Overview

An update that I missed the last week of June: the Court of Appeals of Virginia withdrew an opinion. On June 21, 2024, in Carmello v. Cockrill, Record No. 1818-22-4 and Carmello v. Cockrill, Record No. 1819-22-4, the CAV "for reasons appearing to the Court" withdrew an opinion that outlined the common law and statutory law regarding obligations of property owners to motorists on public roads related to natural parts of the property such as trees. I neglected to maintain a pdf/local copy of the opinion, so I will have to work from my synopsis to analyze any differences from any new opinion that issues. It is also possible that the CAV resolves this by unpublished order.

The Supreme Court of Virginia issued 1 opinion and 1 published order. Both related to sovereign immunity, and cases involving sovereign immunity have seen an uptick in recent months, it appears. See Justice Kelsey's opinion in Page v. Portsmouth Redevelopment & Housing Authority, Record No. 230521, for a masterclass in the history of sovereign immunity and a finding that the CAV failed to properly apply the approbate-and-reprobate doctrine.

The CAV issued 14 unpublished opinions and 1 published opinion on a short week. In Sechrist v. Com., Record No. 1062-23-3 (published), the CAV determined that even though a court speaks through its orders, where the record is clear that the parties had agreed on a particular deferral statute (§ 18.2-251) which the court accepted and the order referenced another (§ 19.2-298.02), the order is clearly a clerical error. As such, Sechrist did not waive his appellate rights, and the CAV reviewed the merits of his argument.

In unpublished cases, the CAV issued a good mixture of criminal and civil opinions. In the criminal context, the CAV answered sufficiency questions and a myriad of other issues. Review the bolded short summaries for a complete list of the issues analyzed. In Potts v. Com., Record No. 1146-22-2, the CAV ruled that potential impeachment evidence of the primary law-enforcement witness was not material, and thus any late disclosure of the evidence was not in violation of Brady. The CAV did not address whether the knowledge of an officer employed in a different jurisdiction should be imputed to the CA's office. In Hammonds v. Com., Record No. 0667-23-4, the CAV, in a divided panel, reiterated that a jury is not entitled to know about the automatic and administrative penalties for a DUI conviction.

In the civil context, the CAV reviewed the issuance of punitive damages, reversing the circuit court on the same, in RITcon, LLC, v. Doran, Record No. 0416-23-4. The CAV also applied strict construction of Rule 3:21, finding a litigant waived his right to a jury trial by not timely filing his jury demand in Sahadeo v. City of Norfolk, Record No. 0333-23-1. The CAV reiterated that the Bowers rule does not apply if the jury award is the exact amount of a portion of medical damages requested. Popal v. Garg, Record No. 0706-23-4.

SCV Opinions and Published Orders

Page v. Portsmouth Redevelopment & Housing Authority, Record No. 230521: (Kelsey, J.)
Sovereign immunity; Negligence; Demurrer; Plea in bar; Approbate and reprobate
The SCV reversed the CAV's application of the approbate and reprobate doctrine, finding no inconsistencies in Page's position at trial and on appeal. Further, the SCV reversed the finding that sovereign immunity applied to PHRA's demolition of their building, resulting in damage to Page's property, finding that in this instance PHRA was in no different situation than a private landowner.

> Page owns a building in Portsmouth which shared a common wall with a building previously owned by the PRHA. The City of Portsmouth had declared PRHA's building to be an unlawful nuisance, so PRHA demolished their building. Page's claim was that the demolition "was negligently performed and damaged his building's supporting structures" and other portions of his building.
>
> PRHA demurred (subsequently withdrawn) and filed a plea in bar raising soverieng immunity. The defense was based on Portsmouth's "Notice of Emergency Demolition." Had PRHA ignored the notice, PRHA was liable for criminal prosecution and civil penalties under § 36-106. PRHA complied with the notice and hired a private contractor to raze the building.
>
> Page presented 2 arguments against the application of sovereign immunity: (1) "PRHA intended all along to sell the property akin to a private land developer and manipulated the City to issue" the Notice "because PRHA would not be eligible for the block grant funds if the property was not blighted" and (2) PRHA's "malfeasance" caused Portsmouth to declare it an unlawful nuisance, which was not a governmental function and instead "an inept exercise of a proprietary function." PRHA argued that "PRHA's immunity should be exactly the same as that of the City of Portsmouth" because it was simply "obeying the City's Notice of Emergency Demolition." The circuit court agreed with PRHA and granted the plea in bar, dismissing the case.
>
> The CAV affirmed in a panel hearing (en banc was either not pursued or not granted). The CAV found that "Page had conceded in the circuit court that PRHA was acting . . . on behalf of the City." (ellipsis in SCV opinion). Therefore, the CAV found that Page's arguments were barred by the approbate and reprobate doctrine.
>
> The SCV first reviewed the CAV's application of the approbate and reprobate doctrine, reiterating that this doctrine "forbids litigants from 'playing fast and loose with the courts or blowing hot and cold depending on their perceived self-interests.'" (quoting Babcock & Wilcox Co. v. Areva NP, Inc., 292 Va. 165, 204-05 (2016) (internal quotation marks and citation omitted)). The SCV found that the record did not support the CAV's conclusion that Page had conceded that the PRHA was acting in a governmental function. Instead, the CAV specifically "inserted an ellipsis that deleted an important qualifier in the sentence – 'in their proprietary

role.'" Therefore, the CAV failed to acknowledge that while Page did state that PRHA was acting on behalf of Portsmouth, Page repeatedly stated that PRHA was doing so in a proprietary function rather than a governmental function, which would not violate the approbate and reprobate doctrine.

The SCV thus moved to review the merits of Page's arguments, finding that "the unique facts of the case" determine that sovereign immunity does not apply. "[A] municipal redevelopment and housing authority can be held liable in tort while engaging in proprietary functions but not governmental functions." (citing VEPCO v. Hampton Redev. & Hous. Auth., 217 Va. 30, 34 (1976)). The SCV conducts a thorough analysis of the various findings of governmental vs. proprietary functions throughout the years.

"[W]hen applying sovereign-immunity principles . . . courts must look behind [a party's] declarations 'to ascertain the **true nature** of the functions.'" (quoting VEPCO, 217 Va. at 35 (emphasis in SCV opinion)). "Under any interpretation . . . the operation and maintenance of a municipal housing project would be classified as proprietary." (quoting the same). The SCV distinguished this case from Lee v. City of Norfolk, 281 Va. 423 (2011), finding that it is important who actually demolishes the building. In Lee, it was Norfolk that demolished the building, "pursuant to its traditional police power" whereas in the instant case, it was PRHA. When Portsmouth issued the Notice, PRHA was no different "than any other private landowner that owned a dilapidated building constituting an unlawful public nuisance."

Commentary: While all SCV cases should be read by practitioners, Justice Kelsey's opinions are notable in particular because they are a lesson/essay on the history and application of whatever legal theory is analyzed.

School Board of Stafford County v. Sumner Falls Run, LLC, Record No. 240352 and Virginia Dep't of Transportation v. Sumner Falls Run, LLC, Record No. 240353: (Published Order)
§ 8.01-670.2; Sovereign immunity; Declaratory judgment; Doctrine of necessity; Eminent domain
In a published order, the SCV reversed the circuit court and found that sovereign immunity did apply as it related to VDOT. The SCV held that the Sumner Falls's claims were not yet ripe, as no Taking had occurred, but remanded the case for evidence regarding the doctrine of necessity.

Sumner Falls was concerned about the potential adverse effects of the construction of 2 new schools in Stafford County regarding Sumner's easements and valuation of property. Sumner filed for declaratory judgment of 4 declarations that Sumner believed would protect its interests, including a declaration that the schools may not extend "the current easement" as it would "violate the doctrine of necessity."

In response, the School Board and VDOT filed a plea of sovereign immunity. The circuit court denied the plea. Relying on § 8.01-670.2, Sumner appealed the interlocutory decision.

The SCV reversed the circuit court, stating that the "language of the Declaratory Judgment Act . . . does not expressly waive sovereign immunity." The SCV also abrogated a separate circuit court decision (Pritchett v. Petersburg City Council, 103 Va. Cir. 270 (Petersburg 2019)), upon which the circuit court herein relied. The SCV stated that Pritchett "cannot be reconciled with [the SCV's] precedent." (n.1).

The SCV explained that, provided the cause of action is justiciable, where "a constitutional provision is self-executing, 'sovereign immunity does not preclude declaratory and injunctive relief.'" (quoting DiGiacinto v. Rector & Visitors of George Mason Univ., 281 Va. 127, 137 (2011)). As they pertained to VDOT, Sumner's claims did not "implicate a self-executing provision of the Virginia Constitution." Therefore, the SCV held that the circuit court should have granted the plea of sovereign immunity.

"With respect to the School Board, the answer is more complex." The SCV conducted a brief review of whether the School Board has committed a taking at this point. The SCV found, "No taking has yet occurred." So, Sumner's claims should be dismissed in part. However, the SCV remanded for further evidence regarding Sumner's claim "that the School Board plans to take more of its property than is necessary." As such, the SCV reversed the circuit court in part and remanded with instruction to dismiss the claims against VDOT as unripe and to take further evidence related to the doctrine of necessity claims against the School Board.

Commentary: My initial concern upon reading of the reversal was that there must be some mechanism for declaratory judgment regarding the eminent domain and doctrine of necessity issues. Obviously, my concern was dispelled upon reaching the conclusion of the case, as well as Footnote 2: "Code § 8.01-187 plainly authorizes declaratory judgment actions in eminent domain proceedings" but "that statute does not contemplate a declaratory judgment that is based on future or speculative facts." As we learn in the conclusion (and potentially should have learned in the beginning of the order, the SCV is simply stating that most of Sumner's claims are not yet ripe. However, it remanded for evidence related to the doctrine of necessity claim.

CAV Published Decisions

Sechrist v. Com., Record No. 1062-23-3: (Friedman, J., writing for Chaney and Lorish, JJ.)
Fourth Amendment motion to suppress; CAV jurisdiction; § 18.2-251; § 19.2-298.02; Deferred disposition; Waiver of appellate rights; Consensual encounter; Legal concessions; Video not admitted into evidence; Scrivener's error; Alternative grounds
Sechrist did not waive his right to appeal where all parties had agreed to proceed under § 18.2-251 but the circuit court's order referenced § 19.2-298.02. The CAV found no Fourth Amendment violation where officers had reasonable suspicion to believe Sechrist had weapons on him, and Sechrist voluntarily gave the officers his methamphetamine. Remanded to correct the circuit court's scrivener's error.

> Deputies Martin and Elgin were dispatched to Sechrist's mother's house to conduct a well-being check on Sechrist, as he "was reportedly trying to commit suicide." Martin and Elgin entered the house with permission, and Sechrist came downstairs voluntarily to speak with the deputies in the living room. Sechrist had a knife, and Martin asked that Sechrist give the knife up. Martin was still worried about concealed weapons and "went to pat Sechrist down to make sure he didn't have any other weapons that could possibly harm himself or [the deputies]."
>
> During the pat-down, Martin "felt a bulge in Sechrist's pocket" and asked about it. But, Sechrist did not respond, so Martin "went into Sechrist's pocket to identify the object." It was a sock, but Martin felt something within the sock. Before Martin opened the sock, Sechrist stated "that he had found the meth pipe that was in the sock on the side of the road." Martin confirmed that it was a pipe commonly used to smoke methamphetamine. Additionally, Sechrist had voluntarily given Elgin "a sunglass bag that had been in Sechrist's back pocket" which contained methamphetamine. Sechrist never objected to the search but also had not given affirmative consent, but no search was conducted when Sechrist gave Elgin the sunglass bag.
>
> Sechrist moved to suppress the evidence, but the circuit court denied the motion, finding that there was no "problem at all with the initial search" and ruling that the search did not go "too far." Further, the circuit court found that there was no detention, and the officers acted reasonably "based on the totality of the circumstances."
>
> After the suppression, Sechrist pleaded not guilty but stipulated to facts sufficient, requesting a "deferred disposition as a first-time offender." Sechrist was "trying as best he can to preserve his appellate rights." There was no mention of Code § 19.2-298.02 and instead all parties referenced § 18.2-251 (first offender's disposition). "Months after the hearing, the court entered a written order on a pre-printed form deferring disposition pursuant to Code § 19.2-298.02." Ultimately, Sechrist was convicted for failing to abide by his conditions.

The CAV first conducted an analysis of whether Sechrist's deferral proceeded under 251 or 298.02. Importantly, 251 allows for a potential appeal, while 298.02 "clearly imposes a waiver of appellate rights." The CAV distinguished the two statutes and found that "when the General Assembly has used specific language in one instance, but omits that language or uses different language . . . elsewhere in the Code, [appellate courts] must presume that the difference in the choice of language was intentional." (quoting Zinone v. Lee's Crossing Homeowner's Ass'n, 282 Va. 330, 337 (2011)).

Notwithstanding that a court speaks through its orders, the CAV found sufficient evidence to rebut that presumption. (citing Dir. Of the Dep't of Corr. V. Kozich, 290 Va. 502, 511 (2015) (citation omitted)). Because "the record flatly contradict[ed] the order referencing deferral under Code § 19.2-298.02" the CAV held that Sechrist did not waive his appellate rights. Instead, the order entered by the circuit court was "a scrivener or clerical error." (citing Guba v. Com., 9 Va. App. 114, 118 (1989)).

Moving toward the analysis on the merits, the CAV found no error in the denial of the motion to suppress. The CAV conducted a thorough review of Fourth Amendment pat-downs and reasonableness. The CAV found that the officers maintained reasonable articulable suspicion that Sechrist may have been a danger to himself or others. The CAV remanded solely to correct the scrivener's error regarding the deferred disposition code section under Code § 8.01-428.

Commentary: This case, while seemingly minor, also discusses the need for the Commonwealth or the Defense to move videos into evidence. There was BWC footage played at the motion to suppress, but "[t]his footage . . . was never admitted into evidence and is not part of the record on appeal." Failing to move the video into evidence precludes the CAV from reviewing it. Now, Meade v. Com., 74 Va. App. 796 (2022), *does require the CAV to defer to the circuit court's interpretation of the video, but if the circuit court's interpretation is wholly unreasonable, then the CAV could step in. They cannot do so if the video is not properly in the record.*

Some dicta in Footnote 5 states that even if Sechrist had proceeded under § 19.2-298.02, the record did not demonstrate that the circuit court had notified Sechrist that such a deferral would have waived his appellate rights. I absolutely agree that 298.02 requires that "the court shall notify" the defendant of such waiver. However, the statute does not outline the remedy of a violation of this subsection/provision. Because there is no specific remedy, this "shall" is directory rather than mandatory. See Rickman v. Com., 294 Va. 531, 537 (2017). "A shall command in a mandatory statute carries with it a specific, exclusive remedy" but "a shall command in a directory statute carries no specific, exclusive remedy." Id.

In these types of cases, the courts have "discretion in fashioning a tailored remedy if one is called for at all." Rickman, 294 Va. at 537. While I agree that here, Sechrist had not waived his appellate rights and had no reason to believe he was waiving

his rights, there are other situations that are implicated. For instance, had the parties all agreed at the plea hearing that the proper deferral was under § 19.2-298.02, and Sechrist signed a form (not prepared by the Court but by counsel) and the form indicated that he was waiving his appellate rights. I don't think it would be an abuse of discretion to find that the defendant was aware that he was waiving his appellate rights, even though the circuit court was not necessarily the one to advise him of that waiver. Food for thought, until the General Assembly amends and makes a clear remedy for a failure of advisement.

CAV Unpublished Decisions

Perez v. Com., Record No. 1945-22-3: (Friedman, J., writing for Ortiz and White, JJ.)
Submission on brief; Parties waived oral argument; Sufficiency; Hypotheses of innocence; Fourth Amendment waiver
The CAV found that the evidence presented was sufficient for a factfinder to reject all Perez's proposed hypotheses of innocence regarding his PWID conviction, where officers searched the house prior to Perez's arrival and found no narcotics, then located narcotics directly underneath where Perez was sitting.

Officer Moss discovered a small amount of methamphetamine during a search of a vehicle. The driver of the vehicle told Moss that he obtained the methamphetamine from McMillian, a known drug user who had previously waived his Fourth Amendment rights as part of probation. Officers searched McMillian's house and found paraphernalia and marijuana but no other narcotics. Officers asked McMillian if he could get his distributor to bring more narcotics to the house. McMillian contacted Perez, who advised "that he was on his way." The officers concealed themselves and waited for Perez's arrival.

Perez was driven to McMillian's house by Perez's wife. When Perez arrived, he went into the house and McMillian shut the door. The vehicle remained running with its headlights on. Officers observed Perez "rolling a knotted plastic baggy containing a crystal substance." Officers entered the house and located a baggy under the couch. The baggy contained 26.89 grams of methamphetamine. Officers found the bag "directly underneath where Perez had been sitting and in the area [where] . . . Perez [bent] over."

Perez submitted evidence that he went to "McMillian's house to talk about a tattoo." Perez's wife testified that she turned off the vehicle and its lights, prepared to be in the vehicle for some time while Perez got the tattoo. The circuit court denied Perez's motions to strike, and the jury convicted Perez of PWID Sch. I/II.

The CAV found no reason to disturb the jury's findings of fact. Sufficient evidence was presented that Perez had brought the narcotics into McMillian's house. The jury's rejection of Perez's hypotheses of innocence was not plainly wrong or contradictory to the evidence.

Commentary: The parties submitted the appeal on the briefs without oral argument, which is rare. Normally, even if the appellant waives oral argument, the Commonwealth does not.

Phoenix v. Com., 1915-23-1: (Per Curiam Opinion: Fulton, Lorish, and White, JJ.)
Probation revocation; Findings of fact; Rule 5A:18
No abuse of discretion where probation violation was well-founded and revocation of sentence was within the statutory maximum. The CAV reiterated that circuit courts do not have to make specific findings of fact absent a statutory requirement to do so.

The CAV rejected Phoenix's appeal without oral argument, finding it was "wholly without merit." Code § 17.1-403(ii)(a); Rule 5A:27(a). Phoenix originally pleaded guilty to possession of narcotics and child neglect. Phoenix violated her probation in 2022, and a second Major Violation Report was issued in 2023 because Phoenix had incurred a new drug conviction.

At the revocation hearing, Phoenix presented mitigating evidence that her relapse was isolated to the anniversary of her father's death. She was also pregnant and would not be released until well after her child was born. Phoenix admitted her drug addiction and requested treatment in a Richmond facility. She desired to get clean for her children but admitted that she continued to use narcotics while pregnant. The circuit court revoked her suspended sentences and imposed an active sentence of two years and six months.

As stated above, the CAV affirmed without oral argument because there was no abuse of discretion in the revocation of probation nor the sentence imposed. Phoenix also argued that the failure to make specific findings of fact "violated public policy, due process, and the rehabilitative nature of probation violations." The CAV reiterated that "absent a statutory requirement to do so, a trial court is not required to give findings of fact and conclusions of law." (quoting Bowman v. Com., 290 Va. 492, 500 n.8 (2015) (citation omitted)). Further, Phoenix did not object on this ground in the circuit court and further did not argue that the CAV should exercise either of the exceptions to Rule 5A:18.

Commentary: This is yet another situation of probation revocations where the CAV refuses to cite to Lawlor v. Com., 285 Va. 187 (2013), regarding an abuse of discretion. For those who don't know, Lawlor is one of the most cited cases for appellants raising an abuse of discretion, because Lawlor identifies 3 major ways a court abuses its discretion in the criminal context that previously had been cited in the civil context: (1) "when a relevant factor that should have been given significant weight is not considered"; (2) "when an irrelevant or improper factor is considered and given significant weight"; and (3) "when all proper factors, and no improper ones, are considered, but the court, in weighing those factors, commits a clear error of judgment." Lawlor (pincite omitted) (quoting Landrum v. Chippenham & Johnston-Willis Hosps., Inc., 282 Va. 346, 352 (2011)).

Instead, as it normally does, the CAV cited to Grattan v. Com., 278 Va. 602 (2009) (probably the most cited to case in a Commonwealth brief on abuse of discretion). "An abuse of discretion has occurred' only where 'reasonable jurists could not differ' about the correct result." (quoting Grattan, 278 Va. at 620 (in turn quoting Thomas v. Com., 44 Va. App. 741, 753 (20045))).

Without reading Phoenix's brief, I cannot say for sure that her counsel cited to Lawlor, but it is a seminal case on the issue of abuse of discretion and the weighing of mitigating factors. However, in the context of probation revocations, appellants' continued reliance on Lawlor is unlikely to be fruitful. I do not say this to dissuade counsel from citing to and quoting Lawlor, and Lawlor is still extremely important in evaluating whether a circuit court abused its discretion. The case must be addressed in some form or fashion.

Brown v. Showalter, et al., Record No. 1637-23-3: (Per Curiam opinion: Decker, CJ., O'Brien and Causey, JJ.)
Personal injury; Timely service; § 8.01-275.1; Rule 3:5(e); Due diligence; Definition of "due diligence"
Brown's failure to perfect service on his complaint was not explained away by due diligence where Brown delayed amending his complaint to include the correct address for several months after being notified of the error. A circuit court's finding regarding "due diligence" is factual in nature and owed deference.

The CAV rejected Brown's appeal without oral argument, finding it was "wholly without merit." Code § 17.1-403(ii)(a); Rule 5A:27(a). The CAV further found that "the dispositive issue or issues have been authoritatively decided" and the appellant "has not argued that the case law should be overturned, extended, modified, or reversed." Code § 17.1-403(ii)(b); Rule 5A:27(b).

Brown filed a complaint against Showalter for a personal injury claim as well as property damage on December 27, 2021, listing an address for Showalter. Nearly a year later, Brown requested service, which returned as "not found." 6 months later, service was obtained on Showalter at a slightly different address, indicating that the Complaint contained a typo. Showalter moved to dismiss the Complaint because of untimely service as required by § 8.01-275.1 (service is required within 12 months of filing the complaint).

Brown asserted that the failure to perfect service was caused solely by "a scrivener's error" and "that it was reasonable for him to wait before trying again because the insurer filed a demurrer and Brown anticipated amending the complaint." The CAV stated "diligence means devoted and painstaking application to accomplish an undertaking." (quoting Dennis v. Jones, 240 Va. 12, 19 (1990) (citation omitted)). Further, the CAV reiterated that diligence "is a factual question"

and the circuit court's finding of diligence (or lack thereof) must be given deference.

The CAV found that the record supported the circuit court's finding that Brown did not act with due diligence to obtain service. While the simple typographical error was almost definitely the cause of the initial lack of service, Brown had 4 more months to perfect service before the deadline, and he failed to do so. Further, the CAV stated that actions related to one defendant do not impact the perfection of service on a separate defendant.

Corpin v. Fredericksburg DSS, Record No. 1210-23-2 and Laboy v. Fredericksburg DSS, Record No. 1440-23-2 (consolidated cases): (White, J., writing for Decker, CJ., and Raphael, J.)
Termination of parental rights; § 16.1-283(C)(2); Best interests of the child; Submission on briefs; Waiver of oral argument
No error in terminating parental rights under § 16.1-283(C)(2) for failure to remedy the conditions necessitating the foster care placement where Mother and Father repeatedly refused to improve their mental health treatment/medication and failed to abide by DSS's treatment plan.

Appellants are Mother and Father of a minor child. Mother and child (2 years old at the time) were traveling from Florida to New York when Mother "tried to access" the Marine base at Quantico. Mother was "seeking protection from people who were out to get her and the child . . . claiming that the NSA had instructed her to go to the Pentagon." Mother also stated that her child was "the Messiah" and that the mother's blood "was rare and could cure diseases," requesting that the blood be given "to a physicist." A Marine officer "discovered that the child had been laying in urine and feces for some time" and also found "a roach infestation in the car."

The officer called Father, who stated that Mother "was severely bipolar" and admitted that there was another child "who was removed by Florida Child Protective Services." Father later spoke to "a family services specialist" and confirmed that Mother "goes through these manic episodes in a six-month cycle," and further stated that Mother was "violent in many of these episodes, even to the point of strangling" Father.

DSS got involved and created a compliance course of psychological evaluations and parenting capacity evaluations, as well as couples counseling. Father relocated to Spotsylvania county to reside with Mother, who had been released from the hospital. Mother and Father were attentive to their meetings with DSS and their couples counseling therapist. Mother and Father "consistently participated in visitation with the child."

After the child was placed in foster care, Mother was "very adamant that she was not willing or wanting to be put on medication." Mother's mental health also deteriorated quickly when her child in foster care (in Florida) died in an accident in 2022. Mother continued in the manic cycling that Father had previously identified.

> Father said "that he was willing to relinquish seeing the child and to leave the area just to avoid having any further contact with" Mother. "Father told the Department he was able to see into the future . . . and feel and know when . . . bad things were going to happen."
>
> DSS found that both Father and Mother were failing to meet DSS's standards and plan for treatment. JDR terminated parental rights, and after an appeal, the circuit court did the same under § 16.1-283(C)(2), which states that the parents have been unwilling or unable "to remedy substantially the conditions which led to . . . the child's foster care placement."
>
> The CAV affirmed, reiterating that "Subsection C termination decisions hinge not so much on the magnitude of the problem that created the original danger to the child, but on the demonstrated failure of the parent to make reasonable changes." (quoting Yafi v. Stafford Dep't of Soc. Servs., 69 Va. App. 539, 552 (2018) (citation omitted)). The CAV found that the record supported the circuit court's conclusions.

Humphrey v. Com., Record No. 1301-23-1: (Huff, J., writing for O'Brien and Athey, JJ.)
Conditional guilty plea; Fourth Amendment suppression; Reasonable articulable suspicion
The CAV affirmed Humphrey's conviction and found that the officers conducted a consensual encounter that only ended after Humphrey tripped while leaving, which exposed "an angular shaped item" that officers believed to be a firearm. That belief was reasonable and articulable, allowing a pat-down, which located a firearm on Humphrey's person.

> Sergeant Roys was conducting a foot patrol on the oceanfront. He observed Humphrey "with another man who had an outline of a firearm visible through his clothing." The man denied having a firearm, and Roys and another officer, Walker, detained him, finding a firearm. Humphrey began walking away, but Walker asked if he also had a firearm. Humphrey said "nah, I'm good." Walker asked for permission to pat Humphrey down, but Humphrey simply repeated his prior statement.
>
> When Humphrey moved away, he tripped over a sign, and Walker "saw an angular shaped item" which Walker believed to be a firearm. Walker ordered Humphrey to stop, and, when he didn't, Walker handcuffed Humphrey "and removed a gun from his waistband."
>
> Humphrey moved to suppress the firearm based on a lack of reasonable articulable suspicion (RAS). The circuit court denied the motion, and Humphrey entered a conditional guilty plea, reserving the right to appeal the motion to suppress.
>
> The CAV affirmed, finding that the initial encounter was consensual. The consensual counter ended only after Humphrey tripped, "revealing the outline of a firearm on his person." Only at that point did the encounter become "an investigatory detention" which required RAS. The CAV reiterated that RAS is not eliminated simply because "noncriminal explanations . . . would rationally explain

his observed behavior." In fact, "reasonable suspicion need not rule out the possibility of innocent conduct." (quoting United States v. Arvizu, 534 U.S. 266, 277 (2002)). "Instead, the standard 'requires only a moderate chance of finding evidence of wrongdoing.'" (quoting Shifflett v. Com., 58 Va. App. 732, 736 (2011) (citation omitted)). Therefore, there was no reason to overturn the circuit court's denial of the motion to suppress or reverse Humphrey's convictions for possession of a firearm by a violent felon or carrying a concealed weapon.

Potts v. Com., Record No. 1146-22-2: (Decker, CJ., writing for Fulton and Ortiz, JJ.)
Sufficiency; Brady material; Giglio material; Impeachment evidence; Imputation of knowledge to prosecution; Multi-jurisdictional offense; Rule 5A:18
Potts failed to demonstrate the materiality of impeachment material regarding a law-enforcement witness obtained from the Commonwealth the day after the jury trial concluded. The CAV found the witness's actions would have had only a slight impact at trial.

Detective Sprouse (Chesterfield County Police Department) began investigating Potts for possession with the intent to distribute (PWID). Sprouse used a confidential informant to meet with Potts and surveilled Potts along with other detectives. Sprouse conducted this investigation for several months at multiple locations. Eventually, Sprouse obtained search warrants for Potts's residence in Chesterfield County, an apartment in Richmond, and Potts.

Potts was found in his vehicle, and a search of Potts/his vehicle located $20,320 in cash, a pistol with an extended magazine, and 2 cell phones. In his Chesterfield residence, officers found $85,000 in cash, baggies with residue, and the boxes for two firearms. In the Richmond apartment, officers "found numerous items there that connected [Potts] to the apartment" as well as drug packaging paraphernalia, multiple firearms, and four different Schedule I/II substances (fentanyl, methamphetamine, cocaine, and psilocybin). The narcotics totaled approximately $75,000 in street value.

At his Richmond trial, Potts denied possession of the narcotics and presented a defense that the lessee of the apartment was the owner of the narcotics. A jury convicted Potts of four counts of PWID and four related charges of possessing a firearm with PWID. Potts was sentenced to 100 years incarceration, with 65 suspended.

The day after the Richmond conviction, "the prosecutor notified defense counsel of impeaching evidence about Detective Sprouse." The impeachment evidence related to Sprouse's actions the week before trial where he added "information to several already-issued search warrants in an unrelated drug case." Sprouse had applied for seven search warrants, which the magistrate granted. The affidavits "contained all necessary information, but the warrants themselves were blank in the section for describing the property, objects and/or persons to be searched for." After the magistrate signed the warrants, officers executed them. Prior to filing them in the

circuit courts, Sprouse noticed that the warrants were missing that information and added them in "us[ing] a search warrant template and a printer."

The Richmond Commonwealth's Attorney spoke to Sprouse on the day he modified the search warrants and asked him whether there was "any information that might affect his credibility." Sprouse denied any impeachment evidence and never notified the office that he modified the search warrants. During Potts's trial, a magistrate noticed the error in the unrelated case and notified the police department. Potts admitted to the police that he had changed the warrants stating, "I thought I was correcting a clerical error." The Commonwealth's Attorney for Potts's case was advised of Sprouse's comments and immediately told Potts's attorney. Shortly after, Sprouse either resigned from the department or was fired as a result of his actions.

Potts moved for a new trial based on the impeachment evidence, arguing that because Sprouse was the Commonwealth's primary witness, testifying as both an expert and a fact witness, the impeachment evidence would have changed the outcome of the trial. First, the circuit court found "that knowledge of the impeachment evidence was not imputed to the Richmond" Commonwealth's Attorney's office because Sprouse was employed in a separate jurisdiction. Second, the circuit court found no materiality, such that disclosing the evidence would not have "led to a different result at trial" because Sprouse "primarily just placed [Potts] at the Richmond apartment which was clearly established anyway."

The CAV found that Potts failed to meet his burden to demonstrate reversible error. The CAV limited its analysis to reviewing whether nondisclosure "prejudiced the defendant." In doing so, it expressly did not review the imputation of knowledge question regarding separate jurisdictions. Instead, the CAV found that the transference of "information contained in the affidavits into the appropriate blanks on the search warrant" did not rise to evidence that would have more than a slight impact. (Citing Lemons v. Com., 18 Va. App. 617, 620 (1994) (holding that a mere lessening of confidence in the outcome does not meet the materiality standard)). Some of Potts's arguments were barred from appellate review under Rule 5A:18 and 5A:20.

The CAV also found sufficient evidence to attribute the narcotics located in the Richmond apartment to Potts. Potts's items in the Richmond apartment provided circumstantial evidence for a jury to find, at the very least, joint constructive possession of the narcotics. The CAV found a significant amount of circumstantial evidence that Potts knew the nature and character of the substances in the Richmond apartment and thus found no error in the jury's conviction.

Popal v. Garg, Record No. 0706-23-4: (Callins, J., writing for Athey and Causey, JJ.)
Admissibility of evidence; Motion to set aside the verdict; Bias; Jury instructions; Rule 5A:18; Bowers rule
The CAV found that the Bowers rule did not apply where the jury awarded the exact amount of a portion of Popal's requested special damages; therefore, the award was not insufficient as a matter of law. No issue in the limitation of testimony of Dr. Moshirfar nor in instructing the jury to disregard portions of Dr. Moshirfar's testimony. Popal failed to properly preserve several arguments under Rule 5A:18.

> Garg rear-ended Popal in a vehicle collision. Emergency services responded and examined the parties but did not transport anyone from the scene. Popal sought medical treatment for his neck 3 days after the incident, and the doctor prescribed over-the-counter pain medication. Popal was 18 years old at the time.
>
> 3 months later, Popal again complained of neck pain and was referred to physical therapy and a spine specialist. Popal only attended 2 therapy sessions before stopping for 6 months until he had 4 more appointments. 2 years after the collision, "Popal received trigger point injections to his neck."
>
> At trial, the circuit court did not allow Popal to discuss causation of his neck pain, finding that "there was no foundation laid for Popal to address causation" and that such an opinion "intruded into the medical realm." The circuit court required Popal to answer cross-examination questions on "the total billed medical expenses related to his neck injury" which "totaled $4,545."
>
> Popal's medical expert, Dr. Hasz, testified that Popal's total medical bills for future surgeries could be between $20,000 and $60,000 but admitted that one surgery that might alleviate Popal's pain could cost as little as $2,500 to $4,000. Garg's medical expert, Dr. Moshirfar, testified that Popal needed no more treatment and that Popal suffered a minor neck sprain/strain.
>
> The circuit court limited Dr. Moshirfar's testimony, sustaining multiple objections regarding Popal's MRI results. The circuit court issued several instructions to the jruy "to disregard Dr. Moshirfar's statements regarding the MRI results," and in its second instruction, the circuit court "cautioned the jury against holding such error against the witness." The jury confirmed it could disregard the testimony. The circuit court, over Popal's objection, instructed the jury that Popal had an obligation to mitigate his damages.
>
> The jury asked 2 questions in deliberation: (1) asking whether the MRI record was admissible because the results were not part of the documents provided; and (2) "what type and how many trigger point injections Popal received." The circuit court responded simply that the jury "must base their verdict on the evidence received . . . in accordance with the instructions of the court." The jury awarded Popal $4,545. The circuit court denied Popal's motion to set aside the verdict, which was substantially based upon the same reasons Popal raises on appeal.

The CAV dispensed with several of Popal's arguments for failing to properly preserve them in the circuit court, pursuant to Rule 5A:18. Popal's preserved arguments related to the exclusion of Popal's testimony regarding causation of injury, the jury instructions, and the potential application of the Bowers rule. The CAV found no abuse of discretion on the exclusion of testimony, as it was outside the scope of a layperson's knowledge. Further, the CAV specifically stated that "a plaintiff's testimony of his physical condition before and after an incident permits a fact-finder to make a causal inference." (distinguishing Sumner v. Smith, 220 Va. 222 (1979)).

On the jury instructions, the CAV found no issue with the limiting instructions regarding Dr. Moshirfar's testimony, stating, "[W]e presume that a jury follows an explicit cautionary instruction given by the trial court." (quoting Riner v. Com., 268 Va. 296, 317 (2004)). The CAV affirmed the denial of the motion to set aside the verdict and order a new trial because the record did not demonstrate that the jury disregarded the circuit court's instructions. The CAV also found no abuse of discretion in the circuit court's instruction on the potential failure to mitigate. The CAV found that Dr. Moshifar's testimony provided more than a scintilla of evidence that with proper follow-ups and "diligent physical therapy," Popal's pain would have subsided in 8 weeks.

Finally, the CAV engaged with Popal's argument that the jury verdict was insufficient as a matter of law under Bowers v. Sprouse, 254 Va. 428 (1997). Bowers asserted that when a verdict is "for the exact amount of the plaintiff's medical expenses and other special damages" it is insufficient as a matter of law. Id. at 431. However, the CAV distinguished Bowers and followed Walker v. Mason, 257 Va. 65 (1999), which stated that when "the amount of the verdict corresponds to an identifiable portion of the special damages" the Bowers rule does not apply. Id. at 68. Therefore, because the verdict was the exact amount of his prior medical bills and did not include Popal's requested future medical treatment and his other requested special damages, the verdict was not insufficient as a matter of law.

Hammonds v. Com., Record No. 0667-23-4: (Athey, J., writing for Callins, J.; Dissenting opinion written by Causey, J.)
DUI; Scrivener's error; § 8.01-428; Jury instructions; Waiver of assignment of error; Rule 5A:20
A divided panel found that the circuit court was not required to instruct the sentencing jury of the automatic results of a DUI conviction (suspension of license and ASAP). Judge Causey would have reversed for new sentencing and required the instruction. No errors in the sufficiency of the evidence or the inclusion of Trooper Bonnet's testimony explaining why he did not obtain a search warrant for Hammonds's blood.

Hammonds was speeding on I-395 when Trooper Bonnet noticed her vehicle. Bonnet paced Hammonds's car at 79 mph in a 55-mph zone. During the pursuit, Hammonds accelerated to 95 mph. Hammonds also "failed to maintain her lane" and "tailgated the vehicle in front of her." Eventually, Hammonds stopped her

vehicle, and Bonnet approached her. Bonnet noticed the odor of alcohol, glassy eyes, and other indicia of intoxication.

Hammonds repeatedly refused to provide identification and appeared confused throughout the interaction. Hammonds performed poorly on SFSTs. Bonnet arrested Hammonds for DUI and performed an administrative search on the vehicle, finding two bottles of Hennessy, one of which was half-full and within reach of the driver's seat. En route to the magistrate, Hammonds admitted drinking Hennessey and stated, "I'm drunk" and "I fucked up."

At trial, Hammonds's counsel solicited testimony from Bonnet about whether Bonnet knew how to obtain a blood draw. Then, Hammonds's counsel asked, "Why didn't you get a warrant for her blood?" Bonnet responded that Hammonds was "uncooperative" and referenced that Bonnet had taken Hammonds to do a breath test. Hammonds objected because she had been acquitted of unreasonable refusal previously. The circuit court ruled that Hammonds had opened the door and permitted Bonnet to testify about why he did not obtain a search warrant for Hammonds's blood. Bonnet stated that he "chose not to go with a blood draw or attempt to have Ms. Hammonds do the Intoxilyzer machine because she had been uncooperative, and he did not think it was prudent" to obtain the search warrant.

Hammonds testified in her own defense and explained her behavior as nervousness about interacting with law enforcement and fear regarding COVID-19. She explained her version of her statements and admitted that she had purchased the two bottles of Hennessey earlier that day. The circuit court denied her motions to strike, and the jury convicted Hammonds of DUI.

The circuit court heard argument on sentencing jury instructions. Hammonds proffered Sentencing Instruction P, which identified the statutory penalties of DUI, such as the revocation of Hammonds's driver's license and the completion of VASAP. The circuit court declined to inform the jury of these statutory penalties. During sentencing deliberation, the jury specifically asked if Hammonds would lose her license, and "if so, for what period of time?" The circuit court declined to inform the jury of the mandatory suspension because "it's not a simple yes answer" and "there are certain what-ifs involved in this." The jury returned a total sentence of 7 days in jail and $800 in fines for her convictions. The circuit court suspended all incarceration and all but $250 of the fines.

The CAV quickly dispensed with Hammonds's arguments regarding the sufficiency of her convictions. In doing so, the CAV reiterated that "a defendant's admission that she consumed several alcoholic beverages, together with . . . the defendant's appearance and lack of coordination, is sufficient to support a conviction for driving under the influence of alcohol." (quoting Hogle v. Com., 75 Va. App. 743, 754 (2022)). The CAV also found that Bonnet's testimony did not comment on Hammonds's innocence regarding unreasonable refusal of a breath test, finding that it was "proper rebuttal evidence as it addressed a material issue raised by

Hammonds's cross-examination" regarding whether Bonnet understood the procedures to obtain a search warrant for blood.

On Sentencing Instruction P, the CAV found no abuse of discretion in denying the instruction. The CAV reiterated "a jury is not permitted to consider what may happen to a defendant after the jury reaches its verdict." (quoting Booker v. Com., 276 Va. 37, 41 (2008)). The mere fact that a DUI conviction suspends a defendant's driver's license "is not part of the determination of sentence that the fact finder must make." Further, the CAV found that "[i]nforming the jury about the mandatory driver's license suspension for DUI merely invites speculation about the consequences of a conviction other than incarceration or a fine."

Causey, J., dissenting: Judge Causey would have reversed solely on the issue of Sentencing Instruction P and remanded for new sentencing proceedings. Judge Causey states that because Instruction P accurately stated the law regarding the mandatory punishment of a DUI conviction, the circuit court should have issued the instruction. Specifically, Judge Causey found that Instruction P "furthers the goal of truth in sentencing."

Jackson v. Com., Record No. 0652-23-2: (Beales, J., writing for Callins, J., and Clements, SJ.)
Sufficiency; Doctrine of necessity; Self-defense; Imminent danger; Jury instructions
No error in instructing the jury on the definition of "imminent danger" where the instruction was a correct statement of law and could help the jury understand the self-defense instruction given at Jackson's request. Sufficient evidence presented to convict Jackson of unlawful wounding and possession of a firearm by a violent felon.

Jackson's mother-in-law (Chavis) lived in a townhome neighborhood, and on January 2, 2021, new neighbors were moving into a townhome next-door to Chavis. Chavis and the people helping the neighbors move in got into an argument, and Jackson's wife (Ariel) arrived. Ariel began arguing with the other individuals, as well. Shortly after, Jackson arrived with two children in his car. One of the people helping the neighbors move in was Parham, who was not involved in the arguments and was "standing around the U-Haul truck . . . with his back turned away from the other members of the group." Jackson was standing "several parking spots away from the U-Haul."

"Jackson suddenly walked toward Parham, pulled out a firearm, and placed the firearm to the back of Parham's head." Parham struggled with Jackson before Parham was able to run away. "Gunfire then erupted as the group dispersed." Parham was shot in the thigh and elbow, sustaining "nerve damage and muscle loss to his arm." Officers located Jackson in Ariel's car, and a loaded firearm was locked in the glovebox. The firearm matched to all five cartridge casings located at the scene.

Jackson testified in his own defense and stated that "he shot at Parham first because he was scared for his life." Jackson told the jury that Parham had a firearm on his

hip and "was coming at" Jackson. The circuit court instructed the jury on self-defense (Instruction 16) and gave Instruction 23, which defined "imminent danger." Jackson objected to 23, but the circuit court overruled the objection, finding that Instruction 23 clarified an undefined term used in Instruction 16 and that it was an accurate statement of the law from Lienau v. Com., 69 Va. App. 254 (2018), aff'd on reh'g en banc, 69 Va. App. 780 (2019).

The CAV reiterated the definition of "imminent danger" affirming the circuit court's reliance on Lienau and also citing Com. v. Sands, 262 Va. 724, 729 (2001). The CAV stated that "Instruction 16 and Instruction 23, when read together, accurately state the Supreme Court's and this Court's binding precedent on the law of self-defense." As such, there was no abuse of discretion in the circuit court's instructions.

Further, the CAV affirmed the sufficiency of Jackson's unlawful wounding and possession of a firearm by a violent felon convictions. The CAV found that the jury's rejection of Jackson's self-defense claim was founded in credible evidence, and stated, "The video simply does not show . . . that Parham acted in a way that would have given Jackson a reason to fear for his own life or for the lives of other people at the scene." The CAV similarly found evidentiary support for the jury's rejection of Jackson's necessity defense regarding possessing the firearm. "Jackson failed to demonstrate that there was 'a lack of other adequate means to avoid the threatened harm' when Jackson armed himself with a firearm." (quoting Edmonds v. Com., 292 Va. 301, 306 (2016)).

Babar v. Com., Record No. 0580-23-1: (Huff, J., writing for O'Brien and Athey, JJ.)
Sufficiency; Definition of "firearm"; Submission on brief
Code § 18.2-308.2 does not require that the Commonwealth prove that the firearm is operable. Sufficient evidence presented that Babar possessed a firearm as a convicted felon where an eyewitness's testimony called the object a gun, and video evidence as well as circumstantial evidence corroborated her testimony.

Babar's conviction of possession of a firearm emanated from a shooting in 2020. Epps drove her brother-in-law, Sparks, to purchase marijuana from Small. Small was standing outside of his SUV "with some men." Small's girlfriend, Bowers, was in the SUV. Sparks went to speak with Small, and while he was outside the car, Epps noticed a firearm where Sparks had been seated in the car.

While Sparks and Small were talking, a black Mercedes drove up, and Babar exited the Mercedes running "toward Sparks while brandishing a gun." Babar grabbed Sparks, and Sparks "raised his hands in surrender and declared, 'I don't want no problem.'" Small grabbed his own gun and walked over to Epps, who was still in the car. Small "pointed his gun at Epps and called her a bitch." Small claimed that Sparks threatened him, which was why Epps and Sparks couldn't leave.

Epps heard a gunshot from where Sparks and Babar were. Sparks was "hunched over," and Babar ran from the scene. "Six or seven" more gunshots rang out, and Sparks collapsed to the ground. Epps drove Sparks to a hospital, but Sparks died as a result of his gunshot wounds. Poor quality surveillance footage of the shooting corroborated Epps's version and showed Babar walking "rapidly toward Sparks, who turned and fled." Babar "ran after Sparks, extending his hands towards Sparks while holding them together as if holding an object."

At trial, Epps's testimony from a prior trial was entered into evidence, the surveillance footage was shown, and an officer opined that Babar's actions were "consistent with a firearm presentation stance." Babar presented testimony from Small, Bowers, and a neighbor, McDowell, claiming that Sparks "c[a]me up with a gun." Bowers further "claimed that Sparks pointed a firearm at her during the fray." The circuit court found Epps's version of events credible as "it was corroborated by the shooting video in every respect." The circuit court "reject[ed] as unreasonable [Babar's] proffered hypothesis of innocence" and found Babar in possession of a firearm.

The CAV affirmed, finding "no merit in [Babar's] assessment of either the evidence or his interpretation of Code § 18.2-308.2." The CAV reiterated that the Commonwealth is not required to "prove the instrument was operable, capable of being fired, or had the actual capacity to do serious harm." (quoting Armstrong v. Com., 263 Va. 573, 584 (2002)). Instead, the Commonwealth only must prove that the object "was designed, made, and intended to expel a projectile by means of an explosion." (same). The CAV found sufficient circumstantial evidence that a rational factfinder could conclude Babar was in possession of such a device.

Curry v. Com., Record No. 0485-23-3: (Friedman, J., writing for Ortiz and White, JJ.)
Sufficiency; Cross-examination; Improper argument; Rule 5A:18; Manifest injustice
Sufficient evidence presented to convict Curry of PWID where a jury could have inferred that the 9 grams of methamphetamine were either for distribution or "remained from a larger supply held for distribution." Curry's proposed closing argument that the jury had to acquit because the Commonwealth did not bring the methamphetamine to court was not legally correct, and the circuit court did not err in limiting closing argument to legally correct principles. No error in the circuit court's questioning of the forensic scientist where the questions were reasonable and unbiased.

The CAV rejected Curry's appeal without oral argument, finding it was "wholly without merit." Code § 17.1-403(ii)(a); Rule 5A:27(a).

A Confidential Informant working with Augusta County Skyline Drug Task Force contacted Curry to set up a methamphetamine purchase. Officers set up near the purchase site, and Curry arrived shortly after. Officers detained Curry and searched his vehicle, locating roughly 9 grams of meth (including innermost packaging). Curry stated he purchased an ounce of meth every few days and that his dealer "typically carried at least a pound." Curry agreed to cooperate, so the officers did

not charge Curry. Curry stopped cooperating, and he was charged with PWID (2nd offense).

At his jury trial, Curry presented the argument that the weight was incorrect because it included the innermost packaging (which included "plastic containers"). Counsel pointed to a box and asked its particular weight, the Forensic Scientist stated that "he never weighed any of the containers individually." The circuit court "interrupted defense counsel to ask [the scientist] to clarify which containers listed in the certificate corresponded to the items seized from Curry's vehicle." Curry objected, arguing that the circuit court "was unfairly stepping in to help the Commonwealth." The circuit court stated "that it was entitled to ask [the scientist] to specify which containers he examined because [his] answers were confusing." The circuit court ended its questioning and asked if either party had any further questions. Curry declined to ask any further questions.

During closing argument, Curry's counsel attempted to argue "that the Commonwealth must introduce the drugs to prove his guilt" and because the Commonwealth did not bring the meth to court, the jury should acquit him. The Commonwealth objected, and the circuit court ruled that while counsel "could argue that the drugs are not here . . . he could not argue that because they're not here Curry can't be convicted." The jury convicted Curry of PWID Meth, 2nd offense.

The CAV affirmed the sufficiency of the evidence to convict, finding that the totality of the circumstances "permitted the jury to conclude that the quantity seized was what remained from a larger supply held for distribution." On the issue of cross-examination of the scientist, the CAV found that most of Curry's arguments were defaulted under Rule 5A:18. The CAV held that the circuit court did not err in its limitation of Curry's cross-examination nor when it asked its own questions, finding that the circuit court's questions "were both reasonable and unbiased." It also noted that if there was any error, such error was harmless beyond a reasonable doubt that the "jury would have returned the same verdict absent the error." (quoting Com. v. White, 293 Va. 411, 422 (2017) (in turn quoting Washington v. Recuenco, 548 U.S. 212, 221 (2006))).

Finally, the CAV reiterated that while "the practice of bringing illegal drugs to court for the factfinder to observe personally has been done before and *may* be done in the future, there is simply no legal authority that it *must* be done for the Commonwealth to prove its case." Therefore, there was no error in limiting Curry's closing to legally correct arguments.

Commentary: The analysis of the circuit court's questioning the forensic scientist is particularly interesting because it was a jury trial. The circuit court's ability to ask questions in a jury trial is rarely taken advantage of because, like Curry argues here, it can sometimes be viewed as the circuit court taking a side. This opinion (without oral argument) serves as a good reminder that if done properly and in an

unbiased manner, the circuit court may clarify answers that it finds confusing, without prejudicing the parties.

RITcon, LLC, v. Doran, Record No. 0416-23-4: (Haley, SJ., writing for Decker, CJ., and AtLee, J.)
Breach of contract; Gross negligence; Conversion; Punitive damages; Cross-errors; Remand; Mootness; Rule 5A:18
CAV reversed over $300,000 in punitive damages, finding no gross negligence where RITcon acted only with mere negligence and conduct was not with conscious disregard of another's rights. Punitive damages "are designed to punish the conduct itself" and where conduct is not egregious, punitive damages are inappropriate. RITcon failed to preserve an argument on appeal under Rule 5A:18, and the CAV found the rest of the assignments of error moot under its ruling.

Doran hired RITcon to clean and store her personal property after her condominium flooded. Part of the contract limited RITcon's liability "to the total amount paid for services rendered" which was $25,177.92. A subcontractor inventoried and packed Doran's personal property, including an "armoire with jewelry boxes inside" but nobody inventoried what was in the boxes nor photographed the contents.

Approximately five months later, RITcon began returning her property, but some items were damaged, others had not been cleaned properly, and others were never returned. "Some of her property had been delivered to the wrong address by mistake." RITcon located the armoire, which was still "sealed with plastic wrap," unwrapped it, located some containers with jewelry and some empty containers," rewrapped the armoire, and returned it to Doran. In doing so, the "truck was secured with a lock that could be opened only by the truck driver." Doran received the armoire and claimed that it was unwrapped with jewelry missing.

Doran sued for fraud, gross negligence, breach of contract, and conversion. The circuit court struck the fraud claim but entered judgment in favor of Doran for all other claims. The circuit court found compensatory damages in the amount of $107,066.92 and punitive damages of $321,200.76.

The CAV found that RITcon failed to preserve the argument that the limitation clause in the contract extended to claims of negligence because it did not present the argument to the circuit court "that the liability limitation expressly applied to the mysterious disappearance of property." In the circuit court, RITcon focused on the vagueness of the "*first* sentence of the limitation clause" created a broad application whereas on appeal, RITcon emphasized "the *second* sentence of the limitation clause . . . specif[ied] the type of liability to which it applied." The CAV found this argument "fundamentally different from its argument to the trial court" and therefore precluded appellate review of RITcon's first assignment of error.

The CAV further found that RITcon did not display sufficient "willful and wanton" conduct "in conscious disregard for another's rights or with reckless indifference

to consequences." (quoting Doe v. Isaacs, 265 Va. 531, 535 (2003) (citation omitted)). The CAV reminds us that "compensatory damages are a recompense for a plaintiff's injury" whereas "punitive damages . . . are designed to punish the *conduct itself* and only the most egregious conduct." (first citing Sch. Bd. of Newport News v. Com., 279 Va. 460, 470 (2010) then quoting Horn v. Webb, 302 Va. 70, 81 (2023)). The CAV reversed the punitive damages and remanded the case, finding the rest of the assignments of error moot.

Commentary: In Footnote 3, the CAV found that it should not engage with Doran's cross-assignment of error because it would not have any effect. "It is not the office of courts to give opinions on abstract propositions of law, or to decide questions upon which no rights depend, and where no relief can be afforded." (quoting Chaffins v. Atl. Coast Pipeline, LLC, 293 Va. 564, 571 (2017)).

On a much more somber note, this may be the last opinion issued by Senior Judge Haley, who passed away earlier this year. Judge Haley was a former Commonwealth's Attorney and General District Court Judge, serving King George County, and a Circuit Court Judge, serving Stafford County for 15 years in that capacity. Judge Haley retired from the Court of Appeals of Virginia in 2012.

Sahadeo v. City of Norfolk, Record No. 0333-23-1: (Huff, J., writing for Malveaux and White, JJ)
Waiver of oral argument; Eminent domain; Summary judgment; Due process; Demurrer; Rule 3:21; Admissibility of evidence
The circuit court did not err in finding that Sahadeo waived his right to a jury trial by untimely filing the request. No due process issues where Norfolk sent multiple notices to owner of dilapidated building set for demolition.

Sahadeo owned a residential building in the City of Norfolk. In July 2016, Norfolk demolished the property, "after deeming it unsafe and uninhabitable." A judicial sale of the property was to be conducted "to recover demolition costs and unpaid taxes." Sahadeo objected and counterclaimed that Norfolk violated his due process when it took his property (raising 3 claims). Norfolk demurred, the circuit court sustained the demurrer with leave to amend Claims I and III and overruled the demurrer on Claim II. Sahadeo filed his amended complaint and requested leave to amend Claim II, which was denied. Norfolk filed its answer to Claim I and III, relying on its previous answer to Claim II.

Sahadeo then requested a jury trial "for all issues so triable." Norfolk filed for partial summary judgment on Claims I and III, which was granted. The circuit court began proceedings on Claim II and Norfolk's petition for a judicial sale, and Sahadeo claimed that a jury trial was warranted based on his prior request. The circuit court disagreed, finding that since Claim II was never amended, his request for a jury as to Claim II was not filed before 10 days lapsed after the last pleading directed at Claim II. Norfolk also moved to preclude Sahadeo from referencing the Uniform Statewide Building Code. The circuit court granted the motion, conducted a bench trial, and approved the judicial sale.

The CAV found no issue with the circuit court's rulings. The CAV reviewed de novo the denial of the jury trial and the granting of partial summary judgment. The CAV found that the circuit court correctly interpreted and applied Rule 3:21(b), determining that Sahadeo failed to timely demand a jury on Claim II. Further, the CAV found that Sahadeo was given sufficient notice to satisfy due process, interpreting and applying both Lee v. City of Norfolk, 281 Va. 423 (2011) and Presley v. City of Charlottesville, 464 F.3d 480 (4th Cir. 2006). Finally, the CAV found that the circuit court appropriately precluded Sahadeo from referencing the USBC because it was irrelevant to Claim II and the petition for judicial sale.

Commentary: This may be one of the oddest situations for oral argument and is a reminder to keep the courts updated with your most accurate contact information possible. Sahadeo's appellate counsel apparently changed his email address between filing his brief and the oral argument. But, he never updated the clerk's office with his new email address. Over the phone at oral argument, he claimed he never received notice of the oral argument date and requested a continuance. The CAV denied his request finding that he had waived oral argument, telling counsel that "his outdated address produced neither a bounce back message nor automated forwarding message" that would have informed the CAV of an issue.

Davenport v. CBR Motorwerx, LLC, Record No. 0174-23-2: (Beales, J., writing for Callins, J., and Clements, SJ.)
Pro se party; Admissibility of evidence; Rule 5A:8; Sanctions; § 8.01-271.1
CAV rejected Davenport's appeal where both parties failed to timely file written statements of fact or transcripts. CAV could not review whether sanctions were appropriate because the record was insufficient; thus, sanctions and attorney fees were denied.

Davenport sued CBR to recover "damages inflicted to his car while it was in CBR's custody for repairs." In pertinent part, Davenport alleged that CBR mounted incorrect tires, retained both the tires and the money Davenport paid even though Davenport rejected the tires, and that CBR drove the car over 500 miles without permission.

The CAV rejected Davenport's appeal because he failed to deliver a transcript or written statement of facts regarding the necessary and indispensable portions of the proceedings. Specifically, the circuit court "rejected Davenport's written statement of facts in lieu of a transcript, noting that the written statement of facts was not timely filed." Further, the CAV found that CBR's written statement of facts was also not timely filed (although the circuit court did not find the same and had initially certified CBR's filing to the CAV). The CAV also rejected CBR's request for sanctions under § 8.01-271.1(B) because the CAV could not review the record to determine whether Davenport was filing pleadings "not well grounded in fact."