Overview

Only one new opinion/order from the Supreme Court of Virginia (SCV) this week. It affirmed a finding of misconduct by an attorney and is thus relatively unimportant to civilians. But, it reiterated several principles important to practicing attorneys, although none of these principles are surprising at all. The SCV stated that one of the highest obligations of attorneys is to be courteous and respectful to the court and opposing counsel.

In the Court of Appeals of Virginia (CAV), the emphasis was on issuing opinions on cases without oral argument. Out of 12 total opinions (1 published and 11 unpublished) 5 of these opinions were issued without oral argument. This is an extremely high percentage, and 2 of these cases are somewhat unusual because they identify an author of the opinion. Most of the opinions without oral argument are delivered without an author and are *per curiam*, which means "by the court" or "for the court."

For the most part, this week's opinions are uneventful and do not have significant precedential value. Unfortunately, this means that there is less to discuss. Without further ado, let's get into the cases.

SCV Opinions and Orders

Jenkins v. Virginia State Bar, ex rel. 8th District Committee, Record No. 240276: (Opinion)
Rules of Professional conduct; Suspension of license to practice law; Rule to show cause
Suspension of license to practice law affirmed where attorney violated Rules 3.4 and 8.2 of the Rules of Professional Conduct.

> Jenkins filed a motion to intervene a sale of property held by a trust, on behalf of beneficiaries of the trust. As part of the motion, Jenkins wrote that "if these actions are allowed to stand, the citizens . . . will rightly question the rule of law." Jenkins stated at oral argument, "[I]f we're going to ignore this statute . . . what other statutes are we going to ignore?" The circuit court found that the motion "was not well founded" and that "several of the allegations made by Jenkins were false, insulting and offensive to counsel and to the Court and were made without any basis in law or fact and were in violation of 8.01-271.1." The circuit court stated that "the statements and allegations impugned the integrity of the Court and Judicial system itself."
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> The circuit court ordered Jenkins to pay the legal fees of the opposing party. Jenkins refused, and the circuit court issued a rule to show cause against him. Jenkins challenged the jurisdiction of the circuit court to proceed on the rule to show cause. Jenkins argued that the circuit court was improperly transferring property out of the trust to "the brother of a former circuit court judge" in a "wrongful and unethical assertion of judicial power." In an email to the local Bar Association, Jenkins stated that the circuit court had "little to no experience with the civil side of the court" and that the circuit court "would rather send [Jenkins] to jail than admit he was wrong."

The circuit court held Jenkins in contempt, and Jenkins paid the fine, but the circuit court "revoked Jenkins's privilege to practice law" in the circuit court. A subcommittee of the Virginia State Bar certified misconduct charges against Jenkins, and then the Bar initiated a complaint that Jenkins violated Rule 3.4, "Fairness to Opposing Party and Counsel" and Rule 8.2 "Judicial Officials." A three-judge panel found Jenkins violated the rules and suspended his license for 9 months.

The SCV affirmed, reiterating that review of a disciplinary proceeding requires that the SCV "conduct an independent examination of the entire record pertaining to the charge before [the SCV]." (citing Pilli v. Virginia State Bar, 269 Va. 391, 396 (2005)). But, while the panel's determinations are not afforded "the weight of a jury verdict, [the SCV] will sustain those conclusions unless it appears that they are not justified by a reasonable view of the evidence or are contrary to law." (quoting id.)

The SCV rejected Jenkins's arguments that because the circuit court acted without jurisdiction or improperly, that Jenkins could not have violated the Rules. Instead, the SCV reiterated that even if the circuit court had acted contrary to the law, that "would not justify" "the statements and the method that Jenkins used to communicate the dissent that Jenkins had with the Judge and the language that Jenkins used." Further, the SCV stated, "Litigation is to be conducted by educated and professional advocates who carry out their duties with civility and courtesy. Baseless insults and accusations are the antithesis of the decorum necessary for effective representation."

The SCV rejected the remainder of Jenkins's assignments of error, finding sufficient evidence to support the panel's decisions on Jenkins's behavior. "[E]ven if a judge commits a legal error . . . that does not justify a violation of the ethical rules that govern lawyers' conduct."

Commentary: I don't think there's too much to be said about the SCV's analysis here. It is simply a restatement that our highest obligation as attorneys and members of the Bar is to act responsibly and courteously. Whether that is in the courtroom or in private conversations with clients, we should be respectful of opposing counsel/party and the court.

CAV Published Decisions

Shifflett v. Hill, et al., Record No. 1357-23-4: (Lorish, J., writing for Malveaux and Friedman, JJ.)
Employee grievance procedure; Officer-involved shooting; Statutory interpretation; Jurisdiction
Employees cannot collaterally attack their termination when a grievance process is outlined. Circuit court's order was a final order and gave the CAV jurisdiction over the appeal.

Shifflett was a police officer for the Fairfax County Police Department. One day, Shifflett was chasing a suspected shoplifter. Shifflett stated that, during the pursuit, "the suspect quickly stopped his flight, turned towards Shifflett, dropped into a

defensive stance, and reached for his waistband." Because of this, Shifflett drew his firearm and shot the suspect, killing him. About a month after the shooting, Shifflett was notified that he was being terminated because of the shooting and that "his personal conduct, specifically his inconsistent articulation and lack of forthcoming answers to questions, in totality have failed to meet the expected standards of the department."

Shifflett filed a grievance notice, asserting insufficient notice and cause for his termination. The Fairfax County grievance process includes 4 different steps, beginning with speaking with a direct supervisor, continuing with additional meetings with higher supervisors, and finally, filing an official form after the 3rd step. Shifflett began following the procedures, but also contested his termination and argued to the County Executive that "his due process rights were violated because he was not provided with a meaningful pre-termination hearing, required by Cleveland Bd. of Ed. v. Loudermill, 470 U.S. 532 (1985)" as well as other statutory arguments regarding the grievance procedures.

The County Executive found that it had no authority to review his termination and only reviewed the "compliance with the grievance procedure itself." Shifflett appealed to the circuit court, which agreed with the County Executive and dismissed the pleading until the grievance process had been resolved. Shifflett appealed to the CAV, but the grievance process continued.

On the merits of the grievances, the County Executive found that Shifflett's claim that the Department violated its personnel policy was not a "grievable issue." The circuit court later reversed that decision. Shifflett, on the appeal in the CAV from the initial determination that the termination was not subject to review prior to the grievance process, argued that the circuit court's decision reversing the County Executive was contradictory to its prior decision.

The CAV found that the circuit court's order on the termination issue was a final order and thus subject to the CAV's jurisdiction under § 17.1-405(A)(3). The CAV then determined that § 15.2-1507(A)(7) did not permit the County Executive to review the termination outside of the grievance process. "Because they are outside the bounds of the grievance procedure, they are also beyond the chief administrative officer's consideration." "Instead, those concerns would need to be alleged as grievances themselves." Because "[t]he statute only gives a circuit court limited authority to review the compliance determination, . . . the circuit court did not err in rejecting Shifflett's efforts to shoehorn broader questions about the merits of his termination into the compliance review process."

Commentary: Many of our jurisdiction will likely be familiar with Shifflett's criminal case, which was recently decided in the Fairfax Circuit Court. A jury convicted Shifflett of reckless handling of a firearm but acquitted him of involuntary manslaughter. This opinion obviously answers a fundamentally different question and will likely have relatively little impact, as opposed to the criminal case.

This opinion only restates that publicly employed individuals who have a grievance process must first fully explore the grievance process before any other proceeding. Thus, it will likely not affect many pending/possible cases in the Commonwealth but simply provide instruction to attorneys counseling clients undergoing the grievance process.

CAV Unpublished Decisions

Boyce Benton, III v. Nelson County DSS, Record No. 2033-23-3 and Samantha Benton v. Nelson County DSS, Record No. 0056-24-3 (Consolidated Cases): (Lorish, J., writing for AtLee and Chaney, JJ.)

Termination of parental rights; Best interests of the child

Termination of parental rights affirmed where parents failed to take advantage of the services offered by DSS. Circuit court properly found that termination was in the best interests of the children.

Appellants are Mother and Father of A.B., J.B., N.B., and B.B., all under the age of 12. DSS became involved because of a history of methamphetamine use and domestic abuse. DSS initiated unannounced home visits, and on one visit, a social worker found "an overwhelming odor of urine, cigarettes, and marijuana. The children's beds had no sheets," and dirty clothes were strewn about. "There was a disposable pan in the home that N.B. explained to the social worker was the children's 'litter box.'" The floors were little more than plywood because the carpets had been removed because of mold issues. Mother tested positive for marijuana, and Father refused a drug test. DSS removed the children.

Over the next 2 years, Mother and Father were given supervised visitation and were supposed to go to counseling and undergo a parenting evaluation. The children were split into 2 separate foster families, as no relatives could be located. The children met up once a month for sibling visits. The GAL and counselors found that the children were doing well in the foster homes, but the children maintained emotional and psychological trauma because of their parents. The children complained of sexual and physical abuse sustained by both parents.

JDR petitioned to terminate the parents' parental rights. The circuit court heard evidence of all the children's psychological issues and improvements they were making in foster care. The circuit court also heard evidence that the parents hadn't used any drugs other than marijuana and that Father was "consistently interested in the kids and kind of held back some of the more problematic behavior during visitation." But, a counselor testified that Father would have to rehabilitate for another year because "he's got a very complicated set of symptoms." DSS argued that there had been services available for several years, and both Mother and Father failed to fully take advantage of the opportunities. The circuit court terminated both parents' parental rights under both § 16.1-283(B) and (C)(2).

The CAV affirmed. The CAV found that the circuit court did not abuse its discretion in finding that "the children's health and development were threatened by the abuse and neglect they suffered while under the care of the mother and father." The CAV also found that there was clear and convincing evidence that termination was in the best interests of the children.

The CAV further found clear and convincing evidence that "it [was] not reasonably likely that the conditions which resulted in such neglect or abuse can be substantially corrected or eliminated so as to allow the child's safe return to his parent or parents within a reasonable period of time" sufficing for termination under § 16.1-283(B). The CAV rejected the parents' argument that DSS offered insufficient services for complete rehabilitation. The CAV affirmed that the code section "requires only that the circuit court consider whether rehabilitation services, if any, have been provided to a parent." (quoting Toms v. Hanover DSS, 46 Va. App. 257, 266-67 (2005)). The statute does not "mandate that a public or private agency provide any services to a parent after the child enters foster care." (quoting Kate D. O'Leary, Termination of Parental Rights in Virginia, 17 J. Civ. Litig. 17 (2005)).

Stuckey v. Com., Record No. 0636-23-1: (Per Curiam Opinion: Beales and Causey, JJ., Petty, SJ.)
Sufficiency
Conviction of possession of firearm by felon affirmed without oral argument where Stuckey admitted he was a felon and had returned to collect the firearm, stating that he had left a "legal" firearm in Room 204.

The CAV rejected Stuckey's appeal without oral argument, finding 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).

A housekeeper at a hotel in Williamsburg located a firearm in Room 204 "between the bed and the wall where the window is at." Her manager called the police, but before the police arrived, Stuckey asked the manager to re-open Room 204 because he left something in there. The manager asked Stuckey what was inside the room, and Stuckey responded that it was "legal." The manager pressed him, and Stuckey affirmed that it was a firearm. Stuckey told police that he was a convicted felon.

At trial, Stuckey moved to strike the evidence, arguing that there was insufficient evidence of dominion and control over the firearm. The circuit court disagreed and convicted Stuckey of possession of a firearm by a felon.

The CAV affirmed, reiterating that "the relevant question is whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (quoting Vasquez v. Com., 291 Va. 232, 248 (2016)). Considering that the firearm was located in room 204, Stuckey told the manager that he left a firearm in room 204, and Stuckey admitted that he was a felon, there

was sufficient evidence for a factfinder to conclude that Stuckey had dominion and control over the firearm.

Curtis v. Com., Record No. 0943-23-4: (Callins, J., writing for Athey and Causey, JJ.)
Sufficiency; Admissibility of evidence; Hearsay
Child abuse conviction affirmed where S.E. had no injuries on his person prior to being picked up by Curtis, and S.E. identified Curtis as the abuser. Statements to forensic nurse were properly admitted under § 19.2-268.3.

S.E. lived with his aunt (Curtis) and his grandmother. S.E. was having behavioral issues in school, and his teacher filed 2 incident reports. Although the school had to physically restrain S.E., nobody (including the school nurse) noticed any injuries to S.E. while he was at school. The school nurse testified later that none of the restraints used would have resulted in an injury to the upper leg.

S.E. went to after-school care and later was taken home at the end of the day by Curtis and his grandmother. Curtis took S.E. upstairs to have a bath, and his grandmother began preparing dinner. Curtis then called grandmother upstairs to show bruises on S.E.'s leg. Grandmother took pictures and sent them to S.E.'s father, who was getting out of jail the next day.

Police investigated the injury, and Curtis stated that S.E. must have been injured at school. Curtis did admit that "she had hit S.E. with a belt a couple years earlier." But, S.E. had told a forensic interviewer that Curtis had caused the injuries; however, S.E. also contradicted himself and said that "his abuser's name was Jacob." The circuit court admitted these statements over objection under the "tender years" exception in § 19.2-268.3. The circuit court also admitted statements S.E. made to a forensic nurse under the same exception. The jury convicted Curtis of child abuse.

The CAV affirmed, finding that the circuit court did not abuse its discretion in admitting S.E.'s hearsay statements under § 19.2-268.3. Specifically, the CAV found that "sufficient indicia of reliability rendered S.E.'s statements during the forensic interview with Campbell inherently trustworthy." Further, the CAV found sufficient evidence for a factfinder to conclude that Curtis committed child abuse against S.E. based on the facts of the case.

Mays v. Com., Record No. 1429-23-3: (Ortiz, J., writing for O'Brien, J., and Humphreys, SJ.)
Submission on brief; Sufficiency; Inherent incredibility; Cold case prosecution; Rule 5A:20
Rape and forcible sodomy convictions affirmed where DNA matched to Mays 20 years later. Mays's argument of inherent incredibility waived because he did not support the assignment of error under Rule 5A:20.

In 1999, S.V. lived with her boyfriend, and the two of them got into an argument. S.V.'s boyfriend dropped her off about 5 miles from their house, and S.V. began walking home. A car with "two Black males inside" approached, and they offered

to drive S.V. home, which she accepted. Ultimately, she felt danger and tried to get out of the car. But, they did not let S.V. leave and instead took S.V. to a secluded area. The men took turns raping S.V. repeatedly. They threatened to kill her before leaving her on the side of the road. Another driver saw S.V., "naked and crying" and stopped to help her.

2 male DNA samples were obtained. S.V.'s boyfriend was excluded from the DNA profiles, but the police could not find a match until 2020, when one of the samples matched with Mays's. Mays denied any involvement in the rapes and claimed he had never had sex "expressly including oral sex" with a white woman. Mays also denied using or selling drugs, as well as trading drugs for sex. At trial, though, Mays contradicted himself and stated that he may have exchanged sex with S.V. for drugs, as he often did in the 1990s. The jury convicted Mays of rape, forcible sodomy, and attempted forcible sodomy.

The CAV affirmed, reiterating, "If there is evidentiary support for the conviction, the reviewing court is not permitted to substitute its own judgment, even if its opinion might differ from the conclusions reached by the finder of fact at the trial." (quoting Washington v. Com., 75 Va. App. 606, 615 (2022)). The CAV rejected Mays's argument that S.V. was inherently incredible because Mays failed to support his bare assertion of error. "Unsupported assertions of error do not merit appellate consideration." (quoting Bartley v. Com., 67 Va. App. 740, 744 (2017)). "It is not the role of the courts, trial or appellate, to research or construct a litigant's case or arguments for him." (quoting id.). The CAV dispensed with Mays's sufficiency argument based on the inconsistency of his statements and the DNA evidence.

Hamel v. Galax DSS, Record No. 2247-23-3: (Per Curiam Opinion: Athey, Callins, and Frucci, JJ.)

Termination of parental rights; Motion for a new trial; Rule 5A:8

Termination of parental rights affirmed without oral argument because the circuit court did not abuse its discretion in denying continuance motion based on Hamel's failure to appear and failure to notify the court. CAV did not review the merits of the case because the merits were not part of the circuit court's order.

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

Hamel is the biological mother of B.D., and her parental rights were terminated by the JDR court. Hamel timely noted her appeal to the circuit court, and on the first trial date, she agreed to a continuance to a new date. Hamel failed to appear for her rescheduled trial date, and she did not answer the circuit court's phone calls. Hamel's counsel moved to continue the case, but the circuit court found no good cause to grant the request.

Before the circuit court dismissed the case, Hamel moved for a new trial and stated that she failed to appear "because she did not have a ride to court." The circuit court

scheduled a hearing on the motion for new trial, but Hamel did not appear. The circuit court denied counsel's request to continue the motion and dismissed the case.

The CAV affirmed, finding that the circuit court did not abuse its discretion in denying the continuance. Further, the CAV found that Hamel waived any argument on the request to continue the motion by failing to present a transcript or written statement of facts related to the motion for a new trial hearing. The CAV, citing Rule 5A:8, found that Hamel failed to present a complete record and had waived her right to appeal that issue.

Bashir v. Com., Record No. 1603-23-4: (Ortiz, J., writing for Huff and AtLee, JJ.)
Recusal; Abuse of discretion in sentencing
Life sentence affirmed without oral argument because Bashir will be eligible for geriatric release. Therefore, the CAV refused to conduct a proportionality review of his life sentence. No abuse of discretion in sentencing where circuit court found the guidelines were wholly inadequate. Circuit court did not abuse its discretion in not recusing himself because there was no proof of actual bias.

The CAV rejected Bashir's appeal without oral argument, finding it was "wholly without merit." Code § 17.1-403(ii)(a); Rule 5A:27(a). Bashir pleaded guilty to arson, false statement on a firearms form, and possession of a firearm by an acquittee, and unauthorized use of an electronic tracking device. After a proffer, Bashir was sentenced to life imprisonment plus 10 years and 12 months.

The Commonwealth's proffer included the facts of Bashir's prior acquittal by reason of insanity from 2013, when Bashir shot an Alexandria police officer in the head. During Bashir's conditional release period, his treatment team became concerned about his behavior towards female therapists. Bashir had learned of one therapist's private address without her consent. Bashir sent inappropriate text messages to this therapist.

In 2019, Bashir purchased a pistol and ammunition from a gun show. 2 days later, he purchased a silencer. That month, Bashir went to his treatment manager's house. She woke up to the smell of gasoline and called 911. Firefighters found an open container of gasoline just outside the back door. Only a few days later, Bashir purchased another pistol that was compatible with his silencer. A few days after that, Bashir went to his NGRI coordinator's house and started a gasoline fire at her house. That night, Bashir also went to the therapist's house and spread gasoline over her car. The victims called the police and reported the incidents. During the investigation, officers uncovered that Bashir had made numerous inculpatory searches online and had attached a GPS tracker to one of his therapist's cars.

The circuit court, after hearing the proffer, took a recess to determine whether he should recuse himself because the judge was a former Alexandria police officer. The circuit court had contacted the Judicial Inquiry and Review Commission, which informed him that "his prior service in the police did not raise a conflict with

this case because it was so remote." Bashir still moved for the circuit court to recuse himself, but the circuit court denied the motion, reiterating that he "had no feelings one way or the other about the matter."

The circuit court accepted the guilty pleas and continued the matter for sentencing. At the sentencing hearing, the circuit court heard testimony from several witnesses, including the officer that Bashir had shot in 2013. The circuit court imposed a life sentence on the arson and an additional 11 years on the other charges, emphasizing "Bashir's actions were manipulative, disturbing, devious, chilling, bizarre, dangerous, evil, and troubling." The circuit court found the guidelines "wholly inadequate to address the serious nature of Bashir's behavior and the facts of the case."

The CAV affirmed. On the recusal issue, the CAV reiterated that "[i]n the absence of proof of actual bias, recusal is properly within the discretion of the trial judge." (quoting Com. v. Jackson, 267 Va. 226, 229 (2004)). The CAV found no abuse of discretion in the circuit court's decision not to recuse himself.

On the sentencing issue, the CAV rejected the proportionality argument because appellate courts "do not undertake proportionality review in cases that do not involve life sentences without the possibility of parole." Because Bashir is eligible for geriatric release and "geriatric release under Code § 53.1-40.01 provides a meaningful opportunity for release that is akin to parole," the CAV declined to conduct a proportionality review. (quoting Johnson v. Com., 292 Va. 772, 781 (2016) and citing Cole v. Com., 58 Va. App. 642, 654 (2011)). In general, the CAV found no abuse of discretion in the sentences.

Commentary: Interestingly, while denying the appeal without oral argument, the panel still identified an author, rather than preparing a per curiam opinion. This isn't unheard of, but it is somewhat abnormal. This also happened in Hardesty Construction, Inc. v. Weedon, released this week and discussed infra.

Turner v. Com., Record No. 0948-23-4: (Ortiz, J., writing for Huff and AtLee, JJ.)
Sufficiency; Constructive possession
Possession of Schedule I/II substance conviction affirmed without oral argument where Turner fled from the police for 30 yards down a hill before officers found a bag of cocaine and a pipe 3 feet away from him and paraphernalia/cocaine residue was found in his area of the car.

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

One night, an officer "responded to a report from a hotel employee that a vehicle in the hotel parking lot was flashing its high beams at guests." Turner was identified as a passenger in the car. When the officer parked, Turner was outside next to the front passenger door. "Turner was looking around and reaching toward his pocket"

repeatedly and did not respond to the officer's initial question. The officer told Turner to stop reaching toward his pocket. Turner fled.

After about 30 yards, Turner tripped and fell down. An officer located a clear plastic bag with cocaine and a pipe next to Turner. In a subsequent search of the car, the officer located paraphernalia and cocaine residue in the front passenger seat. Turner was convicted of simple possession.

The CAV affirmed, rejecting Turner's argument that there was insufficient evidence to demonstrate constructive possession. The facts of the case, including the flight, paraphernalia/residue in the car, and the proximity of the narcotics provided sufficient evidence for a rational factfinder to conclude Turner was guilty.

Lewis v. Com., Record No. 1337-23-2: (Decker, CJ., writing for Raphael and White, JJ.)
Sufficiency; Admissibility of evidence; Contempt of court; Failure to appear; Constructive possession; Harmless error; Rule 5A:18
Conviction of Possession of Schedule I/II substance affirmed where circuit court properly admitted Lewis's statements about his drug use 2 hours before being arrested. Contempt finding by jury proper where there was sufficient evidence to implicate the permissive inference of willingness. Lewis's argument regarding the permissive inference instruction waived.

Police initiated a traffic stop on a car for speeding, but the driver tried to flee. Ultimately, the driver crashed the car, and police detained the occupants. Labons was identified as the driver, and Lewis was identified as the front passenger. On the front passenger floorboard, the officers found a hypodermic needle with brown liquid believed to be methamphetamine. Officers also found a folded dollar bill with white powder. Lewis identified that powder as methamphetamine and claimed ownership.

Lewis told the officers that there was a bag in the backseat that he wanted to retrieve. Officers searched the bag and found a recently used syringe with residue in it. Lewis admitted he had used methamphetamine for the last 2 months. Lewis also said that he had used methamphetamine only 2 hours before the traffic stop.

Lewis failed to appear for his first court date and was later tried by a jury for contempt of court for failure to appear and for possession of narcotics. The circuit court admitted Lewis's statements to the officer over Lewis's objection. The circuit court also instructed the jury that failing to appear after receiving timely notice is sufficient for an inference of willfulness. The jury convicted Lewis of both charges.

The CAV affirmed, finding no abuse of discretion in admitting Lewis's statements, rejecting Lewis's argument that the evidence was of "other crimes wrongs or acts," instead finding that the evidence was evidence of the crime for which he was on trial. The CAV distinguished this case from Wilson v. Com., 16 Va. App. 213, adopted upon reh'g en banc, 17 Va. App. 248 (1993) and found that the statements

Lewis made about his drug use that night was evidence of constructive possession that night. The CAV further found that any error was harmless and found sufficient independent evidence to convict for possession.

On the contempt issue, the CAV found that Lewis had waived his argument on the permissive inference of willfulness by failing to specifically and timely object, citing Rule 5A:18. The CAV found sufficient evidence to support the conviction, as well.

Hardesty Construction, Inc. v. Weedon, Record No. 1579-23-2: (Decker, CJ., writing for Raphael and White, JJ.)
Breach of contract; Rule 5A:18
Breach of contract finding affirmed without oral argument where Hardesty failed to preserve its argument on the unsupported valuation/damages testimony by Weedon.

The CAV rejected Hardesty'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).

Weedon engaged with Hardesty Construction (Hardesty) to replace the roof of her house because it was damaged by hail. Hardesty hired a subcontractor, which damaged the home's vinyl siding, landscaping, lighting, and a fence post. Weedon repaired the damage and submitted a bill to Hardesty. Hardesty did not pay.

Weedon also noticed that her roof "was coming apart at the edges." She complained to Hardesty, who sent an individual for 2 months to remedy the roof. They failed to do so, and Weedon complained. Hardesty stated there was nothing else wrong with the roof and refused to do anything else.

Weedon hired a consultant to inspect the work. The consultant found several deficiencies, and a building inspector also determined that Hardesty failed to follow the manufacturer's instructions and "violated the Virginia Residential Code." Hardesty replaced the roof a 2nd time but there were still deficiencies.

At trial, Weedon estimated that her house was worth $40,000 less because of the issues. Weedon did not substantiate her claim, but Hardesty did not object to her testimony. The jury returned a verdict for Weedon on one claim and awarded $30,253.30 in damages.

The CAV affirmed, finding that Hardesty waived its objection to Weedon's valuation testimony, citing Rule 5A:18. Further, the CAV found no error in submitting the case to the jury, as there was sufficient evidence for a jury to find the damages awarded. The CAV also found that it could not reach the merits of

Weedon's cross-error because she failed to join Samuel Hardesty in his individual capacity.

Dotson v. Com., Record No. 1599-23-3: (Humphreys, SJ., writing for O'Brien and Ortiz, JJ.)
Admissibility of evidence; Best evidence rule
Forgery/Uttering convictions affirmed where best evidence rule permits photographs of a check/form filled out by Dotson. Photographs were considered duplicate originals.

Dotson entered a convenience store and told the "money center manager" that he wanted to cash a $495 payroll check. Dotson filled out a new customer form, which included his social security number and a thumb print, and he provided a photo id. The check identified Dotson's employer as J Kuntryboy Beatz, LLC. The manager attempted to confirm the check, but Dotson told her to contact a different individual. The manager refused and told him that she was calling the check's maker. Dotson left the store multiple times and eventually did not return.

At trial for forgery, uttering, and attempted obtaining money under false pretenses, the Commonwealth elicited testimony from the owner of J Kuntryboy Beatz, LLC, its only employee. He testified that his checkbook was stolen only a few days prior to the incident. He testified that nobody had his permission to fill the check and that he did not recognize the signature on the bottom of the check. The Commonwealth also introduced exhibits 1, 3, and 4, which were photographs of the check, Dotson's photo id, and a photo of the form Dotson filled out. The circuit court convicted Dotson as charged.

The CAV affirmed Dotson's convictions. On the best evidence rule, the CAV reiterated that "[p]roper circumstances exist to treat a photocopy as a duplicate original when the accuracy of the photocopy is not disputed." (quoting Frere v. Com., 19 Va. App. 460, 466-67 (1995)). The CAV determined that proper circumstances existed to consider the photographed items as duplicate originals.