Summary of Suggested Answers & Annotations to the Essay Part of the July 2012 Virginia Bar Exam prepared by Susan S. Grover, Eric Chason & J. R. Zepkin of William & Mary Law School, Emmeline P. Reeves of University of Richmond Law School, Leslie Alden of George Mason University Law School & C. Scott Pryor and Bradley Jacob of Regent University Law School.

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 references to some of the case and statutory law for reference even though the BBE may not expect such specificity in applicant's answers on the exam.

1. [Wills] Sonny's father, Charlie, died intestate in Hampton, Virginia in 2010, and Sonny qualified as administrator of the estate in the clerk's office of the Circuit Court of the City of Hampton. Sonny, Betty and Diane survived Charlie. Betty is Sonny's mother and Charlie's widow. Diane is Charlie's daughter by a prior marriage to Amy, who died shortly after Diane's birth.

Charlie invested heavily in real estate throughout Virginia. After their marriage, Charlie and Amy purchased Appomattox Farm, located in Appomattox County, Virginia, and took title as "joint tenants by the entirety with right of survivorship." After Amy's death, Charlie remarried and soon thereafter he and Betty purchased Colonial Acres, a 50-acre tract of land in New Kent County, Virginia. Three years later, Charlie and Betty purchased their home in Hanover County, Virginia. Title to both Colonial Acres and their home was held as "tenants by the entirety with right of survivorship."

Charlie also owned a house named "Bayshore Cottage" located on the Chesapeake Bay in Hampton, Virginia, which he inherited from his father in 1980. Title to Bayshore Cottage was held in Charlie's name alone.

Several years before Charlie's death, Charlie and Betty executed a general warranty deed giving Sonny fee simple ownership of Colonial Acres. Charlie gave Sonny a properly signed and notarized deed of gift while in the office of Charlie's lawyer, but Sonny neglected to record the deed until after Charlie's funeral. Unknown to Sonny, approximately one month before Charlie's death, and having forgotten about the deed to Sonny, Charlie and Betty executed a deed of trust on Colonial Acres to secure a promissory note for $200,000 to State Bank of Virginia. The deed of trust was recorded in the clerk's office of the Circuit Court of New Kent County on the day it was executed and before the Bank learned of Charlie's deed of gift to Sonny.

(a) What legal interest do Sonny, Betty and Diane each have in:

(i) Appomattox Farm?

(ii) Bayshore Cottage?

(iii) The home in Hanover County?

Explain fully.

(b) What legal interest, if any, does Sonny have in Colonial Acres, and, as between Sonny and the State Bank, does the bank have an enforceable interest that takes priority over Sonny's interest? Explain fully.

Suggested Answer

a. Under the intestacy rules, Sonny, Betty and Diane would each take 1/3 of Charlie's estate. If a decedent dies with a surviving spouse and children not born of the surviving spouse, then the spouse takes 1/3 and all of the children take 2/3 of the estate. So, in this case, the two children would share the 2/3 interest, or 1/3 each.

(i) The Appomattox Farm would pass by intestate succession with a 1/3 interest to Sonny, Betty and Diane as tenants in common. Charlie and his first wife owned the Appomattox Farm as tenants by the entirety with rights of survivorship, so when Charlie's first wife died, Charlie automatically took her interest in the farm through the right of survivorship. Therefore, he owned the entire interest in the farm in his name only. Accordingly, when Charlie died intestate, the farm passed to Charlie's heirs under the rules of intestate succession.

(ii) The Bayshore Cottage would pass by intestate succession with a 1/3 interest to Sonny, Betty and Diane as tenants in common. Charlie inherited the property from his own father and owned the entire interest in the property in his name only. Accordingly, when Charlie died intestate, the cottage passed to Charlie's heirs under the rules of intestate succession.

(iii) Betty owns the entire undivided interest in the home in Hanover County. Betty and Charlie owned the home as tenants by the entirety with rights of survivorship. When Charlie died, Betty automatically took his interest in the farm through the right of survivorship.

b. Sonny owns Colonial Acres in fee simple absolute, but his interest in the property is subject to State Banks's deed of trust, which takes priority over Sonny's interest. A transfer of property by gift requires donative intent, acceptance and delivery of a properly executed deed. Here, Charlie and Betty properly executed a deed giving Sonny fee simple ownership in Colonial Acres. It is clear from the facts that Charlie and Betty had the requisite donative intent and that Sonny accepted the gift. Finally, Charlie and Betty delivered the deed to Sonny by physically giving it to him. Although Sonny failed to record the deed to Colonial Acres, recording is not required to transfer real property.

Nonetheless, Sonny's interest in Colonial Acres is subject to State Bank's deed of trust. A subsequent purchaser or mortgagee for value without notice of a prior transfer and who first records has priority over the earlier transferee. Here, the Bank had no notice of the transfer to Sonny because, as set forth in the facts, the Bank had no knowledge of the transfer and the deed was unrecorded. Additionally, the Bank recorded its deed of trust before Sonny recorded his deed. Therefore, Sonny's interest in the property is subject to the Bank's deed of trust.

2. [Domestic Relations] Fred and Wilma married in 2004 at the Chapel of Love in Las Vegas, Nevada and continued to live in Las Vegas until 2006. Fred was a successful venture capitalist specializing in social media, and Wilma was an artist. Those two years were marked by lots of heated arguments, but no violence and no children. After a particularly bad night at a casino, on Christmas Day, 2006,Wilma told Fred that she was leaving him. Fred held the front door open for her and said "Good riddance!" as Wilma walked out. Wilma moved to Norfolk, Virginia to be near her parents and setup a household there on January 1, 2007.

Frustrated because she had no appreciable income and her artwork was not selling in Virginia, Wilma consulted a lawyer and told him she wanted to get support payments and a divorce from Fred. The lawyer suggested that Wilma first try to get Fred to agree upon support and a division of property, and he prepared a separation agreement according to Wilma's instructions. The agreement provided that all marital property would be split equally and that Fred would pay Wilma $2,000 per month spousal support for a period of ten years commencing on July 1, 2007. During a trip to Virginia to investigate an investment opportunity, Fred met Wilma at a local internet café where she gave him the agreement. Fred took ample time to read it, went to a realtor's office next door, and signed it before a notary public.

On July 1, 2007, Wilma's lawyer filed a complaint for divorce in the Circuit Court of the City of Norfolk. The complaint alleged incompatibility as the ground for divorce, which is a ground of divorce under Nevada law. The settlement agreement that Fred had signed was attached as an exhibit to the complaint. Fred was properly served, but filed no answer.

From July 1, 2007 through June 30, 2008, Fred made the monthly $2,000 support payments called for in the agreement, but when the recession hit in 2008, his investments failed and he stopped making payments. He called Wilma, told her about his reduced financial situation, and asked her to agree to a reduction in the support payments. Feeling some sympathy and having recently inherited a tidy sum from her Uncle Joe, Wilma agreed to reduce support to $1,000 a month beginning on July1, 2008. The agreement to reduce support was never put in writing. Fred's finances continued to decline. He made no support payments at all until July 1, 2011, when he began paying $1,000 per month.

In the meantime, frustrated by Fred's failure to pay her, Wilma instructed her lawyer to set the divorce proceeding for hearing, to seek (i) a judgment for support payment arrearages in the amount of $72,000, representing support payments at the rate of $2,000 per month for the three years during which Fred made no payments, and (ii) an award of $2,000 per month going forward.

Wilma did not tell her lawyer about the oral support reduction agreement, although later, at the divorce hearing, she admitted that she had agreed orally to the reduction.

Fred's lawyer answered the complaint and counterclaimed for a divorce on the ground of desertion. He asserted that, based on the oral agreement by which he and Wilma had agreed to reduce the support payments to $1,000 per month, the arrears were only $36,000. He also alleged that, because of his significantly changed financial circumstances, Fred was entitled (i) to have the arrearages eliminated or at least reduced and (ii) to have any future support obligation eliminated or at least reduced.

Fred came to Virginia for the hearing on the complaint and counterclaim held on May 3, 2012. He asked for an immediate final decree of divorce so he could go forward with a marriage to a Las Vegas showgirl on the beach of the Atlantic Ocean while he is in Virginia.

(a) May the court grant a divorce to either party on the ground sought in the complaint and counterclaim? Explain fully.

(b) How should the court rule on the respective claims of Wilma and Fred regarding the arrearages and support payments going forward? Explain fully.

(c) Is there a ground upon which the Virginia court may grant an immediate final decree of divorce to either Wilma or Fred, and, if so, are the prerequisites for such a final decree satisfied in this case? Explain fully.

Suggested Answer

(a) The court may not grant a divorce to either party on the ground sought in the complaint and counterclaim. In Virginia, incompatibility, alleged in the complaint, is not recognized as a ground of divorce and Nevada law does not apply to the proceeding. Desertion, as alleged in the counterclaim is not supported by the evidence. Desertion entitling a spouse to a divorce consists of (1) the breaking off of the marital cohabitation and (2) an intent to desert in the mind of the offender. A separation by mutual consent, as shown here, does not constitute desertion.

(b) The parties entered into a written property settlement agreement (PSA) which is valid pursuant to Code 20- 155, and is effective upon execution. Although the PSA had not been incorporated into an Order by the court, under 20-109 C, if the agreement is filed before entry of a final decree, the court may not modify the agreement between the parties. Here, it can be argued that Wilma's in court admission that the support agreement was orally reduced from $2000 to $1000, if reduced to writing, constitutes an enforceable modification to the PSA, as of the date of modification. Therefore, Wilma could recover for the support arrearages of $2000 a month until the modification, and thereafter at the rate of $1000 per month. Although Wilma is entitled to a judgment against Fred for the amount due under the contract, she may not seek contempt of court

sanctions against Fred until the PSA is incorporated into a court order. Fred will not succeed on his request to eliminate past arrearages or future support payments, due to his changed financial circumstances, because such a request is contrary to the provisions of the modified PSA, and cannot be entertained by the court. Had the court determined initially the level of support to award, the court thereafter could modify support upon a showing of a change of circumstances warranting modification.

(c) Either party could move to amend its complaint under 20-121.02 to allege a proper ground of divorce, separation for the statutory period under 20-91(9). Here, Wilma has the requisite residence (6 months) and domicile (living in Virginia to be near her parents and to remain there) to file for divorce in Virginia. Fred was properly served and entered an appearance, thereby submitting to the jurisdiction of the court. Neither party was in the armed services of the United States. The parties had lived separate and apart, without cohabitation and without interruption for at least 6 months, had no children and had a PSA; alternatively, the parties had lived separate and apart, without cohabitation and without interruption for 1 year. The parties intended to live separate and apart on the date of separation and that intent remained at the time of the hearing; there was no possibility of reconciliation.

3. [Federal Procedure] Grand Slam Collectibles, LLP ("Grand Slam") is a two-person Virginia limited partnership that specializes in buying and selling baseball memorabilia. Its main store is in Roanoke, Virginia, and it has a smaller store in Norfolk. Its two partners are Peter Pedroia, who resides in Roanoke and manages the store there, and Lamar Smith, who resides in Sweet Springs, West Virginia and occasionally visits the Norfolk store to oversee affairs there.

In early February 2012, after an unusually heavy snowfall, the roof of Grand Slam's Roanoke store partially collapsed. Realizing Grand Slam stood to lose significant business if the store was closed when spring training began in March, Peter inquired around for a roofer who could do there pairs promptly. On the recommendation of a friend, Peter contacted Kwik-Fix Constructors, Inc.("Kwik-Fix"), a general contracting business incorporated in Delaware and operating exclusively out of Greensboro, North Carolina. After dickering over specific terms, in which Kwik-Fix committed to completing the job by March 1, Peter, on behalf of Grand Slam, entered into a valid service contract with Kwik-Fix. Until then, Kwik-Fix had never done any work outside North Carolina.

Toward the middle of March, a couple of weeks into spring training, Kwik-Fix had not yet begun the work. Finally, on April 2, 2010, Kwik-Fix sent a team of workers from Kwik-Fix's subcontractor, Rapid Roofers, Inc. ("Rapid Roofers") to fix Grand Slam's roof. Rapid Roofers is a business incorporated under the laws of West Virginia with its principal place of business in Covington, Virginia. One week later, the Rapid Roofers team finished, but Peter discovered after a rainstorm that the roof had been shoddily repaired and contained holes and inferior materials not

agreed to in the contract. As a result of the roof's condition, the rain leaked into Grand Slam and ruined several expensive pieces of inventory.

On May 15, 2010, Grand Slam filed suit against Kwik-Fix in the United States District Court for the Eastern District of Virginia in Norfolk, Virginia alleging jurisdiction based on diversity of citizenship. Grand Slam's attorney filed in the Eastern District, noted for its "rocket docket," because he wanted to bring the matter to trial quickly. The complaint alleged that Kwik-Fix is liable for breach of contract in the amount of $70,000 and for the negligent destruction of $10,000 worth of Grand Slam's inventory.

After being properly served in North Carolina, Kwik-Fix filed motions to dismiss for lack of subject matter jurisdiction and, in the alternative, to transfer venue to the Western District of Virginia, in which Roanoke is located. The motion to transfer cited the applicable venue statute, 29 USC § 1391, which states as follows:

> (a) A civil action wherein jurisdiction is founded only on diversity of citizenship may . . . be brought only in (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred . . , or (3) a judicial district in which any defendant is subject to personal jurisdiction at the time the action is commenced . . . .
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> (c) For purposes of venue under this chapter, a defendant that is a corporation shall be deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced. In a State which has more than one judicial district and in which a defendant that is a corporation is subject to personal jurisdiction at the time an action is commenced, such corporation shall be deemed to reside in any district in that State within which its contacts would be sufficient to subject it to personal jurisdiction if that district were a separate State, and, if there is no such district, the corporation shall be deemed to reside in the district within which it has the most significant contacts.

The court denied both of Kwik-Fix's motions.

(a) Did the court rule correctly on Kwik-Fix's motion to dismiss for lack of subject matter jurisdiction? Explain fully.

(b) Should the court have granted Kwik-Fix's motion to transfer venue to the Western District of Virginia? Explain fully, addressing the provisions of the venue statute.

(c) What action might Kwik-Fix take against Rapid Roofers in the same lawsuit to recoup in the event Kwik-Fix is ultimately found liable to Grand Slam? Explain fully.

Suggested Answer

(a) The court correctly denied Kwik-Fix's motion to dismiss for lack of subject matter jurisdiction.

Federal diversity subject matter jurisdiction exists over this case. For diversity jurisdiction to exist, all plaintiffs must be citizens of states other than where the defendants are citizens, and the amount in controversy must exceed $75,000. Both of these requirements are met in this case.

The two plaintiffs are diverse from the corporate defendant. In the case of individuals, citizenship is defined as domicile. Where a party is a partnership, the court must consider the citizenship of each partner. The facts suggest that Plaintiff Peter is domiciled in Virginia and that Plaintiff Smith is domiciled in West Virginia. The defendant, Kwik-Fix, is a corporation. Corporations are deemed citizens of both the state of incorporation and the principal place of business. Thus, Defendant Kwik-Fix is a citizen of Delaware, where it is incorporated, and North Carolina, which is its principal (and up until now, only) place of business. Thus, the facts of this case meet the diversity requirement.

The $75,000 amount in controversy is met. There are two claims against Kwik-Fix, one for $70,000 and on for $10,000. Although neither claim independently meets the amount in controversy, the plaintiffs may aggregate their claims against the single defendant. They thus meet the amount in controversy requirement.

(b) The court improperly denied the motion to transfer venue to the Western District of Virginia.

The federal venue statute permits venue only in the Western District of Virginia, so retaining the case in the Eastern District is improper. The federal venue statute permits venue where a substantial portion of the events giving rise to the suit occurred and where all the defendants reside if all defendants reside in the same state. Corporations are deemed to reside in any district within which the corporation's contacts would support personal jurisdiction if that district were a state. Both of these tests point to the Western District of Virginia. All of the repairs under the contract were to be performed in the Western District. In addition, all of the defendant's contacts in Virginia are in the Western District. This job is the first time that defendant has worked outside of North Carolina, so it is clear that the defendant does not have contacts with the Eastern District.

(c) Kwik-Fix might implead Rapid Roofers as a third party defendant to recoup from Rapid Roofers in the event that Kwik-Fix is found liable to Grand Slam.

Rule 14 of the Federal Rules of Civil Procedure allow a defendant to implead a third-party defendant who is or may be liable to the defendant for some or all of whatever the defendant ends up owing to the plaintiff. Rule 14 permits the joinder of Rapid Roofers in this case.

In order for this claim and this defendant to be added to the case, subject matter and personal jurisdiction over Rapid Roofers must be proper.

Subject matter jurisdiction is proper because the parties on both sides of the claim are diverse. Kwik-Fix is a citizen of Delaware and North Carolina, and Rapid Roofers is a citizen of Virginia and West Virginia. The fact that Rapid Roofers and Grand Slam are not diverse from each other is irrelevant unless one wishes to assert a claim against the other. If, for any reason, the court decides that diversity subject matter jurisdiction cannot be asserted over Kwik-Fix's claim against Rapid Roofers, then supplemental subject matter jurisdiction is available because the claim forms part of the same case or controversy as Grand Slam's original claim, given that Kwik-Fix's claim sees contribution from Rapid Roofers for any liability on that original claim.

The federal court also would have personal jurisdiction over Rapid Roofers because Rapid Roofers has its principal place of business in Virginia and also performed the work for the contract in the state of Virginia.

All requirements for impleading Rapid Roofers are thus met. Rule 14 allows the impleader of Rapid Roofers; subject matter jurisdiction is proper; and personal jurisdiction is proper.

4. [Trusts] George Jones, a Vinton, Virginia, businessman, died in 1998 survived by a daughter, Jane, who was severely physically and mentally disabled. George's wife predeceased him, and they had no other children. George is also survived by a brother and a sister.

George's estate consisted of a business he had successfully operated for a number of years, a home, and a few modest investments. George's will named Blue Ridge Trust Company as executor and trustee and gave the executor and trustee full power to sell assets and invest in its sole discretion. The will established a trust that the trustee was to administer as follows:

> My Trustee shall hold the Trust Estate in trust for the benefit of my daughter. My Trustee shall pay to or for the benefit of my daughter so much of the net income as is necessary for her support and so much of the principal as My Trustee deems advisable in its sole and absolute discretion to provide for her health, maintenance, support and comfort. Upon my daughter's death, the trust principal and undistributed income shall be distributed to my brother and sister, per stirpes.

Blue Ridge Trust Company sold the house, the business and all the other assets in the estate and invested the funds solely in United States government bonds. Jane was placed in a long-term care facility, Unlimited Care, which provides for all her needs.

For the last 14 years, Blue Ridge Trust has paid Unlimited Care an annual fee that has gradually increased to $50,000. In the early years of the trust, the income was more than adequate to provide for Jane's care. However, in recent years, trust income has declined to $40,000 per year. Unlimited Care has advised Blue Ridge Trust that its annual charges for the current year will increase to $55,000. No one disputes the quality of the care being furnished by Unlimited Care. It is also undisputed that moving Jane to another, cheaper facility will have a detrimental effect on her well-being.

However, Blue Ridge has advised Unlimited Care and Earl Rogers, an attorney appointed by the Circuit Court of Roanoke County as Jane's guardian, that it will not pay more than $35,000 from the trust income and no principal toward Unlimited Care's annual charge. Blue Ridge Trust gives the following reasons for its decision: First, Jane has a life expectancy of approximately 20 years, and Blue Ridge Trust is concerned that the trust property will be exhausted by invasions of principal before Jane dies. Second, Blue Ridge Trust is concerned that Unlimited Care's charges exceed those of similar facilities for comparable care. Third, although George's surviving brother and sister have not expressed any opposition to invasion of the principal, Blue Ridge Trust is concerned about its potential liability to the remaindermen of the trust.

Rogers, the guardian, believes that Blue Ridge Trust must pay the Unlimited Care bill from income and principal of the trust, and he has told Blue Ridge Trust that, if it does not pay the entire annual charges of Unlimited Care, he will commence a judicial proceeding to require such payments and/or to remove the trustee and appoint a successor.

(a) Is a court likely to compel Blue Ridge Trust to distribute all the trust income in payment of Unlimited Care's annual charge? Discuss fully.

(b) Is a court likely to compel Blue Ridge Trust to distribute any of the principal in payment of Unlimited Care's annual charge? Discuss fully.

(c) Is a court likely to remove Blue Ridge Trust and appoint a successor trustee upon the unilateral application of the guardian, Earl Rogers? Discuss fully.

Suggested Answer

Who Are the Trust "Beneficiaries"

Jane is clearly a beneficiary. The brothers and sisters of George Jones are not current beneficiaries. They do, however, have future beneficial interests in the trust (probably contingent upon surviving Jane). Such interests are sufficient to make them trust beneficiaries. *See* Va. Code § 55-541.03 (defining "beneficiary" to include "a person that (i) has a present or future beneficial interest in a trust, vested or contingent").

Duties Implicated by the Question

Blue Ridge Trust owes duties of loyalty, impartiality, and prudence to its beneficiaries. *See* Va. Code § 55-548.02 to 55.548.04.

Loyalty: The question does not raise any facts to suggest that Blue Ridge Trust is favoring its own interests over Jane's. Roger's claim would not be based on the duty of loyalty.

Prudence: Blue Ridge Trust must administer "as a prudent person would, by considering the purposes, terms, distributional requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution." Va. Code § 55.548.04. This duty of prudence governs Blue Ridge Trust as it makes distributions to Jane.

Impartiality: As the trust has multiple beneficiaries, Blue Ridge Trust "shall act impartially in investing, managing, and distributing the trust property, giving due regard to the beneficiaries' respective interests." Va. Code § 55.548.03. Blue Ridge Trust, thus, must consider Jane and the remaindermen when making distributions.

Effect of Trust Terms

In general, the terms of a trust trump any competing rules in the Virginia UTC. *See* Va. Code § 55-541.05(B). In our question, the trust instrument authorizes only income distributions to Jane, and even those are subject to the trustee's "sole and absolute discretion." Even under this discretionary standard, Blue Ridge Trust must make distribution decisions "in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries."

Discussion of Specific Questions

(a) It seems unlikely that a court would compel Blue Ridge Trust to distribute all income. All that the Trust Code requires is "good faith" as it has discretion over how much income to distribute. The question suggests legitimate reasons for Blue Ridge Trust to distribute only $35,000 per year.
(b) It is even less likely that a court would compel Blue Ridge Trust to distribute any principal at all. The trust instrument does not authorize principal distributions to Jane.
(c) Removal and replacement of Blue Ridge Trust is also very unlikely. The two main grounds for removal would be

- committing a serious breach of trust or
- unfitness, unwillingness, or persistent failure of the trustee to administer the trust effectively

See Va. Code § 55-547.06. Blue Ridge Trust does not seem to have breached its duties at all. Indeed, Roger's desire for a new trustee seems predicated on finding a new trustee who would itself breach by distributing principal.

Note on Va. Code Cites

The cites in this document do not reflect the recodification of Virginia trusts and estates law that will take effect on October 2012.

5. [UCC Sales & Va. Civil Procedure] Catawba Manufacturing Corporation, which is based in Botetourt County, Virginia, manufactures a premium applesauce that it markets throughout the eastern United States. Catawba's applesauce has a unique flavor and it sells both wholesale and retail for an above market price. The recipe for Catawba applesauce contains 10% from an heirloom Virginia mountain apple grown only in Botetourt and Allegheny counties of Virginia.

For several years, Catawba has purchased its Virginia mountain apples from Jeremiah's Orchard near Eagle Rock and found their product to be the best available for its applesauce. In2011, it entered into a written contract with Jeremiah's Orchard to supply all of Catawba's requirements of Virginia mountain apples for $500 per ton on and after July 1, 2012. The contract, which is on Catawba's standard form, prohibits Jeremiah's from selling any excess of this variety of apples without Catawba's express consent. The contract also provides that Catawba may reject Jeremiah's apples for any reason, even if they conform to the contract. The Jeremiah's representative considered those provisions onerous and objected to their inclusion in the contract. The Catawba representative assured the Jeremiah's representative that, although these provisions were part of Catawba's standard form, the company never enforced them. In fact, to the contrary, Catawba routinely required its suppliers to comply with those provisions.

On June 1, 2012 Catawba wrote to Jeremiah's setting forth dates for delivery of apples in 10-ton increments from the July and August harvests and confirming the price of $500 per ton. Due to a poor growing season, Virginia mountain apples were in short supply and the price rose dramatically.

Another manufacturer, Allegheny Apples, LLC, without knowledge of the Catawba-Jeremiah's contract, offered Jeremiah's $750 per ton for its entire crop of Virginia mountain apples. On June 15, Jeremiah's accepted Allegheny's offer and informed Catawba that it was not going to fulfill its contract with Catawba.

After learning of this from Jeremiah's, Catawba tried unsuccessfully to contract for Virginia mountain apples, but found that the season's entire crop was committed to other manufacturers. Other varieties of apples are readily available, but Catawba is reluctant to switch to the other varieties because Virginia mountain apples give its applesauce unique color, texture and flavor.

It is now June 20, 2012. Catawba demands that Jeremiah's fulfill the Catawba-Jeremiah's contract in all respects.

In a suit to require Jeremiah's to deliver to Catawba 100 tons of Jeremiah's Virginia mountain apples, what remedies might Catawba seek; what defenses might Jeremiah's reasonably assert; and what is the likely outcome on each remedy sought by Catawba? Explain fully.

Suggested Answer

Catawba can seek specific performance under VA. CODE. ANN. § 8.2-716(1) or detinue under § 8.2-716(3). The UCC relaxed the requirement that goods must be unique for a court to grant specific performance for a contract of sale. Off. Cmts. 2 and 3 to U.C.C. § 2-716. The inability of Catawba to "cover" by buying the same apples elsewhere warrants specific performance. Detinue is probably also warranted because Catawba is unable to cover and the apples were "identified to the contract" within "twelve months or the next normal harvest season after contracting." VA. CODE ANN. § 8.2-501(1)(c).

Catawba will need to seek immediate relief if it wishes to obtain Jeremiah's apples. It could seek a temporary injunction in order to preserve its right to specific performance, which involves filing a complaint in circuit court alleging the circumstances and asking the court to immediately enjoin Jeremiah from disposing of the apples, pending a hearing on the merits. The court in deciding whether to grant the temporary injunction will consider these factors:

I. Will there be any irreparable harm to the plaintiff if the motion for a temporary injunction is not granted;

II. Is there an adequate remedy at law;

III. The likelihood of the plaintiff winning on the merits;

IV. Does balancing of the equities in the matter favor the plaintiff

V. Is the plaintiff prepared to post the injunction bond, protecting the defendant from damages suffered, if after hearing the evidence from all sides, the judge decides the injunction should not have been granted?

As noted, Catawba will need to be prepared to post a bond as a condition of any temporary injunction being granted.

Catawba could also use detinue, by filing a complaint alleging the facts and seeking a court order for Jeremiah to give it all the apples. Detinue can be filed in the normal manner where the court will first hold a trial on the merits, or under certain circumstances, can be brought seeking pre-trial seizure. If pre-trial seizure is sought, Catawba will need to allege facts showing that one of the grounds for attachment [Va. Code §8.01-534] is present. Here the facts provide that Jeremiah plans on selling the apples in violation of an obligation to Catawba so as to not be forthcoming to answer a judgment of the court on the merits, which circumstances will permit pre-trial seizure under Va. Code §8.01-534[B][1].

Again, Catawba will need to post a bond to protect Jeremiah in case the judge, when ruling on the merits, rules in favor of Jeremiah.

Jeremiah's could assert two defenses. First, it could argue there was no contract because Catawba gave no consideration for Jeremiah's promise to deliver its apples. "Requirements" contracts are not unenforceable due to lack of consideration (VA. CODE ANN. § 8.2-306(1)); however, the term providing that Catawba "may reject Jeremiah's apples for any reason, even if they conform to the contract" ostensibly permits Catawba to walk away for any reason or no reason. Second, the untrue statement by Catawba's representative that it never utilized an unfettered power to reject would permit Jeremiah's to raise the defense of common law misrepresentation. VA. CODE ANN. § 8.1A-103(b).

Jeremiah's defense of lack of consideration should fail. Requirements contracts are subject to a statutory standard of good faith and commercial fair dealing that would prevent Catawba from

arbitrarily rejecting Jeremiah's apples that would serve to create mutuality of obligation. Off. Cmt. 2 to U.C.C. § 2-306. While stronger, Jeremiah's fraud defense is also not likely to succeed because Catawba is seeking to enforce the contract and the misrepresentation may not be material.

6. [Criminal Law - Substantive] Yancey Tucker and his brother Fred, residents of Warm Springs, Virginia, were on trial in the Circuit Court of Bath County. Yancey was charged with malicious wounding of Ron Mason. Both Yancey and Fred were charged with conspiracy to commit such malicious wounding. The malicious wounding statute, Code of Virginia section 18.2-51, states:

> If any person maliciously shoot, stab, cut, or wound any person or by any means cause him bodily injury with the intent to maim, disfigure, disable or kill, he shall . . . be guilty of a Class 3 felony.

The evidence at the trial established the following facts:

• On the night of February 14, 2012, Yancey and Fred were at the bar of the local tavern and had been drinking heavily for several hours when they saw Ron Mason and his brother, Morgan, enter the tavern and begin playing pool.

• Yancey and Fred harbored a longstanding animosity for Morgan, who had once threatened to "cut Yancey down to size" and had tried to stab Yancey at a cock fight they had attended.

• Yancey said to Fred, "This is our chance to get even with Morgan. I've got my pistol. Let's get him when he leaves." Fred nodded his approval.

• After several more drinks, Yancey and Fred left the bar and waited out front. Fred, after waiting a few minutes, said, "I don't think this is a good idea. Let's forget about it," and staggered off toward the parking lot, got into his car, and fell asleep.

• About 15 minutes later, Morgan and Ron came out the front door. They were confronted by Yancey, who, after an exchange of expletives, drew his pistol.

• Yancey had for many years worn glasses to correct a vision problem that, without his glasses, caused his eyes to cross resulting in double vision. On this occasion, he had left his glasses in the car.

• Yancey, intending to shoot Morgan, took aim and fired, but his aim was misdirected by his double vision. The bullet struck Ron instead, resulting in Ron's losing most of his left ear.

• Blood tests revealed that at the time of the incident the blood alcohol levels of Yancey and Fred were more than twice the level considered legal intoxication, and a medical expert called as a witness by Yancey and Ron testified that they were both in alcoholic stupors.

• An optometrist called as a witness by Yancey testified that, without his glasses, Yancey's double vision caused the misdirected shot.

The defenses asserted by Yancey to the malicious wounding charge were that (i) he was too drunk to have formed the intent to commit the crime charged and (ii) the shooting of Ron was accidental. The defense asserted by Yancey and Fred to the conspiracy charge was that no conspiracy was committed because Fred had walked away before the shooting occurred.

Can Yancey and Fred prevail on the defenses they have asserted?

Suggested Answer

Yancey's drunkenness defense will fail. First, it is possible on these facts that Yancey's intent to injure Morgan existed before he was intoxicated. However, even if his intent was formed after intoxication occurred, voluntary intoxication is not generally an excuse for crime. The only exception to this rule in Virginia is that voluntary intoxication can defeat the specific premeditation required to prove first-degree murder. *Wright v. Commonwealth*, 234 Va. 627 (1988). Yancey is charged with malicious wounding, not first-degree murder, so his voluntary intoxication is no defense.

Yancey's "accidental shooting" defense will also fail. Although the shooting of Ron may have been accidental, the doctrine of transferred intent treats Yancey's wounding of Ron as intentional because it flowed out of his intent to shoot Morgan. Yancey possessed the mens rea required by § 18.2-51 for the malicious wounding of Morgan – malice and specific intent. Under the doctrine of transferred intent, this mens rea remains even though the actus reus was suffered by Ron rather than Morgan.

Yancey and Fred's defense to conspiracy is that the conspiracy was broken because Fred abandoned the plan prior to the shooting, terminating their liability for conspiracy. This is not the law, and this defense must also fail. While withdrawal from the conspiracy might be a sufficient defense to the commission of the underlying crime if it is indeed committed, withdrawal from the conspiracy is not a defense to the crime of conspiracy. The crime of conspiracy is complete when there is a shared intent and agreement to commit a felony.

7. [Corporations] Ten years ago, Romeo Dickerson founded Commonwealth Cigar Corporation("CCC"), a corporation properly organized and validly existing pursuant to the laws of Virginia. CCC had an agreement with a Spanish company, Professor Sila Cigar Factory, granting CCC the exclusive right to distribute Professor Sila brand cigars in the Mid-Atlantic states.

Initially, Romeo was the sole shareholder, officer, employee, and director of CCC. The articles of incorporation contained a provision limiting to $2,000 the liability of any officer or director for damages arising out of a breach of fiduciary duty. CCC was properly capitalized, and

Romeo observed all corporate formalities, making all required corporate filings, holding shareholder and board meetings and keeping minutes thereof, and the like. At the outset, CCC paid its debts promptly, though in time CCC developed a reputation for slow payment of bills and for demanding arbitrary invoice reductions in return for any payment at all.

In 2009, Romeo and Izzy Investor, an outside investor, entered into a stock subscription agreement whereby Izzy acquired 30% of CCC's stock for $30,000 and Izzy's guarantee of a bank letter of credit in favor of Professor Sila that allowed CCC to buy cigars on better terms. The subscription agreement also provided that Romeo remained the sole employee and manager of the business of CCC. Over time, however, Izzy and Romeo had a series of falling-outs, and their relationship deteriorated.

Without informing Izzy, Romeo formed another corporation, International Cigar Company("International'). International operated out of the same facilities as CCC, using CCC's equipment, without compensation to CCC. Initially, International sold cheaper cigars imported from the Dominican Republic. There came a time when Professor Sila expressed dissatisfaction with CCC's efforts to market the Professor Sila brand. Romeo then renegotiated the original exclusive distributorship agreement with Professor Sila, transferring exclusive rights to International. CCC then abandoned efforts to sell the Professor Sila brand and continued doing business on a much reduced scale selling only less popular brands.

When Izzy discovered what Romeo had done, he sued Romeo in the Circuit Court of Fairfax County, Virginia. In the complaint, titled *Izzy Investor v. Romeo Dickerson*, Izzy alleged that Romeo breached the fiduciary duty owed to CCC and sought to recover damages for his own account directly from Romeo measured by the diminution of the value of Izzy's 30% interest in CCC. The complaint asserted that a suit directly against Romeo was justified because CCC was a close corporation functioning essentially as a partnership in which Romeo was the general partner.

Romeo asserted the following defenses: (i) that Izzy's claim is a corporate cause of action, not a claim accruing personally to Izzy; (ii) that, in any event, Romeo is protected from liability by the business judgment rule; and (iii) Romeo's liability is capped at $2,000 by the provision in CCC's articles of incorporation.

Is Romeo likely to prevail on each of his defenses? Explain fully.

Suggested Answer

Romeo is likely to prevail on his first defense but not on his second and third defenses.

(1) Romeo will prevail on his defense that Izzy's claim is a corporate cause of action, not a claim accruing personally to Izzy. Izzy claims that Romeo breached his fiduciary duty of loyalty. That duty is owed to the corporation itself and not to the shareholders. Unlike some other states, Virginia does not recognize an exception to this rule in the case of small, closely held corporations. Thus, this action should be brought by the corporation, or as a derivative action on behalf of the corporation, but not by a shareholder individually.

(2) Romeo will not be protected by the business judgment rule. First, it is not clear that Romeo's actions constituted decisions on behalf of CCC, and to the extent that Romeo was not making decisions on behalf of CCC, the business judgment rule is inapplicable. Second, in Virginia, the business judgment rule is a good faith standard. In this case, Romeo caused CCC to allow International to use its facilities without paying compensation, and he renegotiated CCC's exclusive distributorship agreement with Professor Sila, transferring the exclusive rights to International. There is no basis for Romeo to argue that he made these decisions in the good faith belief that they were in the best interest of CCC. Thus, he would not be protected by the business judgment rule.

(3) Romeo is not likely to prevail on his defense that his liability is capped at $2,000 by the provision in CCC's articles of incorporation. The Virginia Code does allow corporations to cap liability of officers and directors in the articles of incorporation. However, such a cap does not apply to willful misconduct. Here, it is clear that Romeo acted intentionally, knowing that his conduct was wrong. His conduct constituted a clear misappropriation of assets from CCC. Thus, the cap in the articles of incorporation does not apply in this situation.

8. [Virginia Civil Procedure] In March 2012, Peter, an avid runner, was jogging along Midlothian Turnpike, in Chesterfield County, Virginia. As he was crossing at an intersection against a traffic signal for pedestrians that was showing the "Don't Walk" command, Peter was struck by one of two vehicles that collided at the intersection. At the moment of the accident, Kenny, the driver of one of the cars, was speeding, and Dino, the other driver, had failed to stop at a red traffic light. The impact of the accident caused Dino's vehicle to strike Peter.

Peter sued both Dino and Kenny for personal injuries. Dino failed to file responsive pleadings within the time required by the Rules. Kenny filed an answer and grounds of defense. He denied his own negligence, denied that Peter was injured to the extent alleged, and alleged that Peter was guilty of contributory negligence.

Two months after Dino was served with process, Dino's lawyer filed a motion for leave to file late pleadings. He attached an affidavit wherein Dino stated under oath that, while out of town for several weeks, he overlooked taking the suit papers to his lawyer. Counsel for Peter and Kenny objected to the motion and moved for entry of default judgment against Dino. The trial court denied Dino's motion and ruled that he was in default. A judgment of default on the liability issue was entered accordingly, reserving the issue of damages pending Peter's proof.

At trial, Peter presented evidence as to the negligence of Dino and Kenny, regarding injuries to his leg and hip, and medical expenses he incurred because of the injuries. Dino's counsel made several objections to the admission of Peter's evidence regarding his injuries, all of which were overruled on the ground that Dino was in default. Additionally, Dino sought to introduce evidence that Peter had been in a previous accident and that many of the expenses he was claiming in the present suit were duplicative because they had been incurred for the treatment of an

injury received in the earlier accident. The court rejected this evidence, again on the ground that Dino was in default.

After hearing all the evidence, the court, on Kenny's motion to strike, ruled that Peter was guilty of contributory negligence as a matter of law.

(a) Was the court correct in not allowing Dino to file late pleadings? Explain fully.

(b) Was the court correct in overruling Dino's objections to Peter's evidence as to his injuries and expenses? Explain fully.

(c) Was the court correct in refusing to admit Dino's evidence about Peter's expenses incurred in the earlier accident? Explain fully.

(d) Is Peter entitled to a judgment against Dino despite the court's ruling that Peter was guilty of contributory negligence as a matter of law? Explain fully.

Suggested Answer

(a) Was the court correct in not allowing Dino to file late pleadings?

Under Rule 3:19(b), prior to the entry of judgment, the Trial Court has the discretion to permit the defendant to file a late answer. The judge should look at the extent of the delay, reason for the delay and any harm, due to the delay, to the plaintiff. The Trial Court's ruling was not an abuse of discretion considering the weak excuse Dino had for failing to file a responsive pleading on time.

(b) Was the court correct in overruling Dino's objections to Peter' evidence as to his injuries and expenses? and

(c) Was the court correct in refusing to admit Dino's evidence about Peter's expenses incurred in an earlier accident?

Under Rule 3:19(c)(3), the consequences of default, in the circuit court, no longer include a waiver of all objections to the admissibility of the evidence and ¶(3) affirmatively gives the defaulting defendant the right to object to the admission of evidence regarding damages. Consequently, Dino is entitled to make evidentiary objections to the admissibility of evidence that goes to the quantum of damages. The evidence of prior injuries and the expenses of curing them go to the quantum of damages in showing that the expenses were not related to injuries in this accident. The Trial Court erred in overruling Dino's objection to the admissibility of the evidence.

Note: The facts of the problem did not specify or otherwise reveal whether the suit was filed in circuit court or general district court. The assumption was that it was filed in circuit court and thus Rule 3:19 was the controlling authority. If the applicant assumed and revealed the assumption in the answer, that the action was brought in the general district court and recognized that Rule 7B:9 controlled a default in the general district court and imposed a sanction of a waiver of all objections to the admissibility of evidence, then the trial court's ruling in (b) & (c) would have been correct. Our thinking is that if all this occurred, full credit would be given for the answer. Critical is that the answer reveals the assumption that the action was brought in general district court.

(d) Is Peter entitled to a judgment against Dino despite the court's ruling that Peter was guilty of contributory negligence as a matter of law?

This part of the question was subject to much discussion at the post exam session. Credit should be given for good analysis. Better answer is yes, Peter's entitled to a judgment against Dino. Considerations are:

Contributory negligence is an affirmative defense and unless it is pled by way of defense, it is waived. Rule 3:18(c) Dino did not plead contributory negligence. Further, by being in default, the defaulting defendant admits liability to the plaintiff.

An alternative analysis that if well done should gain substantial credit is that under Rule 3:19(c)(1) the court is mandated to enter judgment against the defaulting defendant "for the relief appearing to the court to be due." The court, having found that the plaintiff as a matter of law was guilty of contributory negligence, should conclude that the plaintiff is not due any amount. This track should also recognize the failure to plead contributory negligence and the admission of liability by being in default.

9. [Wills & Real Estate]] Dick and Jane Wilson, prior to their divorce in 2010, bought a home in Lee County, Virginia. Title to the home was held by them as, "Tenants by the entirety, with the right of survivorship, as at common law."

Jane moved to California shortly after the divorce was final, and Dick remained in the home, which he shared with their daughter, Margo, who was Jane's only child. The home was the only marital asset; however, no disposition was made of the home in the divorce proceedings and neither party requested equitable distribution.

Jane was killed in a surfing accident shortly after arriving in California. A safe deposit box that Jane had maintained in the Bank of Pennington Gap, Virginia contained two documents :(i) One was completely in her handwriting and contained no words other than the following: "I, Jane Wilson, leave my entire estate to my sister, Helene. June 30, 2011." (ii) The other document was what appeared to be a duly executed deed dated January 1, 2011, signed by Jane, and purporting to

convey, "My home in Lee County, Virginia to my nephew, Jimbo." Jane had never met Jimbo, and she did not know where he lived.

Jane was survived by Margo, Jimbo, Helene, and Dick. Each of them has asserted an interest in the Lee County home.

What interest, if any, do Margo, Jimbo, Helene, and Dick each have in the Lee County home? Explain fully.

Suggested Answer

The house was part of the decedent's estate because the deed to Jimbo was likely ineffective for want of delivery. The facts state that Jane had not met Jimbo and did not know where he lived, which suggests she did not know where to deliver the deed.

The first issue is whether the handwritten document qualifies as a holographic will. If it does, then the house belongs to Jane's sister, Helene. The handwritten document qualifies as a valid holographic will only if the document is deemed to be signed. The testator's name does not appear at the end of the document, but Virginia law does not require that the signature be at the end of the document to qualify as a signature, as long as the testator intended the name to qualify as a signature. For this reason, the court will decide whether the will is valid by deciding whether the testator intended he name in the document to constitute her signature.

If the handwritten document is not a holographic will, the house belongs to Margo according to the rules of intestate succession.