proving the following elements: [1] the plaintiff has a current right in the property; [2] the plaintiff has a right to immediate possession; [3] the property is capable of possession; [4] the property has value; [5] and the defendant had possession of the property prior to filing suit.

All elements exist on these facts. As the true owner of the car, Scout retained the right of title. Point to Point only had a possessory right as a bailee, and therefore was only able to transfer the right of possession, so the purported *inter vivos* gift from Point to Point to the homeless shelter did not pass title. The car is a tangible chattel and thus capable of possession, and is worth \$4,000 (within the General District Court's exclusive jurisdiction: Va. Code §16.1-77). Since Morgan acquired only possession (not title) from the homeless shelter, Scout will prevail against him. Note that if Scout seeks pretrial seizure, she must post a double bond pursuant to Va. Code §8.01-115.

[3] Scout and Friendly Storage entered into a bailment – a mutually consensual relationship whereby Scout entrusted Friendly Storage with possession of chattels in the storage locker she rented. As an aggrieved bailor, Scout may assert the following theories:

Breach of contract: The facts stipulate that Scout entered into an enforceable contract with Friendly Storage. Friendly breached the terms of the contract by failing to care for Scout's goods as promised, and Scout suffered compensable damages as a result.

Negligence: As a bailee for mutual benefit, Friendly Storage was obligated to exercise ordinary reasonable care. Storage lockers are by their nature clearly numbered, so Friendly should have known one locker from another. Friendly's actions would therefore be simple negligence, breaching its duty of care. Its acts were also the actual and proximate cause of Scout's loss, and she suffered compensable damages.

Conversion: By selling the contents of Scout's locker without permission and without legal right, Friendly Storage deprived Scout of the entire value of her chattels and is liable as a converter – essentially a forced sale whereby title is thrust upon the converter.

Strict liability: A bailee which misdelivers (returns the goods to someone other than the bailor or the bailor's authorized

agent) is strictly liable to the bailor. Friendly Storage misdelivered by selling the contents of the locker at auction rather than returning them to Scout. The fact that Friendly Storage presumably made an innocent mistake in confusing Scout's locker with that of another customer is irrelevant to its strict liability.

Since Scout paid the storage fees in full for the upcoming year, her recovery for breach of contract, negligence, or strict liability would be the value of the her possessions plus the unused portion of the prepaid storage fee. Scout's recovery on the conversion theory, however, would be the fair market value of the chattels at the time and place of the conversion. Although the auction buyer's bid was nearly 200% of the possessions' value, Scout should recover this greater amount to prevent Friendly Storage from being unjustly enriched.

9. [Virginia Civil Procedure] Blake is the owner of Spartan Metal Buildings, Inc., ("SMB"), a metal fabricator located in an industrial park in Salem, Virginia. Periodically, SMB needs to clear its storage yard of accumulated scrap metal.

One day at lunch with his friend Drew, who had just been laid off from his job, Blake was complaining about having to do the cleanup. Drew said he needed the work and asked Blake if he could help with the cleanup, take away the scrap metal on his flatbed truck, and, by way of compensation, sell the scrap metal and keep the proceeds. Blake agreed, and they met later that afternoon in the SMB yard.

For two hours, Blake directed his employees and Drew as they moved all of the scrap metal into a large pile. Blake operated a crane to load some of the larger pieces on the back of Drew's flatbed truck. While moving one of the larger pieces, Drew tried to guide it onto the truck. At that time, the crane was dangerously close to a power line which crossed the yard. The metal piece Drew was guiding onto the truck came into contact with the power line and Drew was severely burned. Drew survived the incident but amassed over \$400,000 in medical expenses to be treated for his injuries. He filed a claim with SMB's insurance carrier for workers' compensation benefits, but the claim was denied.

Drew filed a Complaint in the Circuit Court for the City of Salem alleging negligence against Blake and SMB ("Defendants") for personal injuries that he sustained. The Defendants answered with a general denial. When Blake was deposed in the discovery process, he testified: (1) that he was aware of the low height of the electrical line across the yard; (2) he should have warned Drew to stay clear from the crane and the scrap metal being moved; and (3) he was distracted just prior to the incident when his cell phone vibrated in his rear pocket, and he was reaching to check it when the incident occurred.

Drew filed a Motion for Summary Judgment asserting that Blake and SMB (under a theory of *respondeat superior*) were negligent as a matter of law based upon Blake's own party admissions made in his deposition. The Defendants opposed the Motion for Summary Judgment arguing that (1) Drew, as a plaintiff, is not entitled to move for summary judgment, and (2) in the alternative, summary judgment cannot be granted because the motion relies upon Blake's deposition testimony. The Circuit Court for the City of Salem agreed with both of the Defendants' arguments and denied the Motion for Summary Judgment.

A month before trial, the Defendants filed a Plea in Bar alleging that the Circuit Court had no subject matter jurisdiction over Drew's claim because at the time of the accident Drew was a "statutory employee" of SMB whose exclusive remedy for his injuries was under the Virginia Workers' Compensation Act. Drew filed a Response in Opposition to the Plea in Bar asserting only that the Defendants waived any objection to jurisdiction because they had not raised this defense in their Answer to the Complaint.

By Final Order dated May 22, 2016, the Circuit Court granted the Defendants' Plea in Bar, holding that Drew was a statutory employee of Blake and SMB and that subject matter jurisdiction could not be waived by the Defendants.

On June 15, 2016, Drew filed a Notice of Appeal with the Clerk of the Circuit Court. He believes, but is uncertain, that he has an appeal to the Supreme Court of Virginia as a matter of right. He intends to base his appeal on the following assignments of error:

- [a] That the trial court erred in denying his Motion for Summary Judgment on the grounds that it did.
- [b] That the Defendants' "exclusive remedy" jurisdictional objection was waived because it was not raised as a defense in their Answer to the Complaint.
- [c] The Defendants should have been estopped from asserting the jurisdictional objection because SMB's insurance carrier denied his claim for workers' compensation benefits.

- [1] Did Drew timely file his Notice of Appeal? Explain fully.
- [2] Does Drew have an appeal to the Supreme Court of Virginia as a matter of right? Explain fully.
- [3] If his case properly comes before the Supreme Court of Virginia, what disposition will the Court make on each of the enumerated assignments of error? Explain fully.

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- [1] Yes, the Notice of Appeal must be filed in the CC within 30 days from the date of entry of the final order being appealed from. Drew made this deadline. Rule 5:9
- [2] Appeals from final judgments in the circuit court in civil cases , other than domestic relations cases, are by petition, not of right, to the SCV. Va. Code §8.01-670
- [3] First issue is the question is whether the TC erred in denying his Motion for SJ on the grounds that it did.
- [a] Rule 3:20 permits any party to move for SJ. The TC was wrong as to this ground.

As to the use of discovery depositions in claims for compensatory damages, the TC was correct. Under Va. Code §8.01-420, & Rule 3:20, the ban on using discovery depositions for compensatory damages is controlling.

✖✖ Warning as to future bar exams with questions on summary judgment. There were legislative and rule changes effective 07/01/13 adding some exceptions to what had been the blanket rule regarding use of Rule 4:5 discovery depositions for the basis of a motion for summary judgment. None of these exceptions were engaged by the facts of this bar exam question.

Not necessary to answer this exam's question - the ban on using discovery depositions was continued, but under Va. Code §8.02-420, a moving party may use responses to requests for admissions that are based on discovery depositions under Rule 4:5 and may include admitted facts learned or referenced in such deposition, provided that .... there is no reference to the deposition or require the party to admit that the deponent gave specific testimony. There are more new provisions regarding claims for punitive damages. Read Va. Code §8.01-420 and Rule 3:20, carefully.

Future bar exam takers - be sure and read the facts carefully in what appears to be a summary judgment question to examine if any of the exceptions are in play...

- [b] As to the subject matter jurisdiction issue, subject matter jurisdiction can not be waived by a party or parties. Subject matter jurisdiction can be granted a court only by the General Assembly. There is no special pleading that must be used and no time limitation on raising subject matter jurisdiction. The trial court got this one right.
- [c] The action of Defendant's insurance company does not change any of this because to permit estoppel to work against the insurance company would to be permitting a party to confer subject matter jurisdiction on the court.