August 30, 2019 (9:58am)

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

Summary of suggested answers to the essay part of the July 2019 Virginia Bar Exam

Prepared by the following *attendees*, who were at the post exam meeting with the VBBE: J. R. Zepkin & William H. Shaw, III of William & Mary Law School, Emmeline P. Reeves of University of Richmond Law School, Benjamin V. Madison III of Regent University Law School, Cale Jaffe of University of Virginia Law School & C. Reid Flinn of Washington & Lee Law School (also a member of the adjunct faculty at William & Mary Law School and University of Richmond Law School).

The following, while not attending the meeting, provided us great help with suggested answers in each's particular area[s] of specialty: Robert T. Danforth, Jonathan Shapiro, and Mark A. Williams of Washington & Lee Law School; Lynne Marie Kohm, Natt Gantt II, Louis Hensler II, and Brad Jacob of Regent University Law School.

1. [07.19] [Local Government] The City of Hampton, Virginia, owns and maintains the 100-acre Gosnold's Hope Park for the use and enjoyment of the public. The park includes many paved walkways and roads, but most of the area is covered with trees and grass. The public is permitted to use the grassy areas for walking, picnicking, sunbathing, and games. As Daisy was strolling through a grassy area in the park one Sunday afternoon, she stepped into a hole and broke her ankle. The hole, which was approximately one foot deep, was covered by grass, but the ground under it gave way under Daisy's weight.

Daisy hired a local attorney who gave proper statutory notice of her claim and instituted a lawsuit against the City in the Circuit Court of the City of Hampton to recover for her injuries. At the trial, Daisy proved the following facts during the presentation of her case:

[i] the park was owned and operated by the City;

[ii] the hole into which she stepped was covered with grass;

[iii] she stepped into the hole, the proximate result of which was that she broke her ankle; and

[iv] employees of the City's Parks Department inspected the park on a daily basis while performing routine maintenance.

Daisy offered no evidence with respect to how long the hole had been there, what caused the hole, or whether the existence of the hole was known to anyone until the accident occurred.

At the conclusion of Daisy's case, the City's attorney moved the Court to strike the evidence, arguing that the City breached no legal duty to Daisy and could not be held liable to her under Virginia law.

[a] What is the standard of care that the City owed to Daisy? Explain fully.

[b] How should the Court rule on the City's motion to strike the evidence? Explain fully.

[c] Should the Court's ruling be different if the accident had occurred on a public sidewalk maintained by the City that is outside the park?

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[a] Under VA Code § 15.2-1809, cities have immunity from simple negligence in operating parks and certain other recreational facilities for the use and enjoyment of the public. Cities do, however, remain liable for gross or wanton negligence in operating these facilities. The Supreme Court of Virginia has described gross negligence as the utter disregard of prudence amounting to complete neglect of the safety of another, emphasizing the importance of

deliberate conduct. The Court has also held that gross negligence can be proved from the combination of several acts of simple negligence. Chapman v. City of Virginia Beach 252 Va. 186 (1996).

[b] The Court should grant the motion. Daisy is required to prove that the City engaged in gross negligence. However, Daisy has shown only that the hole was covered with grass and that employees of the City's Parks Department inspected the park daily while performing routine maintenance. While the Supreme Court of Virginia has held that gross negligence can be proved from the combination of several acts of simple negligence, here there is only one possible act of simple negligence.

Additionally, a municipality must have actual or constructive notice of a defect on public property in time to have it remedied before liability attaches. City of Virginia Beach v. Roman 201 Va. 879 (1960). The facts state that, "Daisy offered no evidence with respect to how long the hole had been there, what caused the hole, or whether the existence of the hole was known to anyone until the accident occurred." A plaintiff must show more than that a defect on public property has come into being and caused plaintiff's injury.

[c] If the accident had occurred on a public sidewalk, the Court should also grant the City's motion.

As an initial matter, the standard of care would be simple negligence. Although a city is not an insurer against accidents on its property, it has a duty to keep its property in reasonably safe condition for persons who use ordinary care and prudence. City of Norfolk v. Hall 175 Va. 545 (1940). A municipality is bound to use due and proper care to see that its property which is open to use by the public is reasonably safe to persons passing on or along the property when exercising ordinary care and prudence. Portsmouth v. Lee 112 Va. 419 (1911).

Translating the accident to a sidewalk outside the park, (and deducing that a one-foot deep hole in a sidewalk would not be covered with grass), Daisy proved the following relevant facts: (i) the sidewalk was owned by the City; (ii) she stepped into the hole which caused her injury; and, (iii) employees of the City's Parks Department inspected the sidewalk on a daily basis while performing routine maintenance. Daisy offered no evidence with respect to how long the hole was there or that the City had any notice or knowledge of the hole, so she has failed to prove simple negligence by the City.

Additionally, as noted in [b] above, a municipality must have actual or constructive notice of a defect on public property in time to have it remedied before liability attaches. City of Virginia Beach v. Roman 201 Va. 879 (1960). A plaintiff must show more than that a defect on public property has come into being and caused plaintiff's injury. A municipality has constructive notice of a defect in a public way adjoining a street when the defect has existed for such a period of time that the defect could have been discovered by the exercise of ordinary care. City of Richmond v. Holt 264 Va. 101 (2002). Daisy's failure to show the City's actual or constructive notice of a defect would be fatal to her case.

The Supreme Court of Virginia has also held that open and obvious defects, such as a 2 ½ inch difference in sidewalk sections, do not give rise to municipal liability. Town of Hillsville v. Nester 215 Va. 4, 5, (1974). The Court has also held that a plaintiff whose fall was caused by a 2 1/4-inch depression adjacent to a water meter box was guilty of contributory negligence as a matter of law even though momentarily distracted by other pedestrians. West v. City of Portsmouth 217 Va. 734 (1977). Here, if the one-foot deep hole was open and not covered by grass, Daisy would be contributorily negligent.

It should also be noted that the Supreme Court of Virginia has consistently held that maintenance of a City sidewalk is a proprietary function and not a governmental function. Votsis v. Ward's Coffee Shop, Inc. 217 Va. 652 (1977). Therefore, the City would not enjoy the defense of governmental immunity to Daisy's suit for a fall on the sidewalk.

2. [07.19] [Partnership & Corporations] In 2008, Larry Law and Bruce Barrister, both prominent lawyers in Northern Virginia, formed a law firm to specialize in personal injury litigation law in Alexandria, Virginia. There was no written agreement between them, but they orally agreed that they would practice law together, pay expenses out of revenues, and share the profits 60% to Larry and 40% to Bruce. In 2010, Larry and Bruce invited one of their associates, James Justice, to become an owner in the firm, and they realigned the ownership interest: 55% to Larry, 35% to Bruce, and 10% to James.

In order to maximize certain tax benefits, they formed a Virginia professional corporation in 2012 called Law, Barrister, & Justice P.C. ("LB&J P.C.") and issued stock as follows: Larry 55%, Bruce35%, and James 10%. The corporation was

properly formed, the three shareholders sent notice to all their clients announcing the formation of LB&J P.C. and did everything else formally necessary to maintain the corporation. Informally, however, among themselves, they continued to refer to themselves as "partners," to hold what they called "partnership meetings," and to refer to Larry as the "managing partner" in internal memos and documents, such as the firm's employee handbook.

In January 2014, Larry, Bruce, and James each signed a document titled "Shareholders' Agreement" in which, among other things, they agreed that in the event of a state or federal tax audit, they would share any liability for unpaid taxes equally. All this was done without calling meetings of either the board of directors or the shareholders of LB&J P.C., and no minutes were kept of the transaction.

For several years, Bruce and James had tried to convince Larry that it was in the firm's best interest to expand the practice, but Larry refused even to consider the possibility. In March 2015, Bruce and James left the firm and began practicing together in Arlington, Virginia.

Several months later, in December 2015, Larry received three items. The first was a notice from the Internal Revenue Service addressed to LB&J P.C. advising that the firm's 2014 tax return was being audited and that it appeared there would be substantial liability for unpaid taxes.

The second item was a lawsuit seeking to recover damages from Larry, Bruce, and James as individuals based on two counts of legal malpractice by James for (i) his failure to file a suit within the applicable statute of limitations for damages to a client's vehicle sustained in January 2013, and (ii) his failure to file an appeal of the order forfeiting the same client's Rolls Royce automobile resulting from a 2011 arrest and conviction for drug distribution.

The third item was a letter from Bruce and James stating, "We hereby demand that LB&J P.C. be dissolved and demand an accounting to the shareholders and distribution of the assets." Larry, believing it to be in his best interest not to act, refused this demand.

[a] Is the Shareholders' Agreement regarding liability for unpaid taxes enforceable? Explain fully.

[b] Assuming the two malpractice claims are meritorious, to what extent, if any, may Larry, as an individual, be held liable for either of them? Explain fully.

[c] What remedies might Bruce and James seek and what must they prove in order to dissolve LB&J P.C., obtain an accounting, and distribute the assets? Explain fully.*

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[a] Yes, the Shareholder's Agreement regarding liability for unpaid taxes is enforceable. Under the Virginia Stock Corporation Act, which generally applies to Virginia Professional Corporations, shareholders have broad latitude to enter into agreements concerning, among other things, corporate governance, distributions and the relationship among the shareholders. VA. Code §13.1-671.1. Accordingly, Law, Barrister and Justice could enter into such an agreement allocating liability for unpaid taxes. Additionally, a shareholders' agreement must be set forth in either the articles, bylaws or a written agreement signed by all the shareholders. Here, the agreement was in writing and signed by all three shareholders. Thus, the agreement is enforceable.

[b] Assuming that the two malpractice claims are meritorious, Law will be individually liable for the second claim but not for first claim. Under Virginia law, a partnership is an association of two or more persons to operate a business for profit as co-owners. It is not necessary for the parties to enter into a written agreement or file with the state in order to create a partnership, rather the parties simply must, in fact, operate a business as co-owners. Profit sharing triggers a presumption of partnership, and other indicia of partnership include sharing control and sharing losses.

Up until 2012, when the parties formed a corporation, a partnership existed between Law, Barrister and Justice. The three associated with each other to operate as co-owners a business for profit, ie practicing law. They shared profits from their business, and the facts otherwise suggest that they were co-owners (reference to "ownership interests").

A partnership is liable for the tort of a partner if the partner was acting in the ordinary course of partnership business. Additionally, under partnership law, partners are jointly and severally liable for all debts of the partnership,

including tort and contract obligations. The owners of a corporation, however, generally are not personally liable for the debts of the business.

Here, Justice was acting with in the ordinary course of partnership business when he committed the malpractice, and, thus, the liability for the malpractice would be a debt of the partnership. Additionally, at the time of the second claim – failure to file an appeal of a forfeiture order in 2011 – the parties were operating as a partnership. Thus, each partner would be jointly and severally liable. At the time of the first claim, however, the parties had formed a corporation. Thus, Law, as an owner of the corporation, would not be personally liable on the 2013 malpractice claim.

[c] In addressing the questions of what remedies Barrister and Justice might seek and what they must prove in order to obtain a dissolution, accounting and distribution of assets, the threshold issue is whether a court will treat LB&J PC as a partnership or as a corporation. The parties properly formed a professional corporation; however, the Supreme Court of Virginia has held that partners who formed a professional corporation but continue to conduct their business as a partnership may have their rights and liabilities determined according to the law of partnership. Boyd, Payne, Gates & Farthing v. Payne, Gates, Farthing & Radd 244 Va. 418 (1992).

Although the facts in this question are somewhat similar to the *Boyd* case, there are some significant factual differences. In *Boyd,* the members of the firm publicly announced their incorporation, but they continued to refer to each other as partners publicly, in front of their clients and the legal community. In this question, Lawyer, Barrister and Justice referred to each other as "partners" internally, but no facts indicate that they did so publicly. Also, the members of the firm in the *Boyd* case did not share profits in accordance with their percentages of stock ownership. After incorporation of the firm, a new "partner" was added and he received 5% of the profits but owned none of the stock. In this question, the facts suggest that the owners divided profits in a manner consistent with their ownership interests. Perhaps most significantly, in *Boyd*, the firm filed tax returns that described the firm as a partnership and indicated that the members shared losses as well as profits.

Additionally, the *Boyd* case was decided before the Virginia legislature enacted section VA Code § 13.1.1-671.1, permitting shareholder agreements that have the effect of operating a corporation like a partnership.

Note: This is not necessary for a complete answer, but a leading commentator on Virginia corporate law has observed that "the implications of *Boyd* and its interrelationship with VA Code §13.1-671.1 are not entirely clear." Goolsby on Virginia Corporations at 19.

Given the factual distinctions and the uncertainty as to the continuing viability of *Boyd*, the better conclusion is that a potential dissolution of LJ&B PC should be governed by corporate law. Under Virginia corporate law, Barrister and Justice could seek judicial dissolution of the corporation, but of obtain judicial dissolution, plaintiff shareholders must prove either (1) deadlock in the management of the corporation, (2) oppressive or illegal conduct by the majority or (3) waste of corporate assets. Va. Code §13.1-747. From the facts given, it does not appear that Barrister and Justice will be able to establish grounds for judicial dissolution.

Attendees Note: We think that an answer offering an analysis of dissolution under partnership law based on the Boyd case should get significant credit.

3. [07.19] [Domestic Relations & Va. Civil Procedure] In 2000, Norman Rivers moved out of the house in Alleghany County, Virginia, where he and his wife, Grace Rivers, lived. He moved in with his long-time girlfriend, Carol Majors, in Bath County, Virginia. Norman and Grace never divorced and never cohabited after 2000.

Norman and Carol lived together thereafter, and in 2005 actually went through a civil marriage ceremony in Virginia. Thereafter, they considered themselves to be husband and wife, and Carol adopted the name Carol Rivers.

In 2006, Norman purchased a valuable parcel of property (Blackacre) in Bath County and received a deed, which, based on his specific instructions to the grantor, conveyed title as follows"Norman and Carol Rivers as tenants by the entirety with the right of survivorship." Norman died intestate in 2018.

Grace filed a suit for declaratory relief against Carol in the Circuit Court of Bath County asking the Court to declare that she was an owner of a one-half interest in Blackacre. In the Complaint, she included a legal description of Blackacre and

alleged the following:

- that Norman died intestate in 2018;
- that Carol and Norman were never husband and wife;
- that, although Grace and Norman separated in 2000, they never divorced, so Grace remained Norman's wife up to the time of his death;
- that it is undisputed that Norman intentionally took title to Blackacre as"Norman and Carol Rivers as tenants by the entirety with the right of survivorship;"
- that under the circumstances, a tenancy by the entirety with the right of survivorship is a legal impossibility; and
- that Grace, as Norman's surviving spouse, is entitled to a one-half interest in Blackacre.

Carol filed a demurrer in response to Grace's complaint.

[a] Were Norman and Carol legally married? Explain fully.

[b] What are the requirements and purpose of a Demurrer? Explain fully.

[c] How should the Court rule on Carol's Demurrer ? Explain fully.

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[a] No. The purported marriage between Norman and Carol is bigamous because Norman was still married to Grace when he purported to marry Carol. Bigamous marriages are void *ab initio*. Virginia Code § 20-43 provides that: "All marriages which are prohibited by law on account of either of the parties having a former wife or husband then living shall be absolutely void, without any decree of divorce, or other legal process."

[b] The purpose of a demurrer is to challenge the legal sufficiency of an aggressive pleading. A demurrer, in the circuit court, must be filed in writing, within 21 days of service of process unless the trial judge grants leave for additional time within which to file it. The demurrer must state the specific grounds (not merely failure to plead a cause of action), and the trial judge may look only to the face of the plaintiff's pleading in ruling on the demurrer.

[c] Assuming Carol's demurrer stated specific grounds, the court should sustain the demurrer. It is true that a tenancy by the entirety is only available to husband and wife and therefore a legal impossibility as to Carol and Norman. However, if the instrument creating the estate demonstrates intent to create a survivorship interest, then a purported tenancy by the entirety will create a joint tenancy with the right of survivorship. [Virginia Code § 55-20.1 – *Note: to be repealed October 1, 2019 and replaced by § 55.1-135*] Gant v. Gant 237 Va. 588 (1989) and Funches v. Funches 243 Va. 26 (1992).

Here, the deed to Carol and Norman specified a right of survivorship, so Carol and Norman held title as joint tenants with the right of survivorship. When Norman died, Carol therefore took title to the entire estate by operation of law.

Since Grace has alleged each of these facts on the face of her complaint, she has failed to state any basis upon which relief can be granted. Carol's demurrer should therefore be sustained.

4. [07.19] [Trusts & Equity] Romeo and Julie married the week after their college graduation in 1992 and settled in Fairfax, Virginia, where Romeo went to work in his family's home construction business. Romeo became president of the company in 2000. Soon thereafter, Julie's own professional career was interrupted when she stopped working to care for Romeo's parents, both of whom suffered for years from dementia. In 2002, Romeo purchased a $500,000 life insurance policy on his own life from Dominion Life Insurance Company of Virginia ("Dominion"), designating Julie as the sole beneficiary.

Beginning in 2007 and for several years thereafter, Romeo's business suffered financially. About that same time, Romeo and Julie began having marital problems. In 2010, they commenced living separate and apart, and they executed a

valid separation agreement later that same year which stated, among other things, that "Julie is to remain as sole beneficiary on Romeo's life insurance policy with Dominion."

Their marriage was dissolved by a decree of divorce in 2015. Filed with the decree in the Circuit Court of Fairfax County was the parties' previously executed separation agreement.

In 2016, Romeo married Sophia, and they also resided in Fairfax County. Later that same year, Romeo told Sophia that, "because she was the love of his life," he was making her the beneficiary of his life insurance policy. Romeo filed with Dominion a change of beneficiary form, designating Sophia as the sole beneficiary of his life insurance policy, and removing Julie as beneficiary. Afterward, Romeo told Sophia only that she was the beneficiary of his $500,000 life insurance policy issued by Dominion. In 2019, Romeo died in a single vehicle accident.

As of the date of death, Romeo's probate estate, which did not include the life insurance, had debts of $1,500,000 and assets of $250,000.

For the purpose of responding to subparts [a], [b], [c] and [d] only, assume that following Romeo's death, Dominion paid the entirety of the life insurance policy proceeds to Sophia on July 15,2019, and that Julie has decided to file a Complaint in the appropriate Virginia Circuit Court to recover the life insurance proceeds.

[a] What is the most effective judicial remedy available to Julie? Explain fully.

[b] Who should Julie name as defendant(s)? Explain fully.(c)

[c] What is the applicable cause of action and the standard of proof? Explain fully.

[d] How is the Circuit Court likely to rule on Julie's claim? Explain fully.

For the purpose of responding to subpart [e] only, assume that Dominion has not yet paid the life insurance proceeds on Romeo's life and is still in possession of such proceeds, and that Julie has remarried. Julie sues both Romeo's estate (of which Sophia is the executor) and Dominion. Julie's claim against Romeo's estate is for breach of the separation agreement to recover a monetary amount equivalent to the life insurance proceeds. In response to Julie's Complaint, Sophia argues that there is no breach because the language of the separation agreement can only reasonably be interpreted to mean that Julie would remain as sole beneficiary on Romeo's life insurance policy only for so long as Julie did not remarry.

[e] How is the Circuit Court likely to rule on Sophia's argument, and on what rule of contract construction should the Court's decision be based? Explain fully.

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✺ For parts of the answer to Question 4, as noted below, we have some varying views of what a correct answer should look like.

The facts of this case are taken from the case of Faulknier v. Shafer 264 Va. 210 [2002]. The Faulknier opinion cited Jones v. Harrison 250 Va. 64 [1995].

[a] As to the most effective judicial remedy, Julie should ask the court to declare the existence of a constructive trust based on a theory of unjust enrichment. Julie, contractually was entitled to the insurance proceeds that had been paid to Sophia and Sophia would be unjustly enriched if permitted to keep the money.. It's noted that Julie had cared for Romeo's parents for years. The court should declare that Sophia held the money in trust for the benefit of Julie. "Constructive trusts arise independently of the intention of the parties, by construction of law; being fastened upon the conscience of him who has the legal estate, in order to prevent what otherwise would be a fraud." [Faulknier case] The fact that Sophie while not having done anything wrong, had furnished no consideration for the transfer and would be unjustly enriched at Julie's expense, furnishes the equitable justification for imposing a constructive trust. [Jones case]

[b] As to the suit to reach the insurance proceeds, Julie should name Sophia individually as defendant since she alone has possession and control of the insurance money and there's nothing in the facts to suggest the insurance

company had done anything wrong..

✺	Clearly Sophia individually should be a defendant. There's a view, as to whether Sophia in her capacity of Executrix of Romeo's estate should be made a defendant in the action seeking the creation of a constructive trust, under the theory that the $250,000.00 of assets in the estate should be declared held in trust for the benefit of Julie. There's agreement that there's a cause of action for breach of contract by Julie against the Estate of Romeo and that Sophia in her capacity of Executrix should be the party sued.

[c] The cause of action would seek the creation of a constructive trust declaring that Sophia held the money in trust for Julie's benefit. The burden of proof is by clear and convincing evidence. Sutton v. Sutton 194 Va.179 [1952]

[d] The court should rule in Julie's favor and order the creation of the constructive trust as to the insurance proceeds.

✺	Same difference of views as to the $250,000.00 held in the estate of Romeo.

[e] As to the rule of contract construction the court should use, the court should enforce the agreement that the parties wrote and decline to insert provisions omitted by the parties..

5. [07.19] [Wills & Personal Property] Alex, a successful financial advisor, and his wife, Eliza, gave birth to a son named Phillip in the City of Roanoke, Virginia, in 1980.

In 1991, Alex began an illicit affair with Maria. Shortly after the affair ended, Maria had a daughter, Rachel, who was born in 1993. Rachel's birth certificate had nothing written in the area for designation of the father. Maria did not obtain a Court Order to confirm paternity and a DNA test was never performed. Alex never openly claimed Rachel as his daughter nor had any contact with her, but he did sign a written agreement with Maria whereby he would provide a designated amount of annual support for Rachel until she turned 21 years old. Alex honored the agreement.

Alex was a collector of music and music paraphernalia. In 1998, at his son Phillip's urging, Alex purchased at auction Eric Clapton's Brownie Stratocaster guitar for $200,000. He placed the guitar in a glass case, and it was displayed in his study at home.

When Phillip graduated from business school in 2010, Alex wrote in Phillip's graduation card the following:

Phillip, I am so proud of you. In honor of your graduation, I give you the Clapton Stratoguitar in my study. You may take it when I die, but until then I want to keep it in my possession as long as I live. Love, Dad

Phillip was thrilled with the gift and loved to see "his guitar" when he came to see his parents. With only the knowledge of his father, Phillip used the guitar as collateral to get a personal loan for $50,000 in 2012. The guitar remained in Alex's study. On January 14, 2019, Alex died of cardiac arrest at his home in Roanoke without executing a will. Eliza, Phillip, and Rachel are all still living. When he died, Alex's estate, not including the guitar, consisted of $1.5 million in his bank account. The current value of the guitar is $450,000. Phillip qualified as the Administrator of Alex's estate. Phillip properly provided the Circuit Court for the City of Roanoke with a waiver from Eliza confirming that she consented to Phillip's service as the Administrator of Alex's estate. Rachel contacted Phillip and claimed that she was Alex's daughter and demanded a share of his estate.

In his capacity as Administrator of the estate, Phillip told Eliza that the Clapton guitar is not part of the estate because it was a gift to him. Phillip has also advised Rachel that as an alleged non-marital child of Alex, she would receive nothing from his estate.

[a] Should the guitar be included as part of Alex's estate? Explain fully.

[b] What action or actions might Rachel take to establish that she has the right to inherit from Alex's estate, and is she likely to succeed in establishing that right? Explain fully.

[c] Assuming Rachel proves paternity, how should Alex's estate be distributed? Explain fully.

[d] Assuming Rachel does not prove paternity, how should Alex's estate be distributed? Explain fully.

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[a] No. If the donor has present donative intent, the donor may reserve a right of possession (a gift *in praesenti* with a postponed right of enjoyment). "A formal delivery of a deed or gift is not essential where the acts of the grantor or donor manifest an intent that as to him the transaction is complete." Snidow v. First National Bank 178 Va. 239(1941). "The essence of delivery . . . is surrender of dominion and control of the gift by the donor." Brown v. Metz 240 Va. 127 (1990) Alex's intent to pass title is clear from the language of the graduation card ("In honor of your graduation, I give you the Clapton Strato guitar in my study"), and the facts state that Phillip loved to see "his guitar" when visiting his parents. Title therefore passed to the donee, so the guitar is not part of Alex's estate.

Note also that the card was not a holographic will. Although entirely in the decedent's handwriting and signed by the decedent, there was no evidence of a testamentary intent – intent to make a gift effective upon the testator's death – but rather the intent to make a present gift. "An instrument which is to operate in the lifetime of the donor, and to pass an interest in his property before his death, even though its absolute enjoyment by the donee is postponed till the death of the donor, or even if it is contingent upon the survivorship of the donee, is a deed, contract, or gift, and not a will." Spinks v. Rice 187 Va. 730 (1948)

[b] VA Code § 64.2-102(4) provides: "No claim of succession based upon the relationship between a child born out of wedlock and a deceased parent of such child shall be recognized unless, within one year of the date of the death of such parent (i) an affidavit by such child or by someone acting for such child alleging such parenthood has been filed in the clerk's office of the circuit court of the jurisdiction wherein the property affected by such claim is located and (ii) an action seeking adjudication of parenthood is filed in an appropriate circuit court."

Paternity must be established by clear and convincing evidence. VA Code § 64.2-102(3)(b)

Rachel arguably could succeed. The facts stipulate no open cohabitation with Maria (an illicit relationship), no designation in a birth record, no common use of the decedent's surname, no government document claiming Rachel as his child, no express admission of paternity, no genetic or other scientific tests, and no judicial determination of paternity. VA Code § 64.2-103(B)] However, the support agreement can be argued as an implicit admission.

[c] One-third each to Eliza, Phillip, and Rachel. Eliza takes one-third because she is the decedent's surviving spouse, but the decedent was survived by a child (Rachel) not from her. Rachel and Phillip each take half of the remaining two-thirds (one-third each) because they are the decedent's only two children. VA Code § 64.2-200(A)(1) – *Note: Amended effective October 1, 2019*]

Eliza is also entitled to $24,000 (lump sum or $2,000 month for one year) in family allowance Virginia Code § 64.2-309, $20,000 in exempt personal property VA Code § 64.2-310, and a homestead allowance of $20,000 VA Code § 64.2-311. These claims take priority over all other claims except the cost of administration. Virginia Code § 64.2-528

[d] Eliza would take 100% as a surviving spouse with all children from her. [§ 64.2-200(A)]

6. [07.19] [Criminal] Bob was killed with a shotgun at his home in Washington County, Virginia, on the evening of April 1, 2019. Two 12-gauge shotgun shell casings were found inside of his home. The next day, detectives from the Washington County Sheriff's Office learned that Jerry, a convicted felon who works at the local gas station, may have been involved in Bob's death. The detectives subsequently obtained a valid search warrant allowing them to search Jerry's residence. The warrant specifically allowed the detectives to search Jerry's house for a "12-gauge shotgun" and "12-gauge ammunition."

That evening, the detectives executed the search warrant. When they entered Jerry's house, they saw a clear plastic baggie containing a white powdery material and a hypodermic needle on his coffee table. Based on their training and experience, the detectives believed that the baggie likely contained heroin and that the hypodermic needle was used to inject the substance. Accordingly, the detectives seized these items. Laboratory testing later revealed that the material in the baggie was heroin.

The detectives found four 12-gauge shotgun shells inside of a small jewelry box in a bedroom in Jerry's house. They also found a 12-gauge shotgun inside of a closet in the bedroom. Several shirts emblazoned with the gas station's name and "Jerry" embroidered on the front were hanging in the closet, and two pairs of men's size eleven tennis shoes were sitting on the floor of the closet.

The detectives arrested Jerry after they searched his home. After the detectives read Jerry his Miranda rights, they asked him several questions about the shotgun in his closet. Jerry told the detectives "he didn't know what they were talking about." Jerry, however, later confirmed that the detectives found the shotgun in the closet of his bedroom and that he owned the house. Jerry also told the detectives that the shotgun was "not loaded." When the police arrested Jerry, he was wearing a gas station shirt with his name on the front, and men's size eleven tennis shoes. A receipt for the purchase of 12-gauge shotgun shells was found in Jerry's pocket when he was searched following his arrest.

Jerry was charged with the first-degree murder of Bob, possession of heroin, and possession of a firearm as a convicted felon. At a pretrial hearing, Jerry moved to suppress the heroin and the shotgun shells that were seized from his home, claiming that the seizures of these items violated his rights under the Fourth Amendment of the U.S. Constitution. Although Jerry conceded that the April 2, 2019, search warrant was facially valid, he argued that the warrant did not allow the detectives to seize any heroin or needles from his home. He also argued that the warrant did not allow the detectives to search in places that were too small to contain a shotgun. The Circuit Court of Washington County denied Jerry's motions. At Jerry's trial, he moved to strike the evidence against him pertaining to his possession of a firearm charge, arguing that the evidence failed to prove that he possessed the shotgun found in the closet. The Circuit Court denied Jerry's motion.

[a] Did the Circuit Court err by denying Jerry's motion to suppress the heroin and the hypodermic needle? Explain fully.

[b] Did the Circuit Court err by denying Jerry's motion to suppress the shotgun shells? Explain fully.

[c] Did the Circuit Court err by denying Jerry's motion to strike the evidence pertaining to his possession of a firearm charge? Explain fully.

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[a] The Circuit Court did not err by denying Jerry's motion to suppress the heroin or the hypodermic needle. The detectives entered Jerry's house pursuant to a valid search warrant and therefore had a right to be in the home. Once inside they saw and, based upon their training and experience, seized what they believed to be heroin and a hypodermic needle in a clear plastic bag. Under the plain view exception to the warrant requirement, police may seize illegal items which they observe in plain view so long as they have the right to be where they observe the items and that it is immediately apparent to them that the items are contraband. Robinson v. Commonwealth, 45 Va. App. 592 (2005). Both of these requirements were met in this case, so the seizure of the items was proper.

[b] The Circuit Court did not err by denying Jerry's motion to suppress the shotgun shells. The detectives' valid search warrant specifically listed "12 gauge ammunition" as items for which the detectives were directed to search. In execution of the warrant, they were permitted to search any place or container where the object of the search may reasonably have been found. Rosa v. Commonwealth, 48 Va. App. 93 (2006). Here, it was proper for the detectives to search the small jury box for the ammunition.

[c] The Circuit Court did not err by denying Jerry's motion to strike the evidence pertaining to his possession of a firearm charge. Guilt may be proved by circumstantial as well as by direct evidence. Here, the detectives found the 12 gauge shotgun inside the closet of the bedroom. Hanging in the closet were shirts with the name of the gas station where Jerry worked as well as "Jerry" emblazoned on them, as well as two pairs of men's size eleven tennis shoes sitting on the floor of the closet. When Jerry was arrested he wore the same type of emblazoned clothing and shoes as those found in the closet. He also acknowledged that the gun was in the closet in his house, and offered that it was not loaded. Possession of the firearm does not require active, physical possession. It is sufficient if Jerry held such dominion and control over the firearm such that he had constructive possession of it. Archer v. Commonwealth, 26 Va. App. 1 (1997). The firearm was found in a closet in his home. He said it was not loaded, a statement suggesting he had handled it. Only clothes matching Jerry's work clothes were found in the closet. 12 gauge shotgun shells were found in a jewelry box in the bedroom and a receipt for the purchase of 12 gauge shotgun shells was found in Jerry's shirt pocket during the search incident to his arrest.

Absent is any indication that anyone else occupied the home. In these circumstances, the evidence is sufficient that Jerry had constructive possession of the firearm.

7. [07.19] [Professional Responsibility] While looking for a new job in Warrenton, Virginia, Marvin went through an intense prospective employment process with TP Solutions ("TP"), which included an online test, a phone interview, and submission of a hypothetical project. After completing those tasks, Marvin was invited for an in-person interview with the three owners. The next day, Marvin learned that he did not get the job. A friend of Marvin's, who works at TP, said the owners were surprised that he was"not white."

Believing that he was not hired because he was Asian, Marvin retained Ashley, a Virginia lawyer, to file a lawsuit against TP. An appropriate written legal retainer agreement was signed by both Marvin and Ashley. Marvin explained to Ashley that his goals in the lawsuit were to extract an apology from TP and to yield at least $50,000 after attorney's fees were paid.

TP was served with the suit, and referred it to TP's general counsel, Erin.

Soon thereafter, Ashley heard at the gym that two of TP's owners had forced out the third owner, Octavia. Ashley was acquainted with Octavia, as they were both members of the same community group. Octavia is not an attorney. Ashley went to the next group luncheon and sat next to Octavia. In response to Ashley's inquiry, Octavia confirmed that she had been forced out and no longer worked at TP. During the conversation, Octavia mentioned that she was in the meeting where the decision not to hire Marvin was made. Ashley inquired about TP's hiring practices and specifically asked her whether Marvin and other non-white applicants were denied employment based on race. Ashley did not disclose to Octavia that she was representing Marvin in the lawsuit against TP.

Erin took the deposition of Marvin, and during the deposition Marvin testified falsely about this economic damages and current income. This testimony made Marvin appear to be a more sympathetic plaintiff. Ashley was present at the deposition and knew from her client meetings with Marvin that his testimony on these subjects was untrue but did nothing.

After the deposition Erin told Ashley that she was impressed with Marvin and found him sympathetic. Erin stated that TP had authorized her to offer $25,000 to confidentially settle the case. Ashley was thrilled with the settlement offer and signed a settlement agreement that afternoon. Ashley was busy over the next few months with trials and health issues. She waited 90 days and then advised Marvin of the settlement. Marvin was very unhappy with the amount of the settlement and the failure of TP to make an apology.

According to the Virginia Rules of Professional Conduct, **[RPC]** did Ashley commit any ethical violations regarding the following:

[a] Ashley's conversation with Octavia? Explain fully.

[b] Marvin's false testimony? Explain fully.

[c] The settlement offer? Explain fully.

✖✖ [NB RPC = Virginia Rules of Professional Conduct]

[a] As soon as Ashley confirmed that Octavia had been working at TP Solutions at the time that the hiring/rejection decision was made re: Marvin, Ashley needed to consider the applicability of RPC Rule 4.2 ("In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so."), and RPC 4.3 (discussed below).

After reviewing the rule and its comments, Ashley likely would conclude that she was permitted to talk to Octavia about Marvin's case. See Comment [7] to RPC Rule 4.2. ("In the case of an organization, this Rule prohibits communications by a lawyer for one party concerning the matter in representation with persons in the organization's "control group" … *The prohibition does not apply to former employees or agents of the organization*, and an attorney may communicate ex parte with such former employee or agent even if he or she was a member of the organization's "control group."").

In addition, Ashley clearly **was** permitted to talk to Octavia about being "forced out" at TP Solutions herself, if we assume that Octavia's ouster was unrelated to Marvin's case. See: Comment [4] to RPC Rule 4.2 ("This Rule does not prohibit communication with a represented person, or an employee or agent of a represented person, concerning matters outside the representation. For example, the existence of a controversy between an organization and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter.").

Ashley likely violated the RPC, however, in failing to disclose to Octavia that she was representing Marvin. See RPC Rule 4.3(a) ("In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.").

[b] Ashley also violated Virginia's Rules of Professional Conduct failing to take any action to correct Marvin's false testimony regarding his economic damages and current income at his deposition. See RPC Rule 4.1(b) ("In the course of representing a client a lawyer shall not knowingly: … (b) fail to disclose a fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client."). See also Comment [1] to RPC Rule 4.1 ("[I]f the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures.

Ashley's obligation to avoid assisting Marvin in committing fraud is complicated, of course, by her obligation to protection client confidentiality. See RPC Rule 1.6. For this reason, her first action should be to "remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal and seek the client's cooperation with respect to the withdrawal or correction of the false statements," but further remedial action might be required. See Comment [1] to RPC Rule 4.1. *See also* RPC Rule 1.6(b) (To the extent a lawyer reasonably believes necessary, the lawyer may reveal … (3) such information which clearly establishes that the client has, in the course of the representation, perpetrated upon a third party a fraud related to the subject matter of the representation."). If that fails, the attorney may consider withdrawal from representation.

[c] Ashley also violated Virginia's Rules of Professional Conduct in accepting the offer to confidentially settle the matter for $25,0000 without first consulting with Marvin, and in conflict with his earlier direction to obtain at least $50,000 after attorney's fees and an apology. See RPC Rule 1.2(a) ("A lawyer shall abide by a client's decisions concerning the objectives of representation …. A lawyer shall abide by a client's decision, after consultation with the lawyer, whether to accept an offer of settlement of a matter."). "

Ashley also erred in waiting 90 days to advise Marvin of the settlement offer (not to mention the egregious error of waiting 90 days to alert Marvin that she had gone ahead and accepted the offer on his behalf). See RPC Rule 1.4(a) ("A lawyer shall keep a client reasonably informed about the status of a matter … "); RPC Rule 1.4(c) ("A lawyer shall inform the client of facts pertinent to the matter and of communications from another party that may significantly affect settlement or resolution of the matter."); Comment [5] to RPC Rule 1.2 ("A lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea agreement … should promptly inform the client of its substance unless prior discussions with the client have left it clear that the proposal will be unacceptable.").

Ashley's personal health and work issues are no excuse. See RPC Rule 1.3(a) ("A lawyer shall act with reasonable diligence and promptness in representing a client."); Comment [1] to RPC Rule 1.3 ("A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer…"); Comment [3] to RPC Rule 1.3 ("Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness.").

8. [07.19] [Torts] Lucy Loud consumed a large number of alcoholic beverages served to her by the owner and wait staff at Dunker's Bar & Grille, owned by Dave Dunker and located in Leesburg, Virginia. Everyone at Dunker's that night knew Lucy was intoxicated for most of the evening, as well as when she left and drove her automobile out of the parking lot.

Not more than ten minutes later, Lucy's automobile crossed the center line of the highway and collided head-on

with a sports car driven by Junah Jones, who suffered severe personal injuries as a result. Junah's medical expenses exceeded $1,000,000. Thereafter, Junah settled his claim against Lucy and released both her and her insurance company. Junah then learned that Virginia statutory law provides that the seller of intoxicants who dispenses alcoholic beverages to an intoxicated person is guilty of a Class 1 misdemeanor.

The next month, Dunker's bouncer, Bobby Bowers, escorted out of the building two inebriated customers, the Furr brothers, Fred and Fuzzy, after they started a loud argument and began cursing and throwing food at other customers. As the three of them reached the parking lot, Fred threw a punch, Bobby ducked, and the punch knocked out Fuzzy. His patience exhausted, Bobby told the Furr brothers to stay away from Dunker's, and then he slugged Fred, knocking him to the ground,,breaking his eyeglasses, and causing a partial loss of sight in Fred's right eye.

Bobby, who started as a dishwasher at Dunker's, had earned an online training certification as a bouncer and as a security guard. Bobby had no criminal record and had never been sued. Dave considered Bobby to be a model employee.

Several weeks later, Sam stopped at Dunker's about 5:00 p.m. for a beer and a sandwich. While the kitchen prepared his sandwich, Sam announced that he was going to wash his hands in the restroom. Dave warned Sam to be careful as the flooring "in back" was being replaced, but Sam was looking at his smartphone and not paying attention. Moments later, Sam tripped over a knee-high stack of floor tiles, suffered a broken ankle as a result of his fall, and was not able to work for four months.

The floor tiles were being installed by Chubby Chesson. Chubby had a contract with Dunker's to furnish and install commercial floor tiles in the designated area for the sum of $1,500.There were no specifications, drawings, or advance submittals. Dave was busy and left Chubby to do the job, because Chubby had successfully completed previous projects for Dunker's. In performing for this job, Chubby worked on one section of the floor at a time before moving to the next area; as a result, Chubby made numerous trips to his truck to retrieve only those new tiles he would need to install in the area in which he was then working.

Each injured individual below has filed a separate lawsuit against Dave, doing business as Dunker's Bar & Grille, in the Circuit Court of Loudoun County, Virginia.

[a] Is the Circuit Court likely to hold Dave liable for damages for the personal injuries suffered by Fred as a result of his being struck by Bobby at Dunker's Bar & Grille? Explain fully.

[b] Provide two reasons the Circuit Court is unlikely to hold Dave liable for the personal injuries sustained by Sam when he tripped over Chubby's stack of tiles at Dunker's Bar & Grille. Explain Fully.

[c] How is the Circuit Court likely to rule on the claims by Junah that Dave is liable for damages for his injuries based upon strict liability? Explain fully.

[d] How is the Circuit Court likely to rule on the claim by Junah that Dave is liable for damages for his injuries based upon negligence? Explain fully.

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[a] Yes, the Circuit Court is likely to hold Dave liable for damages for the personal injuries suffered by Fred as a result of his being struck by Bobby at Dunker's Bar & Grille. Under the doctrine of respondeat superior, an employer is liable for the torts of his employee that are committed within the scope of employment. An employee is an agent whose principal controls, or has the right to control, the manner and means of how the job is performed. Additionally, an act is within the scope of the employment if "(1) it was expressly or impliedly directed by the employer, or is naturally incident to the business, and (2) it was performed, although mistakenly or ill-advisedly, with the intent to further the employer's interest, or from some impulse or emotion that was the natural consequence of an attempt to do the employer's business, 'and did not arise wholly from some external, independent, and personal motive on the part of the [employee] to do the act upon his own account.'" Kensington Assoc. v. West 234 Va. 430 (1987) (quoting Broaddus v. Standard Drug Co. 211 Va. 645, 653 (1971)).

It is clear that Bobby is an employee of Dave. Nothing in the facts suggests otherwise. The issue is whether Bobby was acting within the scope of employment when he hit Fred. Bobby committed an intentional tort, and traditionally, courts have been more reluctant to find an intentional tort within the scope of employment. However, when the tort was "naturally incident" to the employee's position and was performed with a purpose to

serve the employer's interest, then the intentional tort is within the scope. Here, Bobby was employed as a bouncer in a bar, and in those circumstances, a physical altercation with a customer is likely to be "naturally incident to the business." Fred was behaving badly in the bar (inebriated, cursing, throwing food) and removing him from the premises was clearly part of Bobby's job. Dave may argue that the battery was outside the scope because they had already reached the parking lot and Bobby was acting out of personal annoyance (his patience was exhausted). However, a court is likely to find that this incident was closely related to Bobby's position and that he was acting with the intent to serve his employer's interest ("stay away from Dunker's"), and, thus, the tort was within the scope of his employment and Dave is liable for damages.

[b] The Circuit Court is unlikely to hold Dave liable for the personal injuries sustained by Sam when he tripped over Chubby's stack of tiles at Dunker's because (1) Sam was warned and (2) the danger was open and obvious. A landowner owes an invitee a duty to use ordinary care to maintain the property in a reasonably safe condition. This duty is generally satisfied by providing a warning of dangerous conditions. Additionally, the landowner generally does not have a duty to warn of open and obvious dangers. Here, Sam was warned of the dangerous condition: Dave warned Sam to be careful as the flooring "in back" was being replaced. Also, Dave has a strong argument that the danger was open and obvious, and, thus, he had no duty to warn in any event. According to the facts, the stack of floor tiles was "knee high" and Sam didn't see it only because he was looking at his phone and not paying attention.

[c] The Circuit Court is likely to rule against Junah on his claim that Dave is liable for damages for his injuries based upon strict liability. To establish a claim based on negligence per se, which is essentially a strict liability claim, a plaintiff must (1) prove that the defendant violated a statute that was enacted for public safety, (2) establish that he belongs to the class of persons for whose benefit the statute was enacted, and (3) prove that the statutory violation was a proximate cause of his injury. Robinson v. Matt Mary Moran, Inc. 259 Va. 412 (2000). The Supreme Court of Virginia has held that the sale of alcoholic beverages is not the proximate cause of later acts committed by purchaser, and thus, Virginia does not recognize a claim against the seller of alcohol in circumstances such as these. *Id.;* Williamson v. The Old Brogue, Inc. 232 Va. 350 (1986).

[d] The Circuit Court also is likely to rule against Junah on his claim that Dave is liable for damages for his injuries based upon negligence. The Supreme Court of Virginia has held that a common law negligence action does not lie against a vendor who provided alcoholic beverages to a person who later drove an automobile and injured a third party. Williamson v. The Old Brogue, Inc. 232 Va. 350 [1986]. The Court reasoned that individuals are responsible for their own torts and that supplying the alcohol was not the proximate cause of the injury. Id. (reaffirmed in Robinson 259 Va. 412.)

9. [07.19] [Federal Civil Procedure] In October 2018, Nearest Blue took a six-month leave of absence from his job in Louisville, Kentucky, where he resided. He traveled to Zuni, Virginia, and moved into a spare room in his father's house so he could care for his elderly father, who was recuperating from an extended illness.

In December 2018, Nearest was walking to his car in the parking lot of the Ivor Market (Market) in Zuni when he was struck by an automobile driven by Jackie Daniels, a resident of Lynchburg, Tennessee. Market is a Delaware corporation and has its principal place of business in Zuni, Virginia. A number of people who had been shopping at Market witnessed the accident.

Nearest told the police that his view was blocked when Jackie's car struck him because he had just walked out from behind a large sign in the parking lot.

Nearest sued Jackie and Market in the Newport News division of the U.S. District Court for the Eastern District of Virginia, which is the district in which Zuni is located. Newport News is 20 miles from Zuni. Nearest's Complaint alleged negligent operation of a vehicle against Jackie and negligent maintenance of the parking lot against Market. He sought $65,000 in damages for personal injuries against Jackie. Against Market, Nearest sought an injunction ordering Market to tear down the sign, which he alleged was a safety hazard.

Market moved to dismiss Nearest's Complaint on the ground that the Court lacked subject matter jurisdiction. At the hearing on Market's motion, the Court received probative evidence that, if granted, the injunction would require Market to spend in excess of $80,000 to comply with it. The Court denied Market's motion.

Jackie then moved for a change of venue of the action to a U.S. District Court in Tennessee on the grounds that (1) venue in the Eastern District of Virginia is improper, and (2) he is a citizen of Tennessee, and it would be a hardship for

him and for his witnesses to travel to Virginia for trial. The Court denied Jackie's motion for a change of venue.

Jackie then filed a Notice of Appeal of the lower court's denial of his motion for a change of venue to the U.S. Court of Appeals for the Fourth Circuit. The Court of Appeals dismissed Jackie's appeal.

[a] Was the District Court correct in denying the motion of Market to dismiss the Complaint on the ground that the Court lacked subject matter jurisdiction? Explain fully.

[b] Was the District Court correct in denying Jackie's motion for change of venue on each of the two grounds? Explain fully.

[c] Was the Court of Appeals correct in dismissing Jackie's appeal? Explain fully.

Note: You may assume that the claim for injunction against Market is properly pleaded. Do not discuss the merits of whether the Court could or should grant the injunction.

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[a] Yes, the District Court was correct in denying the motion to dismiss on the ground that the Court lacked Subject Matter Jurisdiction. The U.S. District Court typically has subject matter jurisdiction based on a federal question or, as in this case, based on diversity of citizenship jurisdiction. To satisfy diversity jurisdiction, two requirements must be satisfied. First, there must be complete diversity of citizenship, meaning that every plaintiff is a citizen of a State different from every defendant. Second, the amount in controversy must exceed $75,000 exclusive of interests and costs.

Complete Diversity

The test for determining citizenship of parties depends on the type of party. The test for individuals, such as the plaintiff Nearest Blue (and the defendant Jackie Daniels) is the individual's domicile. The test for domicile is (a) where the individual has a physical residence, and (b) the intent to make the residence his or her permanent physical residence. Here, plaintiff Nearest Blue lived in Kentucky. He took a six-month leave of absence to come to Zuni, Virginia and move into a spare room in his father's house. Although he arguably had a physical residence in his father's home, Nearest Blue never had the intent to make it his permanent physical residence. Thus, he never changed his domicile from Kentucky. He is a citizen of Kentucky.

Jackie is domiciled in Tennessee. A corporation such as Ivor Market has dual citizenship in its State of incorporation and in the state where the corporation has its principal place of business. Here, Market is a Delaware corporation and thus a citizen of Delaware. Its principal place of business is Zuni, Virginia and thus Virginia is its other State of citizenship.

Because the plaintiff is a citizen of Kentucky and the defendants are citizens of different states (Tennessee, Delaware, and Virginia), no plaintiff is a citizen of the same state as a defendant. Thus, complete diversity is satisfied.

Amount in controversy

The amount in controversy must exceed $75,000 exclusive of interests and costs. The Plaintiff's claim against Jackie is for $65,000 and the Market would have to spend in excess of $80,000 to comply with an injunction in the event Plaintiff prevails. The general rule precludes a plaintiff from aggregation the amount of damages from more than one defendant so as to exceed $75,000 exclusive of interests and costs. However, an exception allows aggregation of damages of claims against two or more defendant whose negligence jointly contributed to a single injury, such that they are jointly liable. Thus, the aggregated amounts here would exceed $75,000 exclusive of interests and costs.

In addition, Supplemental Jurisdiction would achieve the result of having both defendants in federal court. The claim against the Market exceeds $75,000 because the amount required to comply with an injunction is deemed to be the amount in controversy. Under the Supplemental Jurisdiction statute, the claim against Jackie would arise from the same common nucleus of operative facts.

[b] Yes, the district court was correct in denying Jackie's motion for a change of venue on both grounds. The case was brought in the Newport News Division of the U S District Court for the Eastern District of Virginia, which

is where a substantial part of the events or omissions giving rise to the claim occurred, making venue proper under 28 U S C section 1391. The court could not order transfer of the case to the Tennessee Federal District Court because the case could not have originally been filed there because not all the defendants reside in Tennessee See 28 U S C, section 1404(a) (imposing requirement that transfer not available unless transferee district is one "where it might have been brought"). Tennessee would not be proper because it would not satisfy the "defendant resides" prong of the venue statute because that requires that both defendants reside in the same state. Moreover, a substantial part of the events or omissions giving rise to the claim did not occur in Tennessee.

[c] The Court of Appeals was correct in dismissing Jackie's appeal since there was no final order in the case See 28 U. S .C section 1291 (providing that "courts of appeal shall have jurisdiction from all final decisions of the district courts). Nor is this appeal within one of the narrow exceptions for an appealable interlocutory order.