SCV Opinions and Orders

Harris v. Joplin, Record No. 240450: (Opinion: Mann, J., writing for the Court)
Parol evidence rule; Admissibility of evidence; Standard of review

In 2016, Harris backed out of a parking space in an Enterprise rental car and struck Joplin while he was on his motorcycle. In December 2017, Powell, a claims adjuster, emailed Joplin's attorney a release contract, offering $25,000 for the release of all claims against Enterprise and Harris. Powell never received a response, and in 2018 Joplin filed a suit, claiming $300,000 in damages.

Two years later, Powell sent a follow-up letter regarding the liability release to Joplin's attorney. Another attorney (Briscoe) had taken on the case and could not locate the original release, directing a paralegal to find it. Briscoe told Powell that Joplin was interested in signing the release but wanted to sue Harris separately. Powell advised Briscoe that the release was to both Harris and Enterprise's benefit, and Briscoe requested a modified release.

The paralegal found the release in the firm's computer system and emailed it back to Powell. It had purportedly been signed over a year earlier, even though the signature and notarization were not dated. Briscoe did not know that Joplin had signed the release, and he did not review the release prior to the paralegal's email.

Harris claimed accord and satisfaction, and Powell was deposed. In his deposition, Powell was shown the signed release, which was illegible. Powell testified that the contents of the signed release were identical to a legible unsigned copy. At the hearing on Harris's plea in bar of accord and satisfaction, Joplin admitted that the signature on the release was his own but that he never authorized a settlement with Harris. Joplin objected to the admission of the unsigned release as evidence of the terms of the signed release. The circuit court granted the plea of accord and satisfaction.

The CAV reversed the judgment, finding that the parol evidence rule applied because the document was effectively destroyed but that Harris failed to prove by a preponderance of the evidence "that the unsigned release was 'substantively equivalent' to the signed release." The CAV defined this error as a question of law and applied de novo review.

The SCV reversed the CAV's judgment and reinstated the circuit court's decision. The SCV articulated that "the threshold question of parol admissibility is a legal one that [appellate courts] review de novo . . . [appellate courts] ultimately review the trial court's decision to admit or deny specific evidence for abuse of discretion." (citing Virginia Elec. & Power Co. v. N. Va. Reg'l Park Auth., 270 Va. 309 (2005) and Riverside Hosp., Inc. v. Johnson, 272 Va. 518 (2006)).

The SCV determined that the CAV used the incorrect standard of review when reviewing the admission of the unsigned release. The SCV reiterated that the parol evidence rule did not prohibit the admission of evidence because the document itself was unreadable or "for our purposes . . . effectively blank." Further, the unsigned release was not intended to contradict or expand on the terms of the release, only to "verify those terms." The CAV properly found the same, but then the SCV determined that the CAV improperly "reweigh[ed] the evidence" supporting the admissibility of the evidence. The SCV found that the circuit court's factual findings regarding the link between the two documents was not plainly wrong or without evidentiary support, so the SCV affirmed the circuit court's judgment.

CAV Published Decisions

City of Virginia Beach v. Mathias, et al., Record No. 2073-23-1: (Chaney, J., writing for Causey and Callins, JJ.)
Condemnation/Eminent domain; Statutory interpretation; Effective date of legislation; § 25.1-204; Strict construction; Remedy; Abuse of discretion

The City of Virginia Beach sought to purchase Mathias's property to alter a public road. In June 2022, the City offered $36,333 for the property, which Mathias rejected. Shortly after, new legislation from the General Assembly went into effect on July 1, 2022, specifically an amendment to § 25.1-204's requirements for proceeding with a condemnation claim. In December 2022, the City filed a certificate of take, and in June 2023, the City filed the petition for condemnation which certified compliance with § 25.1-204's requirements of a bona fide claim.

In the circuit court, Mathias claimed that the City failed to provide the full examination of title for the last 60 years to Mathias. Instead, the City only provided some of the documents included in its 60-year title examination. The City conceded that it had not provided all documents but claimed that it had followed the prior version of § 25.1-204 because the bona fide offer was presented to Mathias prior to the effective date of the newly amended version of the statute. In the alternative, the City claimed substantial compliance.

The circuit court found that the 2022 version of the statute applied and further that the City failed to provide all the documents required by the statute. In doing so, the City failed to properly follow the procedural prerequisites to file its certificate of take and dismissed the petition without prejudice.

The CAV agreed, rejecting the City's argument that the offer triggered the choice of law. The CAV found that the plain language of the enactment clauses of the General Assembly's Acts stated that the amendments applied only to takings or "a condemnation proceeding that has been filed on or after July 1, 2022." There was no carveout for offers made prior to July 2022.

In doing so, the CAV distinguished Commonwealth Transportation Commissioner v. Klotz, Inc., 245 Va. 101 (1993), finding that Klotz did not address the effective date of a statute. The SCV in Klotz discussed only what bona fide offers bound the condemnor to a particular price.

The CAV further found that § 25.1-204 requires strict compliance because "[s]tatutes authorizing the power of eminent domain must . . . be strictly construed." PKO Ventures, LLC v. Norcolk Redev. & Hous. Auth., 286 Va. 174, 182 (2013). The City conceded it had not delivered all documents relied upon in its title examination, therefore it did not comply with the statute.

The CAV finally found that dismissal without prejudice was not an abuse of discretion and therefore a permissible remedy. While granting leave to amend was also a permissible remedy to the statutory violation, there was no statute or rule of law prohibiting dismissal without prejudice, as the City can start the process anew with no penalty. The CAV affirmed the circuit court's decision.

Fleming v. Com., Record No. 0867-24-2: (Clements, SJ., writing for Decker, CJ., and Friedman, J.)
Conditional guilty plea; Second Amendment; Constitutionality of statute; Burden-shifting; Void for vagueness; Statutory interpretation; Rule 5A:20; Due process; Rule 5A:18

Fleming had a Glock 22 with an extended magazine that had a "switch" that permitted the firearm to operate in "full-automatic mode." Because the firearm was capable of firing in an automatic manner, the Commonwealth charged him with possession of a machine gun for an offensive or aggressive purpose, in violation of § 18.2-290. After the circuit court rejected his constitutionality arguments that the statute violated his Second Amendment right to keep and bear arms, as well as that the statute was facially vague for voidness, he entered the conditional guilty plea.

The CAV affirmed his conviction. The CAV stated that the recent Supreme Court of the United States opinion in New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1 (2022) did not reject the prior principle that governments could prohibit the possession of machine guns or fully automatic weapons. Instead, Bruen cited and affirmed the prior SCOTUS opinion in District of Columbia v. Heller, 554 U.S. 570 (2008) that the focus on the Second Amendment's protection of a law-abiding citizen's right to possession of reasonable firearms.

Specifically, "[T]hat limitation is fairly supported by the historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.'" Heller, 554 U.S. at 627. Absent "any evidence tending to show that the possession or use of a [dangerous or unusual weapon] has some reasonable relationship to the preservation or efficiency of a well-regulated militia," such a weapon may be prohibited. Id. at 623; U.S. v. Miller, 307 U.S. 174, 177 (1939).

The CAV rejected Fleming's vagueness argument, finding that because he was not claiming that the statute was void for vagueness as it related to his own acts and instead facially, his argument was untenable.

Commentary: I cannot imagine this case stopping here. The SCV may not grant an appeal, but I would be surprised. The Second Amendment has come straight back into the limelight because of the Bruen decision, with multiple cases working their way in the Federal Courts of Appeal, including one in the Fourth Circuit regarding 18 and 19 year-olds right to purchase handguns.

That being said, I firmly believe the SCV will affirm the decision of the CAV. Bruen changed the landscape of Second Amendment analysis, requiring the historical/traditional analysis in any infringement of one's right to bear arms. But, the fundamental analysis remains clear that overly dangerous weapons are prohibitable.

I would also expect this to be appealed to SCOTUS, and I make no comments about how SCOTUS will rule, especially because it won't be decided for a few years. If SCOTUS does overrule this prohibition, it will drastically alter the Second Amendment.

Kuykendall v. Com., Record No. 0577-24-3: (Chaney, J., writing for AtLee and Lorish, JJ.)
Probation revocation; Technical vs. non-technical conditions; First Amendment; Imposition of conditions of probation; Significant government interest; Intermediate scrutiny

Kuykendall was on active supervised probation following his convictions of aggravated sexual battery, criminal failure to appear, and failure to register as a sex offender. A special condition of his probation was that he would not "use any form of social networking." He maintained an active Facebook account, and probation filed a major violation report based on his internet use and failure to do certain treatment programs.

The circuit court imposed a year and three months of the suspended sentence and reimposed the same conditions of probation, including the social networking and internet prohibitions.

The CAV affirmed the sentence but reversed on the issue of the internet prohibition, finding that the record did not support the limitation of Kuykendall's First Amendment rights. Specifically, the CAV reiterated that the Commonwealth must satisfy intermediate scrutiny when creating content-neutral restrictions of an individual's First Amendment. (citing Fazili v. Com., 71 Va. App. 239 (2019) and Packingham v. North Carolina, 582 U.S. 98 (2017)). Intermediate scrutiny requires a significant governmental interest and narrowly tailoring the restriction to meet that interest.

The CAV affirmed that the Commonwealth had a significant interest in imposing certain conditions to rehabilitate probationers and to protect the public, including prohibiting individuals who have been convicted of sexual offenses against minors from interacting with minors, even on the internet. However, the CAV found that the record did not support the circuit court's bare assertion that there was a need to restrict Kuykendall's access to the internet.

Finding that the condition failed intermediate scrutiny, the CAV rejected the condition and remanded the matter back to the circuit court.

Commentary: I firmly believe that the SCV will take this case on appeal. It is not as broad a proscription as Fazili, which prohibited a probationer from possessing any device that could connect to the internet. Additionally, the statute at issue in Packingham prohibited any sex offender from accessing any social media ever and created a new crime based on that action. Here, it is more narrowly tailored to only prohibit individuals on active supervised probation.

ADO Home Services, LLC v. Frykman, Record No. 0414-24-4 and Frykman v. ADO Home Services, LLC, Record No. 0458-24-4 (consolidated cases): (Bernhard, J., writing for O'Brien and Causey, JJ).
Demurrer; Mechanics' lien; Expert testimony; Attorney fees; Jurisdiction; Forum choice

ADO and Frykman entered into a contract to construct an addition to a residence in Alexandria for $369,591. The addition was to be completed by December 2019. In October 2019, Frykman failed to make a scheduled payment, but ADO continued to work. Frykman issued a notice of termination in November, when she had an outstanding balance of $57,516.03. ADO filed a mechanics lien in Alexandria against the property.

Subsequently, ADO filed suit in Loudoun for enforcement of the mechanics lien, breach of contract, and quantum meruit, citing a provision of the contract stating that Loudoun would be the appropriate jurisdiction and venue for any suit. Frykman demurred, and the Loudoun circuit court found that it did not have any jurisdiction over the mechanics lien, as it was in Alexandria.

At the trial on the other claims, ADO introduced "expert witness testimony" regarding its Quickbooks and CoConstruct reports on how much payment ADO was entitled. Frykman claimed that ADO invited the breach by failing to be on schedule to complete by December 2019. Ultimately, the circuit court found that Frykman was the first to breach but found no specific evidence of damages because the circuit court found the "expert testimony . . . was not persuasive to the court at all." The circuit court ordered $1000 in damages in breach of contract, dismissed the quantum meruit claim, and denied attorney fees to both parties.

The CAV affirmed. First, the CAV reviewed the dismissal of the mechanics' lien claim at the demurrer stage. The CAV reiterated that mechanics' liens are purely

statutory constructions "in derogation of the common law." (quoting Synchronized Constr. Servs. v. Prav Lodging, LLC, 288 Va. 356, 363 (2014). Because the statute requires that the mechanics' lien is enforced "in the county or city wherein the structure is situated or wherein the owner resides" Loudoun county was not the appropriate jurisdiction to sue. (§ 43-22). It does not matter that the parties agreed to a forum choice provision because "[w]here a contract is 'in conflict with statutory provisions it is well settled that the statute will prevail.'" (quoting Scholz v. Standard Acc. Ins. Co., 145 Va. 694, 704 (1926)).

The CAV found no error in the rejection of the expert's testimony nor the circuit court's imposition of nominal damages. Finally, the CAV found that the circuit court did not err in denying both parties' requests for attorney fees. Frykman's claim of attorney fees arose primarily out of the dismissal of the mechanics' lien charge, and the CAV found that because Frykman's success did not arise out of the contract or on the merits of any claim, she was not entitled to attorney fees under the contract.

CAV Unpublished Decisions

Funderburg v. Harrisonburg Rockingham Social Services District, Record No. 0421-24-3: (Callins, J., writing for Beales and Frucci, JJ.)
Abuse and neglect; Custody; Rule 5A:18

The CAV found no error in the circuit court's determination that Funderburg (Mother) neglected her children. Mother claimed that Father was in a pedophilic/satanic cult with a former President of the United States and that the FBI considered Father a sociopath. Father testified regarding the state of Mother's house and her inability to care for the children. The circuit court found that Mother was dealing with mental health issues that were impacting her ability to properly care for her children and determined that the children were abused or neglected, setting a final removal hearing.

After the adjudication, Mother was diagnosed with several mental health disorders and began improving her mental health, showing motivation "to provide a healthy, stable environment." At the removal hearing, Mother requested that the circuit court place the children with the maternal grandmother. But, the circuit court determined that grandmother was not an appropriate placement and ordered the Department to take custody of the children.

Mother appealed on many assignments of error, but the CAV found several were withdrawn, several more were procedurally defaulted under Rule 5A:18, and finally that the circuit court's factual determinations and findings were not plainly wrong or without evidentiary support. The CAV affirmed the circuit court's judgment.

Bryant-Shannon v. Vick, Record No. 0180-24-1: (AtLee, J., writing for Friedman and Frucci, JJ.)
Defamation; Punitive damages; Demurrer

> Vick and Bryant-Shannon were employees at the Hampton Roads Community Action Program. Vick was promoted to interim executive director and then accused Bryant-Shannon of several violations of policies. Vick prepared a disciplinary form making the same claims and placed the form in Bryant-Shannon's personnel file. Bryant-Shannon sued for defamation.
>
> The circuit court sustained Vick's demurrer, finding that some of the statements were true and thus not defamatory. The circuit court also found that some claims were barred by the statute of limitations. The circuit court also determined that punitive damages would be inappropriate.
>
> The CAV reversed, in part, finding that Bryant-Shannon sufficiently alleged a defamation claim in the complaint. The CAV reiterated that the circuit court is meant to take all allegations in the complaint as true and not accept any additional evidence. But, the CAV affirmed the dismissal of the punitive damages request.

East End Landfill, LLC v. Virginia Department of Environmental Quality, Record Nos. 0603-24-1, 0604-24-1, 0605-24-1: (Fulton, J., writing for Causey and Bernhard, JJ.)
Writ of mandamus; Doctrine of judicial restraint

> The Department of Environmental Quality (DEQ) sent East End a letter telling them that DEQ was reviewing East End's compliance with its solid waster permit and advising them that the permit could be revoked. Ultimately, DEQ revoked the solid waste permit. East End appealed the revocation and filed for a writ of mandamus and rule to show cause. The circuit court found that the revocation was permissible under the law and denied the writ and rule.
>
> The CAV affirmed, finding that there was evidence to find that East End committed a pattern of violations. Therefore, there was no reason to believe that the circuit court's decision was arbitrary and capricious. Doctrine of judicial restraint limited the appeal to the revocation of the solid waste permit issue.

Premier Homes Group, LLC v. Pinnacle Flooring Solutions, LLC., Record No. 2201-23-4: (Chaney, J., writing for AtLee and Frucci, JJ.)
Contract interpretation; Attorney fees; Voluntary-payment doctrine

> Pinnacle contracted to provide floors for 3 different homes Premier was constructing. Pinnacle did not perform the work to Premier's specifications, and Premier did not pay the full amount owed under the contract. Pinnacle sued, and Premier counterclaimed. Premier prevailed at trial and was awarded approximately $27,000 in damages. Premier's claim for attorney fees was denied under Rule 3:25(b) for failure to specify the nature of the claim in the countercomplaint.

The CAV reversed the circuit court on the attorney fees issue, finding that the references in the countercomplaint to the contract (attached as an exhibit to Pinnacle's complaint) sufficed under Rule 3:25(b), applying the principle set forth in Mintbrook v. Groundscapes, 76 Va. App. 279 (2022).

Thodos v. Com., Record No. 1041-23-4: (AtLee, J., writing for Chaney and Frucci, JJ.)
Admissibility of evidence; Jury instructions; Sufficiency; Chain of custody; Surveillance footage

Thodos appealed his convictions of attempted capital murder, aggravated malicious woundings, use of firearm, and grand larceny of a vehicle.

Thodos was caught shoplifting, and police were called. Thodos was argumentative and resisted handcuffs/arrest. Thodos shot one of the officers multiple times before fleeing the store. The other officer initially chased Thodos but returned when he realized that his partner was not following. He rendered aid to the wounded officer before he could be transported to the hospital. Thodos stole a truck and subsequently crashed it, fleeing on foot. A fanny pack which had Thodos's driver's license in it, was in the truck.

At trial, Thodos objected to the admission of the fanny pack due to chain of custody claims, as well as surveillance footage, a certificate of analysis, and other pieces of evidence. Thodos also proffered a jury instruction that stated that the jurors could infer that Thodos intended "to scare" the officers and "escape" rather than kill. The circuit court rejected the instruction, stating it did not appear to be an accurate statement of the law.

The CAV rejected Thodos's arguments in turn, finding no abuse of discretion in the admission of the evidence nor in the rejection of the jury instruction. The CAV stated that Thodos's proposed instruction was not an accurate statement of the law and distinguished Martin v. Commonwealth, 13 Va. App. 524 (1992) (en banc).

Brown v. Com., Record No. 1284-24-1: (Friedman, J., writing for Beales and Fulton, JJ.)
Sufficiency

Brown appealed his conviction of threatening to burn down a building.

Brown's girlfriend, Jackson, lived in a two-story boarding house. One night, Brown was drunk and came to the boarding house, refusing to leave. Jackson went to the store, and when she returned Brown head-butted her and took her cell phone. Brown threatened to kill Jackson. Another tenant was about to call the police when Brown told the tenant he would "fuck her up and burn the house up."

The CAV affirmed Brown's conviction because "Brown's statements and conduct 'reasonably conveyed a serious intent and would cause a listener to believe that he would act on that intent.'" (quoting Drexel v. Com., 80 Va. App. 720, 749 (2024)).

Smallwood v. Com., Record No. 1892-23-1: (Bernhard, J., writing for Fulton and Causey, JJ.)
Sufficiency

Smallwood appealed his conviction of second-degree murder and use of a firearm.

Surveillance video of an apartment building's parking lot showed several individuals. One wearing red (Robinson), one wearing blue shorts (Smallwood), one wearing jeans, and another in white shorts. Smallwood approached Robinson while holding a handgun and retrieved a firearm from Robinson's waist. Smallwood gave Robinson's firearm to the man wearing jeans. Robinson was knocked down to the ground before he began "undressing himself" and standing in front of Smallwood. Smallwood raised his handgun and shot Robinson. The man wearing jeans did not raise the firearm Smallwood had given him.

The CAV affirmed Smallwood's convictions, finding sufficient evidence for malice and rejecting Smallwood's reasonably hypothesis of innocence argument.

Quiros v. Com., Record No. 0226-24-2: (Per curiam opinion: AtLee, Athey, and Callins, JJ.)
Sufficiency

The CAV rejected Quiros's appeal without oral argument, finding it was "wholly without merit." Code § 17.1-403(ii)(a); Rule 5A:27(a). Quiros was convicted of object sexual penetration by force and argued that there was insufficient evidence of penetration and force. Quiros confessed to police officers, and the victim's testimony corroborated his confession.

Isley-White v. Com., Record No. 0195-24-3: (O'Brien, J., writing for Beales and Lorish, JJ.)
Sufficiency

Isley-White appealed her convictions of child abuse, cruelty or injury to a child, and aggravated malicious wounding.

When B.L.S. was dropped off with Isley-White for babysitting after daycare by B.L.S.'s father, B.L.S. was "perfect" and without any injuries or abnormal behavior. B.L.S.'s daycare teacher confirmed the same. B.L.S. stayed the night with Isley-White, and in the afternoon, B.L.S. was having issues and not waking up from a nap. Father called 911 as soon as he got to Isley-White's residence.

Paramedics observed "bruising around the left ear, hematoma above the eyes, and abrasions under the chin and on the right arm." At the emergency department, B.L.S. suffered seizures and had to be resuscitated before airlifted to a trauma center. B.L.S. was diagnosed with traumatic brain injury and a possible skull fracture. B.L.S. underwent surgery and now has a prosthetic skull, scarring, and two permanent shunts.

The CAV affirmed, noting that Isley-White hid the fact that B.L.S. had been vomiting that day. The circuit court had found that Isley-White's "own statements preclude the idea of an accident." The CAV found no plain error in the circuit court's factual findings and affirmed Isley-White's convictions.