

### Question 3

Rutlington Vermont Police Officer Alice Adams was directing traffic at the Rutlington High School parking lot when an adult driver stopped, pointed out a student, and told Adams that the student had loudly and obnoxiously harassed the driver. Officer Adams approached that student, Bobby Baker, a fifteen-year-old sophomore at the school. Baker loudly declared to Adams that he had done nothing wrong and should be left alone. A crowd gathered. Adams then told Baker to come with Adams and that Baker was under arrest. Baker calmly objected and politely asked Officer Adams permission to leave. Officer Adams said no, and Baker started to run away. Officer Adams chased Baker, tackled him, and handcuffed him. During the struggle, a baggie containing heroin fell from Baker's pocket. Officer Adams collected the baggie. Officer Adams took Baker to the police station, where he was cited for disorderly conduct and possession of heroin.

Two days later, Officer Adams heard from another student who said she had seen Baker sell heroin in the parking lot that day, and that she had seen Baker act aggressively towards the driver to "make him get out of here." Officer Adams convinced a special educator assigned to Baker to take him from his class to a small conference room inside the school building. Officer Adams, the special educator, and the school's principal met with Baker. They did not tell him he was free to leave, nor did Officer Adams give Baker any Miranda warnings. They asked Baker about his loud and obnoxious interaction with the adult driver, and they suggested he'd tried to scare the driver away to hide drug-dealing. Baker denied all wrongdoing, saying he had just been kidding around.

The adults then confronted Baker with the other student's statement that she had witnessed Baker's behavior. Baker admitted that he had sold heroin on school grounds. Officer Adams arrested Baker for distribution of heroin.

1. Was Officer Adams's arrest of Baker in the school parking lot lawful? Discuss and analyze.
2. Can the baggie and its contents be admitted in a criminal proceeding against Baker? Discuss and analyze.
3. Can Baker's confession to selling heroin be admitted in a criminal proceeding against him? Discuss and analyze.

## MODEL ANSWER

### Question 3

1—The question raises whether the arrest was lawful. Loud, obnoxious and harassing behavior is not a felony in Vermont. Such behavior may be disorderly conduct, which is a misdemeanor. One who makes unreasonable noise or engages in threatening behavior with either the intent to cause public annoyance, or reckless disregard of the risk of causing public annoyance, is guilty of disorderly conduct under 13 V.S.A. § 1026. Under Vermont Rule of Criminal Procedure 3, a police officer may arrest a person for committing a misdemeanor if the misdemeanor occurs in the presence of the police officer, but Officer Adams did not witness the disorderly conduct described by the driver. The Rule also allows an officer to arrest someone for a misdemeanor committed outside of the presence of the officer if exceptions described in the Rule apply. The exception that is raised by this fact pattern allows an officer to arrest for a misdemeanor if “necessary to prevent the continuation of the criminal conduct for which the person was detained, . . . .” There is a close question raised by whether Baker’s “loud” response to Adams’ initial question would meet the standards of this exception. Inasmuch as Baker’s response was loud enough to cause a crowd to gather, the prosecution could reasonably contend that the arrest was lawful as Baker was continuing to engage in the conduct for which he was detained. Baker, however, can contend that his interaction with the officer did not meet the standards for “continuation of criminal conduct,” and therefore the attempt to arrest him without a warrant was unlawful.

Baker’s flight does not cure any defect in the arrest, because it followed the arrest. Nor does it constitute a separate crime justifying the arrest. Vermont law criminalizes attempts to escape following arrest. “To obtain a conviction under 13 V.S.A. § 1501(a)(2), the State must prove that defendant was in lawful custody and escaped or attempted to escape from an officer. The crime is a misdemeanor if the person was in custody as a result of a misdemeanor, and it is a felony if the person was in custody as a result of a felony.” *State v. Powell*, 167 Vt. 294, 296-97, 707 A.2d 272, 273 (1997). “Defendant is correct that there is no escape absent lawful custody. 13 V.S.A. § 1501 (“person who, *while in lawful custody* ... escapes or attempts to escape,” commits crime of escape) (emphasis added). Lawful custody does not arise until defendant is brought under the officer's control through physical restraint, or submits to the officer's authority. A suspect who resists, as defendant did here, is not in custody until his liberty is restrained. *State v. Blaine*, 133 Vt. 345, 351, 341 A.2d 16, 20 (1975) (“process of arrest was started, but resisted and never completed”).” *State v. Turgeon*, 165 Vt. 28, 34, 676 A.2d 339, 342-43 (1996), overruled on other grounds by *State v. Brillon*, 2008 VT 35, 183 Vt. 475, 955 A.2d 1108 (2008).

2. The officer observes the bag for the first time in plain view in a public place, and she therefore does not require a warrant to seize the bag. While the seizure itself may seem lawful, Baker will argue that the seizure is the product of an illegal arrest, and therefore

should be suppressed as the “fruit of a poisonous tree.” The bag and its contents will be excluded from evidence if Baker’s arrest is found to be unlawful.

Evidence obtained in violation of the Fourth Amendment and Article 11, or “by exploitation” of a violation, is inadmissible against a criminal defendant. *Wong Sun v. United States*, 371 U.S. 471, 488, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963); *State v. Pitts*, 2009 VT 51, ¶ 19, 186 Vt. 71, 978 A.2d 14 (explaining that Article 11 provides protection equal or greater than Fourth Amendment); *State v. Badger*, 141 Vt. 430, 452–53, 450 A.2d 336, 349 (1982) (“Evidence obtained in violation of the Vermont Constitution, or as a result of a violation, cannot be admitted at trial as a matter of state law.”). There is a general presumption that evidence obtained after an illegal arrest is the tainted product of unlawful government action. See *United States v. Crews*, 445 U.S. 463, 471, 100 S.Ct. 1244, 63 L.Ed.2d 537 (1980) (explaining that where evidence is seized after Fourth Amendment violation “most cases begin with the premise that the challenged evidence is in some sense the product of illegal governmental activity”).

The question in most cases, therefore, is “whether the chain of causation proceeding from the unlawful conduct has become so attenuated or has been interrupted by some intervening circumstance so as to remove the ‘taint’ imposed upon that evidence by the original illegality.” *Id.*; *Badger*, 141 Vt. at 440, 450 A.2d at 342 (stating that second relevant inquiry in fruit of poisonous tree analysis is “whether intervening events break the causal chain and dissipate the effect of the taint”). The temporal closeness between the arrest and the subsequent acquisition of evidence is also of prime importance. See *Brown v. Illinois*, 422 U.S. 590, 603–04, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975) (explaining that “temporal proximity of the [unlawful] arrest and the confession [and] the presence of intervening circumstances” are factors in fruit of poisonous tree analysis). In *Brown*, for example, the U.S. Supreme Court held that a defendant’s custodial statements made following his unlawful arrest should have been suppressed, reasoning primarily that less than two hours passed between his illegal arrest and first statement and that there was no intervening event. 422 U.S. at 604–05, 95 S.Ct. 2254; see also *Kaupp v. Texas*, 538 U.S. 626, 633, 123 S.Ct. 1843, 155 L.Ed.2d 814 (2003) (concluding that defendant’s confession should have been suppressed where no “substantial time passed between [his] removal from his home in handcuffs and his confession after only 10 or 15 minutes of interrogation”).

*State v. Hawkins*, 2013 VT 5, ¶¶ 19-20, 193 Vt. 297, 305-06, 67 A.3d 230, 237-38 (2013). See also *State v. Betts*, 2013 VT 53, 194 Vt. 212, 75 A.3d 629.

The discovery of the bag of heroin immediately followed the arrest. If the arrest itself was unlawful, the heroin will be suppressed and not admitted into evidence.

3. Baker's confession should be suppressed. Baker was in custody when Office Adams and other adults questioned him, and therefore he should have been advised of his "Miranda" rights to remain silent, to have a lawyer present, and that the consequence of speaking with the police was that his statements would be used against him. Having failed to give Baker those warnings, the prosecution cannot use the statements against him in any criminal proceedings.

The Fifth Amendment to the United States Constitution protects a defendant's right against self-incrimination, and thus a police officer must advise a defendant of her right to remain silent and have an attorney present during custodial interrogation. State v. Sullivan, 2013 VT 71, ¶ 28, 194 Vt. 361, 80 A.3d 67 (citing Miranda v. Arizona, 384 U.S. 436, 444-45 (1966)). The reason is that custodial police interrogation isolates and pressures the individual, to the point that "a frighteningly high percentage of people...confess to crimes they never committed." Corley v. United States, 556 U.S. 303, 320 (2009). However, those warnings are not required when a defendant is not in custody. Id.

The key inquiry is whether a reasonable person would have believed she was free to leave and refuse to answer police questioning. State v. Hieu Tran, 2012 VT 104, ¶ 11, 193 Vt. 148, 71 A.3d 1201 (quoting State v. Oney, 2009 VT 116, ¶ 10, 187 Vt. 56, 989 A.2d 995) (quotations removed). The test is an objective one, asking first what "the circumstances surrounding the interrogation" were and, second, whether a "reasonable person would have felt he or she was at liberty to terminate the interrogation and leave." Thompson v. Keohane, 516 U.S. 99, 112 (1995) (text alterations and quotes removed). Subjective views of the officers or the person being questioned are irrelevant. J.D.B. v. North Carolina, --- U.S. ---, 131 S.Ct. 2394, 2402 (2011).

There are several factors that may be employed in making the custody determination, including "(1) the location of the interview; (2) the interviewer's communication to the suspect of his belief in the suspect's guilt; (3) whether the suspect arrives at the interview voluntarily; and (4) 'whether the police told the suspect that he was free to terminate the interview at any point and leave.'" Hieu Tran, 2012 VT 104, ¶ 12, 193 Vt. 148, 71 A.3d 1201 (quoting State v. Muntean, 2010 VT 88, ¶ 19, 189 Vt. 50, 12 a.3d 518). The suspect's age and apparent sophistication may also be considered, as may deceptive police practices and whether the officer was armed. J.D.B., --- U.S. at ---, 131 S.Ct. 2394, 2406, In re E.W., 2015 VT 7, ¶ 15, --- Vt. ---, --- A.3d ---. Whether the police told the suspect she was free to go is the most important factor. Hieu Tran, 2012 VT 104, ¶¶ 12-14, 193 Vt. 148, 71 A.3d 1201.

Here, Baker was likely in police custody when he was questioned, and Miranda warnings should have been given. There is no indication on these facts that he was told he was free to leave. Further, he was confronted with evidence that he was guilty of selling drugs in the school parking lot and using intimidation to scare another adult off. Although he was in a conference room within the school (as opposed to a police station), he was there with three authority figures, none of whom were obviously adults who were completely independent from the prosecution and concerned with his welfare. In re E.T.C., 141 Vt. 375, 379, 449 A.2d 937, 940 (1982). Although there is limited information in the fact pattern, Baker's need for special education services if his circumstances made him more vulnerable to this interrogation.

## Question 4

Ted, a lifelong Vermont resident, died last week. At the time of his death, he was married to Bess. They had one daughter, Erika. Ted had two children from a prior marriage: Carl and Dotty. Carl passed away several years ago, leaving his two sons, Frank and Gary. Dotty is still living. Not long before he died, Ted learned he had another child, Lenny. Lenny's mother was never married to Ted.

At the time of his death, Ted's estate consisted of the following:

- a home owned with Bess as joint tenants by the entirety
- investment real estate worth \$300,000
- a life insurance policy with Bess as named beneficiary
- a \$300,000 IRA account with Carl, Dotty, and Erika as named beneficiaries
- stocks worth \$600,000
- a coin collection valued at \$150,000

Ted first met Lenny and learned of their relationship when Lenny and his wife Mary moved to Vermont two years ago. DNA testing confirmed Ted's parentage. Ted's wife and other children think Lenny is a friend and do not know that Lenny is Ted's son.

For the last several months before he died, Ted's health was declining. While he was generally lucid, Ted sometimes became confused about family members and recent events. A month before he died, Ted fell and broke his hip. He was placed at a nursing home where Mary worked.

While at the nursing home, Ted decided to revise his will to leave something to Lenny and had his lawyer draw up a new will. Ted told his lawyer that Lenny was a friend. The new will: (1) bequeathed Ted's real estate to Bess; (2) directed Ted's stocks "be divided equally among his children," further stating that Dotty and Erika are each to receive 1/3 of the stocks and the remaining 1/3 was to be held in trust for Frank and Gary; and (3) bequeathed Ted's coin collection to Lenny.

Ted's lawyer brought the revised will to the nursing home for Ted to execute. His paralegal and his receptionist were also present to serve as witnesses. The lawyer asked Mary to serve as a third witness, and she agreed. Ted ripped up his current will. As Ted was about to sign the new will, with all witnesses assembled, the charge nurse urgently called Mary to the doorway. Mary stepped into the hallway as Ted finished signing the will and the paralegal began to sign it as the first witness. Mary spoke to the nurse and then returned immediately to the room. The receptionist finished signing, handed the pen to Mary, and Mary signed the will.

Ted died a few days later.

1. Is the will is valid? Discuss and analyze.
2. Does Mary's role as a witness have any effect on the will? Discuss and analyze.
3. What are Bess's options as a named beneficiary and surviving spouse? Discuss and analyze.
4. Should Lenny challenge the validity of the will? Discuss and analyze.

**MODEL ANSWER**  
**QUESTION 4**

**1. Discuss whether the will is valid.**

A valid will may be made by any person of age and sound mind. 14 VSA § 1. “Sound mind” means the testator must have “sufficient mind and memory at the time of making the will to remember who were the natural objects of his bounty, recall to mind his property, and dispose of it understandingly according to some plan formed in his mind.” See *Landmark Trust (USA), Inc. v. Goodhue*, 172 Vt. 515, 519, 782 A.2d 1219 (2010).

In this case Ted was of age, and was probably of sound mind. The facts indicate that he did remember the “natural objects of his bounty” as he specifically named his wife and children. The failure to acknowledge Lenny as his child in the will could be viewed in different ways. If the evidence shows that Ted was trying to hide the fact that Lenny was his son, this would support his having testamentary capacity. If the evidence shows that he was confused, this would undermine testamentary capacity.

It appears that Ted did remember his property—there is no evidence that any of his assets were left out of the will. Lastly, the fact that he made specific bequests to his wife and children (including Lenny) shows that he disposed of his property according to a plan.

Though there is some evidence that Ted was sometimes confused, there is no evidence that he was confused about “the objects of his bounty” (although an argument can be made that he may have been confused about Lenny), property or how to dispose of his assets.

A valid will must also be: (1) in writing, (2) signed or subscribed by the testator, (3) attested and subscribed by two witnesses in the presence of each other. 14 VSA § 5. Here the will is in writing, was signed by Ted, and was signed by two witnesses (the paralegal and secretary) in the presence of each other.

**2. Discuss and analyze whether Mary witnessing the will has any effect on it.**

A will must be witnessed by two credible witnesses. 14 VSA § 5. There were two credible witnesses besides Mary, so her witnessing it has no effect on the validity of the will.

However, where a person who is not an heir at law is one of the witnesses, and the will includes a specific devise to that person or her spouse, that specific devise may be invalid. 14 VSA § 10 provides: “if a person, other than an heir at law, attests the execution of a will whereby he or she or his wife or her husband is given a beneficial devise, legacy or interest in or affecting real or personal estate, such devise, legacy or interest shall be void so far only as concerns such person or his wife or her husband . . . unless there are three other competent witnesses to such will.” In this case, Mary is a witness who is not an heir at law, and she attested to the will which awards a beneficial devise to her husband, and there were not three other competent witnesses. So the literal language of this section would make the devise to her husband, Lenny, void. However, as noted above, in 2005, Vermont changed § 5 to require two witnesses instead of three. But, § 10 was not revised at that time; so it is not clear if the requirement of three additional witnesses would be enforced, as that requirement is inconsistent with 14 VSA § 5.

**3. Discuss and analyze Bess’s options as a named beneficiary and surviving spouse.**

Bess receives the following assets outside of the will: the house (it passes to her upon Ted’s death because they owned it as tenants by the entirety), and the life insurance policy proceeds. She receives these assets whether she takes under the will or elects her statutory share. (The IRA account also passes outside of the will to Carl, Dotty and Erika.)

If she takes under the will, Bess would receive the \$300,000 of investment real estate.

As a surviving spouse, Bess could waive the devise to her under the will and elect to take one-half the balance of the estate after the payment of claims and expenses. 14 V.S.A. § 319. The value of half of the assets is \$525,000 (investment real estate \$300,000 plus stocks \$600,000 plus coin collection \$150,000 = \$1,050,000). Thus Bess receives more money if she elects to take one-half of the estate.

**4. Should Lenny challenge the validity of the will? Discuss and analyze.**

Lenny would probably want to challenge the validity of the will if the gift to him is void because of Mary's witnessing the will. Therefore, instead of receiving nothing, if he is able to successfully challenge the will's validity, Lenny would be able to receive a portion of Ted's estate through intestate succession. To challenge the validity of the will, Lenny will have to establish that Ted did not have testamentary capacity.

As discussed above, there does not seem to be a strong case to challenge Ted's testamentary capacity. Given the facts provided, this type of challenge is unlikely to be successful.

However, if the current will is found to be invalid, Ted will have died intestate since the facts establish Ted revoked his prior will. Lenny will want to argue that he is Ted's "child" under 14 VSA § 315, which states that under the laws of intestate succession an individual is the child of his or her parents regardless of their marital status. Lenny can use the DNA test to establish that he is Ted's child. While the statute permits a parent-child relationship to be established via a parentage proceeding, it is not required. [Note: There are no reported cases addressing this issue.] Moreover a DNA test can be used to establish a parent-child relationship in a parentage proceeding. Therefore, as to the balance of Ted's intestate estate (half would go to

Bess, Ted's surviving spouse), Lenny should be considered one of Ted's descendants and share equally with Erika, Dotty, and Carl's two sons (who share Carl's interest in the balance by right of representation). See 14 V.S.A. § 314(a). Under this scenario he would receive \$131,250 ( $\frac{1}{4}$  of \$525,000).

## Question 5

Matthew Mansfield was the sole owner of a construction equipment rental business located in Greenville, Vermont. Mansfield operated the business under the trade name of MOM Equipment. The business owned heavy construction equipment such as excavators, cement mixers and portable lifts. This equipment was rented out to construction businesses.

In order to operate his business, Mansfield borrowed money from Green Mountain Bank. The first loan, taken out in July 2008, was to Mansfield from the Bank. A security agreement described the collateral as all of MOM's equipment, including "any after-acquired property," together with all of MOM's inventory and accounts receivables. The second loan, taken out in January 2010, was between Mansfield and the Bank for the purchase of office furniture. The security agreement for the second loan described the collateral as "office furniture and any replacements of the office furniture."

Mansfield took out a third loan in July 2011 to purchase a computer system used in the operation of the business. The loan was between Mansfield and Acme Financing. The loan agreement described two types of collateral for the loan: the first for all equipment and accessories comprising the computer system and the second for "all equipment now owned or hereafter acquired by Matthew Mansfield d/b/a MOM Equipment."

In March 2014, MOM Equipment experienced financial problems and defaulted on all three of the loans. During the same month, Mansfield sold four hydraulic lifts to his longtime customer, Charlie. The following month Mansfield closed his business permanently.

1. What steps should Green Mountain Bank and Acme Financing have taken to perfect and maintain their security interests in the collateral given to them? Discuss, including in your answer:
  - a. the name Green Mountain Bank and Acme Financing should have used in describing the debtor; and
  - b. the other specific information that Green Mountain Bank and Acme Financing should have included in the documentation used to perfect their liens.
2. As to Green Mountain Bank and Acme Financing, which entity has priority with respect to the following: (a) the office furniture; (b) the computer system; and (c) the other collateral? Discuss and analyze.
3. Is either lender able to recover the hydraulic lifts from Charlie? Discuss and analyze, confining your analysis to the UCC.
4. What processes are available to either lender in obtaining possession of the collateral from Mansfield?

Question 5 Model Answer:

1. For each loan, the lender (creditor) must file a financing statement with the Vermont Secretary of State. The financing statement must include the name of the creditor, the name of the debtor and a description of the collateral or property. 9A V.S.A. § 9-502. If the debtor does business under a different name, such as the trade name MOM Equipment, the financing statement may, but is not required to, provide this information also. 9A V.S.A. § 9-503 (b)(1). The Code manifests a strict policy of relying solely upon proper filing to settle questions of perfection. *Greg Restaurant v. Valway, et al*, 144 Vt. 59, 63, 472 A.2d 1241 (1984). In this case Matthew Mansfield should be identified as the Debtor on the Financing Statement. Filing under the name MOM Equipment would not provide subsequent attaching creditors with notice of prior lien on the collateral.

The Financing Statement filed by Green Mountain Bank is effective for a period of 5 years from the date of filing. 9A V.S.A § 9-515(a). In order to maintain the validity of the 2008 financing statement, Green Mountain Bank was required to file a continuation statement within six months of the expiration of the five year period. 9A VSA § 9-515(c).

For the first Green Mountain Bank loan, the collateral description should state: “all equipment and property owned by MOM Equipment including any replacements and after-acquired property and all inventory of Matthew Mansfield d/b/a MOM Equipment and all accounts receivables of Matthew Mansfield d/b/a MOM Equipment.” For the second Green Mountain Bank loan, the collateral description should state “office furniture with all replacements thereto.”

Acme Financing should also file a financing statement with the Vermont Secretary of State identifying Matthew Mansfield d/b/a MOM Equipment as the debtor, itself as the secured party and describing the collateral including the computer system and all other equipment owned or hereafter acquired by Matthew Mansfield d/b/a MOM Equipment.

2. Green Mountain Bank has a Purchase Money Security Interest (PMSI) in the office furniture and Acme Financing has a PMSI in the Computer System. A PMSI is the preferred device for protecting a creditor against default by its debtor. Under the Vermont Uniform Commercial Code, a PMSI in collateral other than inventory gives its holder priority over conflicting security interests under certain conditions. 9A V.S.A. § 9-324(a). Accordingly, Green Mountain Bank would have a priority security interest in the office furniture, while Acme Financing has a priority security interest in the computer system. The Code gives the PMSI creditor priority even over pre-existing security interests in after-acquired property, regardless of notice. 9A V.S.A. § 9-324 comment 3.

One challenge with Green Mountain Bank’s collateral is that its first financing statement would expire after five years if it did not file a continuation statement. 9A V.S.A. § 9-

515. If no continuation statement was filed, the Bank's 2008 financing statement has expired. Its 2010 financing statement is only a PMSI for the office furniture (and its replacement), and would not extend to any other equipment, or the A/R and Inventory. In the event a continuation statement was not filed, this would leave Acme Financing with priority to satisfy its loan with the remaining equipment, after Green Mountain Bank took the office furniture.

If a continuation statement was timely filed which continued Green Mountain Bank's perfected security, the Bank maintains a first-priority security interest in all of the equipment, inventory and accounts receivable of Mansfield and MOM Equipment, with the exception that the Bank already has a PMSI in the office furniture, and with the further exception that Acme Financing has a PMSI in the computer system. Acme Financing would be second in line, behind the Bank, for the remaining equipment, but has no priority over the A/R or inventory collateral.

3. In order for one of the secured lenders to recover the hydraulic lifts from Charlie, Charlie must be someone who is **not** considered a buyer in the ordinary course of business. The fact pattern indicates that the business operations of Mansfield included leasing of construction equipment. The sale of several pieces of equipment to Charlie is plainly outside the scope of the business. 9A V.S.A. § 9-320(a). Charlie, accordingly, takes subject to the interests of the creditors and the lifts are subject to repossession.
4. Either lender may take possession of the property using self-help if the property can be taken into possession without a breach of the peace. 9A V.S.A. § 9-609 (b). If the property cannot be repossessed without a breach of the peace, the property must be taken through Vermont's judicial process. Judicial process, in such a case, would be an action for replevin V.R.C.P. 64.

## Question 6

Driving home on June 5, 2011, Ms. Patience, a Vermont resident, was rear-ended at slow-speed by a car driven by Mr. Davidson, a fellow Vermonter. She was rushed to the emergency room in an ambulance, complaining of back pain. On May 22, 2014, she filed a negligence claim in state court in Vermont against Mr. Davidson, alleging that she sustained severe injuries to her neck and back in the accident, resulting in several rounds of surgery and permanent disability. Mr. Davidson was served with a copy of the complaint and summons on July 7, 2014.

During discovery, Mr. Davidson disclosed an expert witness who opined, to a reasonable degree of medical certainty, that Ms. Patience's back injuries and resulting surgery could not have resulted from the slow-speed accident, but he did not produce a report from the expert. Subsequently, Ms. Patience moved to exclude the expert for failing to provide a report or, in the alternative, to compel the expert to generate a report. In addition, Ms. Patience filed a motion to compel production of all communications between Mr. Davidson's counsel and his expert.

Toward the end of the discovery period, Mr. Davidson served notice of a video-taped "preservation" deposition of his own expert because the expert would be attending a conference during the week of trial. Ms. Patience attended the deposition and her attorney vigorously cross-examined the expert. At trial, Ms. Patience objected to the introduction of the deposition arguing that Mr. Davidson failed to show that his expert was not available to attend the trial.

At trial, Ms. Patience sought to introduce the following pieces of evidence, over Mr. Davidson's objections:

- (a) Testimony by an eye-witness to the accident that, when Mr. Davidson got out of his car to assess the damage after the collision, he exclaimed "I just glanced down at my cell phone for one second – of all the luck!"
- (b) A "day in the life" video showing the extent of Ms. Patience's injuries and the effect they have had on her ability to perform daily activities, which includes audio of Ms. Patience's partner discussing Ms. Patience's injuries and limitations. Her partner is expected to testify at trial.
- (c) Statements made by Ms. Patience to a nurse in the emergency room as recorded in the medical records from the date of her hospital admission following the accident.

1. What should Mr. Davidson do if he believes that Ms. Patience's lawsuit was untimely and what argument(s) should he make? Discuss and analyze.
2. How should the trial court rule on Ms. Patience's discovery motions relating to Mr. Davidson's expert? Discuss and analyze.
3. Is the expert's preservation deposition admissible? Discuss and analyze.
4. Should the trial court admit Ms. Patience's proffered evidence? Discuss and analyze.

## Question 6

### MODEL ANSWER

**1. What should Mr. Davidson do if he believes that Ms. Patience's lawsuit was untimely and what argument(s) should he make? Discuss.**

If Mr. Davidson wants to raise the statute of limitations as a defense, he should include this as an affirmative defense in his Answer. See V.R.C.P. 8(c) (“In pleading to a preceding pleading, a party shall affirmatively set forth and establish . . . statute of limitations, . . . and any other matter constituting an avoidance or affirmative defense.”). “The statute of limitations and other avoidance defenses must be pled as affirmative defenses, or else they are waived.” See *Herrera v. Union No. 39 Sch. Dist.*, 2006 VT 83, ¶ 19. Affirmative or avoidance defenses are “those that admit the allegations of the complaint but suggest some other reason why there is no right of recovery, [or] those that concern allegations outside of the plaintiff’s prima facie case that the defendant therefore cannot raise by a simple denial in the answer.” *Roy v. Woodstock Community Trust, Inc.*, 2013 VT 100A, quoting 5 C. Wright et al., FEDERAL PRACTICE AND PROCEDURE § 1271, at 585 (3d ed. 2004).

Although, an affirmative defense should be raised in a party’s initial responsive pleading, Vermont has taken a flexible approach to V.R.C.P. 8(c). *DaimlerChrysler Services North America, LLC v. Ouimette*, 2003 VT 47, ¶ 5. The Vermont Supreme Court has recognized that the rule is primarily “a notice provision, intended to prevent unfair surprise at trial.” *Merrilees v. State*, 159 Vt. 623, 623, 618 A.2d 1314, 1315 (1992) (mem.). For instance, in *Lillicrap v. Martin*, 156 Vt. 165, 591 A.2d 41 (1990), a medical malpractice action, the Court held that Rule 8(c) did not automatically waive any affirmative defense not promptly pled, but rather that in considering a request to amend the pleadings to add an affirmative defense under V.R.C.P. 15, the trial court must balance the right of a party to adequate notice of the defense asserted against the right of the other party to be heard on the merits.

The statute of limitations for general tort claims is set forth in 12 V.S.A. § 512: “Actions for the following causes shall be commenced within three years after the cause of action accrues, and not after: . . . (4) . . . injuries to the person suffered by the act or default of another person, provided that the cause of action shall be deemed to accrue as of the date of the discovery of the injury[.]” An action is “commenced by filing a complaint with the court.” V.R.C.P. 3. But “[w]hen an action is commenced by filing, summons and complaint must be served upon the defendant within 60 days after the filing of the complaint.” *Id.* Ms. Patience’s lawsuit is not untimely as she filed it within three years of the date of the accident. Though she did not serve Mr. Davidson until after the three year period had run, she did serve him within 60 days of filing, thus he cannot successfully argue that the statute of limitations had run. See *Fercenia v. Guiduli*, 2003 VT 50, ¶ 9 (mem.) (“[I]f the filing of a complaint is to be effective in tolling the statute of limitations as of that filing date, timely service under the Rules of Civil Procedure must be

accomplished. This has long been a requirement of our law.”) (quoting *Weisburgh v. McClure Newspapers, Inc.*, 136 Vt. 594, 595, 396 A.2d 1388, 1389 (1979)).

**2. How should the trial court rule on Ms. Patience’s discovery motions relating to Mr. Davidson’s expert? Discuss.**

Decisions on discovery requests are left to the sound discretion of the trial judge. *Schmitt v. Lalancette*, 2003 VT 24, ¶ 9. In exercising its discretion, the trial court must apply the rules and statutes governing discovery. As provided in Rule 26, the scope of discovery is broad. “Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action.” V.R.C.P. 26(b)(1).

The trial court should deny Ms. Patience’s motion to compel production of an expert report from Mr. Davidson’s expert. A party is entitled to an expert’s final report, if it exists, but Rule 26(b)(4) does not require an expert to generate a report. V.R.C.P. 26(b)(4)(A)(iii). Vermont’s Rules of Civil Procedure are distinctly different from the federal rules in this respect. *Hart v. Progressive Northern Ins. Co.*, 2014 WL 5795279 (Vt. Super. May 20, 2014) (Wesley, J.). Compare F.R.C.P. 26(a)(2)(B) (requiring a written report from witnesses retained or specially employed to provide expert testimony). Provided that Mr. Davidson has made an adequate disclosure of his expert’s opinion and the basis for it, there is no basis to exclude his expert. “A party may through interrogatories require any other party to identify each person whom the other party expects to call as a witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions as to which the expert is expected to testify and a summary of the grounds for each opinion.” V.R.C.P. 26(b)(4)(A)(i). In addition, a party may depose any person who has been identified in an answer to an interrogatory as an expert whose opinions may be presented at trial. V.R.C.P. 26(b)(4)(A)(ii). A party may seek to obtain discovery of an expert’s opinions through interrogatories and is not obliged to incur the costs of a deposition to obtain the information requested. *See Stella v. Spaulding*, 2013 VT 8, ¶ 10.

The court should deny Ms. Patience’s motion to compel production of all communications between Mr. Davidson’s counsel and his expert, to the extent that the communications are protected work product, pursuant to Rule 26(b)(3). However, the trial court should compel production of: (a) communications relating to the expert’s compensation, (b) facts and data provided by Mr. Davidson’s attorney that the expert considered in forming the opinions to be expressed, and (c) any assumptions that Mr. Davidson’s counsel provided to the expert upon which the expert relied on in forming his opinions. V.R.C.P. 26(b)(4)(C).

After ruling on the motions, the trial court should, after an opportunity for a hearing, require the party that did not prevail to pay the prevailing party’s reasonable expenses, including attorneys’ fees, unless the court finds that the other party’s motion or opposition to the motion was substantially justified, or other circumstances exist as would make an award of expenses unjust. V.R.C.P. 37(a)(4).

**3. Is Mr. Davidson’s expert’s preservation deposition testimony admissible? Discuss.**

The deposition testimony is not inadmissible hearsay because the deposition was taken in compliance with law in the course of the same proceeding, and Ms. Patience, against whom the testimony is being offered, had the opportunity and motive to cross examine the expert. V.R.E. 804(b)(1). However, in order for the deposition to be used by Mr. Davidson at trial, the trial court must find that the expert is absent from the trial and Mr. Davidson has been unable to procure the expert’s attendance “by process or other reasonable means.” V.R.C.P. 32(a)(3)(E); V.R.E. 804(a)(5).

Demonstrating that a witness is unavailable within the meaning of Rule 804(a) requires more than just showing that the witness is not present. If Mr. Davidson cannot show that his expert’s attendance could not be secured by process or other reasonable means, the deposition testimony should not be admitted. *See State v. Lynds*, 158 Vt. 37, 40, 605 A.2d 501 (1991). In *Nichols v. Brattleboro Retreat*, 2009 VT 4, the Vermont Supreme Court held that the trial court erred in admitting defendant’s expert’s preservation deposition testimony in a medical malpractice action. The lower court had found that the plaintiffs had waived any objection to the use of the expert’s preservation deposition at trial by failing to raise their objection at the deposition. The Vermont Supreme Court held that the trial court erred by not making the requisite finding that the expert was unavailable as a basis for admission.

**4. Should the trial court sustain Mr. Davidson’s objections and admit Ms. Patience’s proffered evidence? Discuss.**

**(a) Mr. Davidson’s statement**

The trial court should admit the eye-witness’s testimony because the statement is an admission made by a party-opponent. It is an out of court statement being introduced for the truth of the matter asserted but it is not a hearsay statement, per V.R.E. 801(d)(2)(A), because it is Mr. Davidson’s own statement and it is being offered against him. As the statement is not hearsay, the court need not consider whether it would otherwise fall within the excited utterance exception to the hearsay rule. V.R.E. 803(2) (“A statement relating to a startling event or condition made while the declarant was under the stress or excitement caused by the event or condition.”).

**(b) Day in the life video**

The video contains relevant evidence as it shows the extent of Ms. Patience’s injuries and the effect her injuries have had on her ability to perform daily activities. V.R.E. 401 (“Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”). The trial court will need to weigh whether the probative value of the video is outweighed by the danger of unfair prejudice to Mr. Davidson and also whether the video is cumulative of testimonial evidence expected to be provided by Ms. Patience and her partner at trial. V.R.E. 403 (“Although relevant, evidence may be excluded if its probative value

is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”). Ms. Patience’s partner’s statements on the video may also be inadmissible hearsay. To address these concerns, the trial court may permit only those portions of the video that satisfy Rule 403 to be shown and/or allow the video to be shown without the audio.

**(c) Statements in Emergency Room Records**

Ms. Patience’s statements to the E.R. nurse are hearsay and the medical records in which they are recorded are also hearsay but the statements would be admissible to the extent that both pieces of hearsay fall within an exception to the hearsay rule. Under V.R.E. 805, the rule governing the admissibility of double hearsay, “[h]earsay within hearsay is not excluded under the hearsay rule if each part of the combined statements conform with an exception to the hearsay rule provided in these rules.”

Regardless of whether Ms. Patience is available as a witness at trial, her statements to the ER nurse are admissible if they were made for the “purposes of medical diagnosis or treatment and describe[ed] medical history, or past or present symptoms, pain, or sensations.” V.R.E. 803(4).

The medical records would be admissible pursuant to Rule 803(6), as the records of a regularly conducted business activity. To admit them, Ms. Patience would need to provide testimony from the custodian of the medical records that these were accurate, were “made at or near the time” of her admission to the ER, and were kept in the regular course of the hospital’s business as part of its regular practice. V.R.E. 803(6).<sup>1</sup> Although these records are likely admissible, the trial court may rule that they are inadmissible if it finds they are cumulative of other testimony from Ms. Patience. V.R.E. 403.

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<sup>1</sup> “A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12) or a statute or rule permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term ‘business’ as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.” V.R.E. 803(6).