Overview

The Supreme Court of Virginia (SCV) was relatively quiet this week, without entering any orders on cases or granting an appeal. We shall see if the SCV grants any more appeals in the 2 weeks before its next writ panel on October 15. The SCV will hold its next merits arguments between October 28 and November 1.

The Court of Appeals of Virginia issued a large number of opinions, both published and unpublished, on a variety of issues. The published cases focused on civil and criminal cases, including opinions on contract interpretation, employment status, sovereign immunity, and the landlord/tenant relationship. The published criminal cases included a felony homicide/child abuse case where a mother killed her 15-month-old child by giving him a lethal dose of methadone. The other published criminal case was a DUI, confirming that statutory exclusionary rules are limited in scope and are to be read strictly.

In unpublished cases, the CAV issued several opinions in the domestic world, including a case on equitable distribution and several on the termination of parental rights. The most contentious case this week was Guevara-Martinez v. Alexandria Dep't of Community and Human Services, Record No. 1848-22-4. Each judge of the panel wrote an opinion in the case, although one opinion was only a paragraph long. The Panel reversed termination of parental rights, but one judge dissented and would have affirmed the termination.

SCV Opinions and Orders

No new orders or opinions this week.

CAV Published Decisions

Jolley v. Ellis, et al., Record No. 0870-23-1: (Lorish, J., writing for Fulton and White, JJ.)
Sovereign immunity; Plea in bar; Ministerial vs. discretionary acts
Dismissal reversed because sovereign immunity did not apply to garbage truck driver who left his route to dump the trash before returning to route. Ellis was not conducting discretionary actions on behalf of the city and instead performing only ministerial actions.

> Ellis was a truck driver collecting garbage for the City of Chesapeake when he came to a two-way stop sign. Ellis "intentionally rolled through the stop sign" and did not come to a complete stop. Ellis did not observe Jolley's car coming from the right, where there was no stop sign. Ellis's truck collided with Jolley's, flipping it on its side and seriously injuring Jolley.
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> Jolley sued Ellis and Chesapeake, both of which claimed sovereign immunity. The circuit court heard evidence related to how many garbage cans Ellis routinely collected and how often he would have to unload his truck, and that on this particular case, Ellis chose to unload the truck slightly early based on the amount of garbage already collected. The circuit court sustained the plea in bar and

dismissed the suit, finding that Ellis's decision to unload at that time was discretionary and not ministerial.

The CAV reversed. There is a four-factor test for sovereign immunity, restated herein. (1) nature of function of employee; (2) extent of state's interest and involvement in the function; (3) degree of control and direction exercised by the state over the employee; (4) whether the act complained of involved the use of judgment and discretion. (quoting Messina v. Burden, 228 Va. 301, 313 (1984)).

The SCV has already determined that garbage removal is "a governmental function" carried out "primarily to promote the health and comfort" of the public." (quoting Ashbury v. Norfolk, 152 Va. 278, 283 (1929)). Thus, the only question is whether Ellis's actions were discretionary or ministerial. (citing Heider v. Clemons, 241 Va. 143, 145 (1991)). A ministerial act is "one which a person performs in a given state of facts and prescribed manner in obedience to the mandate of legal authority without regard to, or the exercise of, his own judgment upon the propriety of the act being done." (quoting Dovel v. Bertram, 184 Va. 19, 22 (1945)).

When it comes to crashes, appellate courts "look to whether the means of effectuating the applicable government function involves ordinary driving in routine traffic versus driving that requires a degree of judgment and discretion beyond ordinary driving situations in routine traffic." (quoting McBride v. Bennett, 288 Va. 450, 455 (2014)). The CAV stated that key question is whether the driving is "a means of transportation to get to the place where the governmental function is to be performed" which would be ministerial or "driving the vehicle is the means of carrying out the government function" which would be discretionary.

The CAV highlighted that when Ellis was driving from his scheduled route to unload his truck, he operated the truck with the normal care and behavior that he did with his personal car. This contrasted with the distinctive differences in operating the truck on the route, collecting the garbage. The CAV likened the case to wherein the SCV found that driving an empty school bus from home to the scheduled route was ministerial because he was only "approaching the place where he would embark on his governmental duty of transporting children." (quoting Stanfield v. Peregoy, 245 Va. 339, 345 (1993) and distinguishing Linhart v. Lawson, 261 Va. 30, 36 (2001)).

Commentary: This case could go to the SCV, but it might not be on the issue of discretionary vs. ministerial, although that is absolutely possible. Instead, I think it would be on the question of deference to the circuit court. This case highlights a narrow situation where the deferential view of the facts almost direct the conclusion of law, which is supposed to be reviewed de novo.

In this case, the circuit court found that Ellis's operation of the vehicle required greater care and discretion than simply driving from one location to the next. In doing so, the circuit court discussed the decision-making process that Ellis used to

> *determine when he should deviate from his route to go unload. It also goes without saying that operating a garbage truck is substantially different than operating a personal vehicle.*
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> *So, viewing the facts in a deferential manner, the CAV would almost have to find that Ellis was using his discretion in determining when to leave the route but acting ministerially immediately upon leaving the route. This is certainly not a major issue, and the CAV did point out the oddity of SCV precedent that operating a school bus was simply transporting oneself to work, regardless of the difference in operating a personal car versus a school bus and the governmental requirement that the driver transport the school bus to the route.*

Harris v. Washington & Lee University, Record No. 1083-23-3: (Athey, J., writing for Huff and Fulton , JJ.)
Wrongful termination; Whistleblower protection; Employee; Plea in bar; Statutory interpretation
Wrongful termination suit properly dismissed where Harris was not a shared or special employee of Washington & Lee University and instead employed by another entity. No error in denying Harris's request for a jury to hear the plea in bar because there were no factual issues, only legal ones.

> Harris was the "house director for the Zeta Deuteron chapter of the Phi Gamma Delta (PGD) fraternity located on the campus of W&L." Harris was hired by the President of PGD's corporation, and only the two of them executed the employment agreement. W&L does own the fraternity house and requires that every fraternity and sorority employ a house director, but W&L did not participate in the hiring of Harris. Harris quickly became "a self-described squeaky wheel" reporting several issues with compliance with PGD's regulations.
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> During the COVID-19 pandemic, W&L distributed guidelines for mitigating the effects. House directors were tasked with reporting violations of the guidelines. PGD's students and other fraternity students were permitted return before testing for COVID-19, in violation of the guidelines. Harris reported these violations to the director of resident life, Reid. Reid did not reprimand the reported students, like Harris requested.
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> An anonymous person reported the issues to a local newspaper, and W&L staff said there was "no doubt this is from Harris at PGD." W&L administrators contacted PGD corporate and discussed termination of Harris. Shortly after, Harris criticized the administration in an email and accused the administrators of violating executive orders and ignoring her complaints. The administrators reached out to PGD's corporation, and Harris was terminated. As part of her termination, Harris signed an agreement that she would not file a suit for wrongful termination against PGD's corporation.
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> Harris sued W&L for wrongful termination and retaliation for whistleblowing. W&L demurred and filed an answer. They conducted discovery and ultimately filed

a plea in bar. The circuit court held a hearing on the plea in bar and found that Harris was not an employee as defined in § 40.1-2 and further did not report any violations to a supervisor at W&L because "she did not have a supervisor" at W&L. The circuit court dismissed the suit.

The CAV affirmed. Finding that § 40.1-2 does encompass "a shared employment arrangement" Harris did not qualify as an employee of W&L, shared or otherwise. The CAV analyzed whether W&L had "borrowed" Harris from the PGD corporation, reiterating that there are situations where a "special employer" may control an employee's labor without compensating the employee, while the "general employer" is the one who hired and compensates the employee. (quoting Smith v. McMillan Pers. Serv., 48 Va. App. 208, 217 (2006) and Ideal Steam Laundry v. Williams, 153 Va. 176, 180 (1929)).

There are 4 elements to a special employer/employee relationship: (1) selection and hiring; (2) payment; (3) power of dismissal; and (4) control over the employee's actions. (quoting Va. Polytechnic & State Univ. v. Frye, 6 Va. App. 589, 593 (1988)). The fourth is the most important but is not dispositive. The CAV found that § 40.1-2 required that for qualification under the Whistleblower protection statute, the employee must be paid by the special employer to claim a violation of the protection by the special employer.

Finally, the CAV found no error in the circuit court's denial of Harris's motion for the plea in bar to be tried in front of a jury. The circuit court was not plainly wrong in finding that there was no factual dispute. Because the only items in dispute were legal in nature, a jury was inappropriate.

Flores v. Com., Record No. 1110-23-4: (Lorish, J., writing for Malveaux and Friedman, JJ.)
Res judicata; Statutory exclusion rules; Statutory interpretation; Rule 5A:18
DUI conviction affirmed because § 46.2-1013(B)'s exclusionary rule did not extend to violations of § 46.2-1013(A), which was the basis of the initial stop.

Flores was driving his car late at night, and police noticed that he did not have either of his rear tail lights illuminated. Officers conducted a traffic stop, and after subsequent investigation, Flores was arrested for DUI.

The general district court granted Flores's motion to suppress the evidence obtained after the seizure, citing § 46.2-1013(B), which requires suppression of evidence obtained after seizing someone for failing to have their rear license plate properly illuminated. The GDC then granted the Commonwealth's motion to enter a nolle prosequi on the charge. The Commonwealth direct indicted the DUI charge in the circuit court.

Flores argued that the circuit court should suppress the evidence under the same subsection, but the circuit court disagreed. A jury convicted Flores of DUI, and the

circuit court denied Flores's motion to set aside the verdict on the basis of res judicata.

The CAV affirmed, finding that res judicata did not bind the circuit court because the GDC's decision was not "a final determination on the merits." (quoting Neff v. Com., 39 Va. App. 13, 18 (2002)). "A nolle prosequi dismisses the action 'without a determination of guilt.'" (quoting Com. v. Jackson, 255 Va. 552, 556 (1998)). As such, it "is a mere discontinuance of the action." (citing Cantrell v. Com., 7 Va. App. 269, 280-82 (1988)).

The CAV specifically found that "[t]he fact that the district court heard evidence and granted the motion to suppress before granting the motion to nolle pros does not change the outcome." The CAV cited § 19.2-60 which states that when a motion to suppress "is granted by a court not of record . . . the ruling shall have no effect on any hearing or trial in a court of record."

On the merits of Flores's motion to suppress, the CAV found no error in the circuit court's denial. § 46.2-1013(B) excludes all evidence obtained after a seizure for a violation of that subsection. Again, that subsection requires that individuals have their license plate illuminated, making them visible at 50 feet. Subsection A requires that individuals have rear tail lights, visible at 500 feet. The exclusionary rule of subsection B only excludes evidence obtained after a seizure of that "subsection." The CAV highlighted the contrast between § 46.2-1013(B)'s exclusionary rule and § 46.2-1030(F)'s exclusionary rule, which excludes all evidence obtained after a seizure for a violation of that "section."

The CAV found that the plain language of § 46.2-1013(B)'s exclusionary rule only applied if the officer conducted a seizure for a violation of that subsection. All parties agreed that the officer only conducted a traffic stop for a violation of § 46.2-1013(A). Thus, the exclusionary rule did not apply.

Commentary: I don't think anyone will or even should be surprised by this result/opinion on the res judicata issue. As an Assistant Commonwealth's Attorney, I always advised others to bifurcate the DUI proceedings in GDC specifically for these types of possibilities. While we have great judges in the district and circuit courts here in Prince William County, nobody is perfect, and mistakes can be made. After I left, I don't know if the practice has continued in the GDC, but this case solidifies that as the best practice.

On the statutory exclusionary rule interpretation, it is important that the CAV left open the question of whether the 1030(F)'s exclusionary rule applied to 1013(A) violations because of the definition of "illuminating devices." Personally, I don't think it does, but the CAV may review that at a later date.

Justice v. Com., Record No. 1515-23-3: (White, J., writing for Athey and Frucci, JJ.)
Intent; Willful
Felony homicide conviction affirmed where Justice gave her 15-month-old son a lethal dose of methadone. Justice's defense that she did not knowingly/willfully give him methadone was properly rejected where a factfinder could conclude that she "knew or should have known" the medicine was methadone.

Justice was the mother of 2 twin boys, who were 15 months old. Early in the morning in 2021, Justice called 911 because J.G. was not breathing and was cold to the touch. Emergency services could not revive J.G., and he was pronounced dead at the hospital. Justice told officers that she had woken up to J.G. crying at 5:00 and let him cry for 15 minutes before tending to him. She then left him to go back to sleep and when she woke up for work, she found that J.G.'s face was blue and he was cold.

Justice stated that she gave J.G. an antibiotic around 6:00pm the night before. Officers found a syringe with pink liquid and a bottle stating it contained Fluconazole, but subsequent testing determined that the bottle had ten times more methadone than Fluconazole. Justice admitted that she went to a methadone clinic but stated that she never kept methadone in the house. Justice told officers that she obtained the bottle of antibiotic from J.G.'s father and claimed that she was being framed, alleging that the father "called the police three days before the incident with a false tip that Justice was trying to kill her kids."

The autopsy uncovered that J.G. died of methadone poisoning and likely the night before rather than the morning that Justice called 911. The examiner found that there was still food in J.G.'s stomach that would not have been present if J.G. died in the morning, like Justice stated. Justice was charged with felony child neglect and felony homicide, killing J.G. "accidentally and contrary to her intention."

Justice argued that there was insufficient evidence to prove willfulness for either of the charges. The circuit court denied her motion to strike, finding that her testimony was "totally belied by the scientific evidence." The circuit court further found that Justice "knew or should have known that the antibiotic she gave to J.G. contained methadone." The circuit court found Justice guilty.

The CAV affirmed. "An act is willful if it is intentional, purposeful, or involves a reckless disregard that injury will probably result from it." (quoting Com. v. Duncan, 267 Va. 377, 384-85 (2004)). "Willfulness is synonymous with criminal negligence or recklessness and is judged under an objective standard that asks whether the actor 'knew or should have known the probable results' of her acts." (quoting Miller v. Com., 64 Va. App. 527, 543-44 (2015)).

The CAV likened the case to Barrett v. Com., 268 Va. 170 (2004), wherein a mother fell asleep after a night of drinking, waking up to find her 3-year-old daughter had drowned her 10-month-old son. The SCV affirmed conviction in that case, and the

CAV found no way to distinguish Justice's situation from Barrett's. The evidence was sufficient for a rational trier of fact to conclude Justice was guilty.

Yellow Mountain Village Mobile Home Park Assoc., et al. v. Yellow Mountain MHP, LLC, Record No. 1638-23-3: (Fulton, J., writing for Huff and Athey, JJ.)
Landlord/Tenant; Declaratory judgment; Contract interpretation
Plain language of the lease permitted Landlord to raise rent from $400/month to $550/month with 60 days notice of the increase.

Appellants are the Tenants of the mobile home park, and Appellee is the Landlord. Landlord purchased the park in February 2022 and entered into new leases with the Tenants, setting rent at $400/month and creating provisions for other fees. In September 2022, Landlord issued a notice of a new $20/month fee for trash disposal, which was previously included in the rent. That fee did not go into effect, but in November 2022, Landlord noticed the Tenants that the rent was going to increase to $550/month in February 2023.

Tenants filed suit to preclude Landlord from raising the rent and for declaratory judgment. Both parties filed summary judgment, and the circuit court held a hearing. The circuit court entered judgment in favor of Landlord.

The CAV affirmed. The plain language of the contract "unambiguously reserve[d] the unilateral right to Landlord to raise lot rents mid-term, after giving 60-days' written notice to Tenants." Because of this plain language, unless it "violates the statutory scheme contained in the [Mobile Home Lot Rental Act]," the Landlord has the ability to raise rent in accordance with that paragraph.

The CAV determined that the lease complied with all provisions of the MHLRA and thus found no error in the circuit court's summary judgment in favor of Landlord. "Nothing in this agreement violates that statutory scheme set out in the MGLRA, and we decline to interpret those code sections in a way that would infringe upon the right of Virginians to freely contract with each other." (citing Com. v. Va. Ass'n of Cntys. Grp. Self Ins. Risk Pool, 292 Va. 133, 143 (2016)). The CAV rejected Tenants' argument that the 60-day notice provision violated the requirement that landlords offer a 1-year lease because it would ultimately become only a set of 2-month leases.

Tuscarora Marketplace Partners, LLC v. First National Bank, Record No. 1465-23-3: (Athey, J., writing for Huff and Fulton, JJ.)
Declaratory judgment; Restrictive covenants; Injunctions; Interlocutory appeal; Horizontal privity; Touch and concern the land
Restrictive covenant enforceable and injunctive relief affirmed in interlocutory appeal. Horizontal privity existed between the original parties, and the restriction touched and concerned the land.

Virginia Bank & Trust Company (VBT) purchased a property from Tuscarora Farms in 1998. Tuscarora Farms owned several adjacent properties. Several restrictions were agreed to, including that the neighboring lots "shall not be used for the location or operation of commercial banking facilities, credit union facilities" or other financial institutions. The day that VBT and Tuscarora Farms closed the deal, Tuscarora Farms and Franklin Properties executed a declaration restricting neighboring parcels (including VBT's) conveyance of any property to competing businesses.

In 2020, VBT was acquired by First National Bank, so FNB immediately owned the lot in question. Also in 2020, Tuscarora Marketplace contracted with URW Community Federal Credit Union to have a branch within the marketplace/shopping center.

FNB argued that this was a breach of the restrictive covenant and sold to a competing business. Tuscarora Marketplace argued that this was not a violation because FNB did not have privity of contract for that restrictive covenant. The circuit court held that "horizontal and vertical privity existed between the original covenanting parties." The circuit court further ordered injunctive relief precluding Tuscarora Marketplace from leasing the space to URW.

The CAV affirmed. "A covenant regarding real property is a promise in writing to do or refrain from doing something, which creates a right in property and constitutes an interest in land." (citing Sloan v. Johnson, 254 Va. 271, 276 (1997)). The CAV reiterated that "general restraints of trade form only personal covenants and per se do not run with the land." (citing Carneal v. Kendig, 196 Va. 605, 612 (1955)). In this case, the CAV followed the modern "touch and concern rule" (citing Mayor of Congleton v. Pattison, 10 East, 130, 136 (K.B. 1808)).

The CAV found that this covenant satisfied the conditions of horizontal and vertical privity. The CAV further found that the negative restrictive covenant was reasonable in nature. (citing Oliver v Hewitt, 191 Va. 163 (1950)). Therefore, the CAV determined that the circuit court did not err in its findings or judgment.

CAV Unpublished Decisions

Totten v. Com., Record No. 0572-23-3: (Chaney, J., writing for Friedman and Lorish, JJ.)
Sufficiency; Abuse of discretion in sentencing; Intent; Carjacking
Carjacking conviction affirmed where the Commonwealth presented sufficient evidence that Totten's intent was to deprive King of her vehicle, even though the force used was in a store and conducted at the same time as the robbery.

Totten asked his girlfriend, King, to take him to get his phone back, which required money. So, King went to the bank to withdraw $25 from her account. Totten and King then got into an argument in the car. King stopped her car at a red light, and Totten took the key out of the ignition and stepped outside. King and Totten argued for 15 minutes before he returned the keys and got back into the car.

King lied and said that she had a headache and needed to stop at a convenience store because she was afraid of Totten and wanted him to leave her alone. King "grabbed her pocketbook, phone, and keys, and" went into the convenience store. Totten exited the car to follow her, and King locked the car, telling Totten that he "did not have permission to get back in her car."

Totten followed King into the convenience store and assaulted her, "forced her over a machine, and fought to take her pocketbook and keys." The Commonwealth introduced a video recording of the assault at trial, which lasted approximately 10 seconds. Totten obtained the pocketbook and keys and left the store, taking King's car with him. North Carolina police located her car 3-4 days later, but King's keys and other belongings were never returned to her.

Totten pleaded guilty to robbery but asserted his right to a trial on the carjacking charge. Totten testified that he was the only one who was driving, but he also contradicted himself several times throughout his testimony on other factual issues. "When asked if he had left King without a car, he answered that she had left him the same way." The circuit court convicted Totten of carjacking and sentenced him on both the robbery and the carjacking charges.

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)). The CAV determined that the Commonwealth presented sufficient evidence of Totten's intent to deprive King of her vehicle by taking her keys multiple times. The CAV rejected Totten's argument that the "taking of the car keys was 'merely incidental' to the robbery." Based on the evidence and King's testimony, there was sufficient evidence of intent, and the circuit court was able to reject Totten's testimony as incredible.

The CAV also determined there was no abuse of discretion in the circuit court's sentence, stating that the CAV "will not presume that a trial court purposefully

ignored mitigating factors in blind pursuit of a harsh sentence." (quoting Bassett v. Com., 13 Va. App. 580, 584 (1992)). There was no evidence to support Totten's allegation of ignoring mitigating factors, so the CAV found no abuse of discretion.

Albemarle County DSS v. Wilson, et al., Record No. 0791-23-2: (Per Curiam Opinion: O'Brien, Malveaux, and Raphael, JJ.)
Termination of Parental Rights; Foster care plan; Best interests of the child; Cross-error; Submission on briefs; Best and narrowest grounds
No error in denying DSS's petition to terminate Parents' parental rights where Parents were attempting to cooperate with DSS and regain custody of the child.

Appellees (Shelly and Keith Wilson) are biological parents of L.W., and the DSS became involved in 2015 after receiving reports of abuse of another child in the household (not subject of appeal). DSS received additional reports of "domestic violence, physical neglect, and sexual abuse in the family." "Mother insisted that the family did not need services."

In 2018, L.W. and B.C. witnessed Father strangle/assault Mother, and in 2019, DSS petitioned to remove L.W. from the home based on the assaultive history and "parents' lack of cooperation with services." The Juvenile and Domestic Relations (JDR) district court removed L.W. from the home and placed her in foster care.

Parents cooperated with DSS, and after a year, they petitioned for more visitation and a trial home placement. DSS opposed the petition and "sought an attachment evaluation" and additional therapy, which generally takes "years to complete." Parents completed the initial attachment evaluation and began the therapy, and in 2021, they participated in a second attachment evaluation. The therapist found that they were not yet prepared to support L.W. but predicted "it would be emotionally safe enough for L.W. to be unsupervised in the home by fall of 2022."

DSS petitioned to terminate their parental rights in 2022. DSS presented evidence that L.W. was in a stable and healthy position with the foster family. L.W. "demonstrated a lot of confusion about having to choose between caregivers" and would be "emotionally upset for hours after visits." The circuit court found that termination of the parental rights was in the best interest of the child because it would "be much less disruptive for L.W. to remain in her foster care placement" and her foster parents wanted to adopt her. But, the circuit court found that DSS did not meet its burden of clear and convincing evidence and gave "an additional 6 to 8 months" for Parents to "substantially address their attachment with L.W." because they had "worked so diligently."

The CAV affirmed. The CAV found no error in the circuit court's findings that Parents were attempting to address their issues and cooperate with DSS. The CAV further found that the 6-8 month timeline complied with the General Assembly's "reasonably presumptive time frame of 12 months." (citing Joyce v. Botetourt Cnty. Dep't of Soc. Servs., 75 Va. App. 690, 705 (2022) The CAV did not address the

> Parents' cross-claim that termination was not in the best interests of L.W. because of the "best and narrowest grounds" doctrine. (quoting Theologis v. Weiler, 76 Va. App. 596, 603 (2023)).

Salkay v. Charlottesville DSS, Record No. 0880-23-2: (Frucci, J., writing for Athey and Callins, JJ.)
Termination of parental rights; Record on appeal; Jurisdiction
Appeal dismissed where the record did not include Salkay's notice of appeal from the JDR court to the circuit court.

> The facts relevant to the termination of Salkay's parental rights are irrelevant to the CAV's analysis and are thus omitted.
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> The JDR court terminated Salkay's parental rights, and, purportedly, Salkay appealed to the circuit court for a de novo hearing. The circuit court entered an order terminating the parental rights, and Salkay appealed to the CAV.
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> The CAV dismissed the appeal, finding that because the record did not include the notice of appeal from the JDR court to the circuit court, it could "not assume that the circuit court had jurisdiction over the proceedings allegedly appealed from the juvenile court." It did not affirm or reverse the circuit court's order but merely dismissed the appeal.
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> *Commentary: This case highlights the difference between a dismissal and another ruling of the CAV. In a dismissal, the CAV is generally commenting on jurisdiction or other defect in the proceedings: untimely filed notice of appeal to the CAV, lack of a necessary transcript (or in this case, order), or that the appeal did not emanate from an appealable order.*
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> *Many times, when appellees or the Commonwealth moved to dismiss the appeal, what they mean to do is move for "summary affirmation" because the reason for the affirmation is apparent on the record or the question is moot.*

Guevara-Martinez v. Alexandria Dep't of Community and Human Services, Record No. 1848-22-4: (Causey, J., with Athey, J., concurring in the judgment, and Callins, J., concurring in part and dissenting in part)
Termination of parental rights; Subject-matter jurisdiction
Termination of parental rights reversed where circuit court improperly found there was clear and convincing evidence that Father had failed to make considerable changes in his behavior. Judge Callins dissented and would have affirmed that the circuit court's decision was not plainly wrong or without evidentiary support.

> Guevara-Martinez is the biological father of a minor child that is not identified in the opinion. Mother of the child moved to the United States with the child in July 2019, and it appears that Guevara-Martinez remained in Honduras. The Department

became involved in October 2019 when allegations arose regarding abuse and neglect by Mother.

Mother refused services, and Department entered a safety plan in which Mother was not permitted to be with the child unsupervised. Shortly after, JDR entered a child protective order and awarded Mother's friend sole legal and physical custody. Department entered a finding that the child was abused and neglected.

In 2020, the custodian of the child informed Department that she needed to go to El Salvador, and the child entered foster care. Guevara-Martinez was not considered a good candidate for placement because of Mother's allegations of abuse. Department established guidelines for Guevara-Martinez to move toward reconciliation. While inconsistent, Guevara-Martinez did demonstrate a desire and ability to participate in treatment and family partnership meetings.

The Directorate for Children, Youth, and Family met with Guevara-Martinez and recommended that the child remain in the United States, describing Guevara-Martinez as "an irresponsible and aggressive person who engaged in domestic violence against Mother." Guevara-Martinez continued to cooperate with Department, although his ability to do all of what Department suggested was limited due to transportation issues.

In 2021, Department petitioned to terminate Guevara-Martinez's parental rights. Surprisingly, at the circuit court hearing, Guevara-Martinez appeared in person, having received a visa. Department presented evidence that the child was in a stable and healthy home and that Guevara-Martinez was abusive towards the Mother and older children. Guevara-Martinez contested this evidence, testifying that Mother had abandoned him in 2017 with the older child and moved to Mexico for 7 months. The circuit court granted the petition and terminated Guevara-Martinez's parental rights, although it acknowledged Guevara-Martinez's efforts.

Judge Causey addressed several of Guevara-Martinez's arguments on appeal, including his argument that the circuit court did not have subject-matter jurisdiction because Mother abducted the child from Honduras, violating "the Hague Convention on the Civil Aspects of International Child Abduction. Judge Causey rejected this argument, finding that the circuit court had jurisdiction to consider the case. Judge Causey further determined that there was not demonstrable evidence that Guevara-Martinez failed to make reasonable changes. (quoting Yafi v. Stafford Dep't of Soc. Servs., 69 Va. App. 539, 552 (2018)).

Judge Athey wrote separately to affirm that the doctrine of judicial restraint requires that the CAV "decide cases on the best and narrowest grounds available" which would be that the termination was inappropriate. (quoting Theologis v. Weiler, 76 Va. App. 596, 603 (2023)).

Judge Callins wrote separately, concurring in the Judge Causey's subject-matter jurisdiction analysis but disagreeing in the reversal. Judge Callins would have found that the evidence presented to the circuit court supported the circuit court's conclusions, regardless of whether she agreed with the conclusion. Judge Callins cited the appropriate standard of review, which is that "the circuit court's judgment, when based on evidence heard ore tenus, will not be disturbed on appeal unless plainly wrong or without evidence to support it." (quoting Castillo v. Loudoun Cnty. Dep't of Fam. Servs., 68 Va. App. 547, 558 (2018)).

Judge Callins also found several of Guevara-Martinez's arguments waived under Rule 5A:18 and Rule 5A:20. Judge Callins noted that Guevara-Martinez "raises . . . issues that should not go unremarked" and while "[e]ach referenced issue is a cause for pause." But, Judge Callins reiterated that the CAV's role is not to "use its position to advocate for parties or make decision on the basis of policy considerations. (citing Payne v. Payne, 77 Va. App. 570, 589-90 (2023)). Thus, she dissented and would have affirmed the circuit court.

Commentary: This is an interesting situation because Judge Athey's opinion would be considered the controlling opinion, as it is the narrowest grounds on which a majority of the panel agree. In general, though, my understanding is that the panel votes shortly after the oral argument and decides who will write the opinion. I don't know to what extent they go into depth about the arguments/rationales. In this case, it may be that Judge Causey was not anticipating going into the depth that she did in the subject-matter-jurisdiction argument when deciding to write the opinion. Judge Athey's opinion is only a paragraph long and thus may not have been initially contemplated. Judge Callins, as the only one that would have affirmed, was the only one absolutely required to determine whether the circuit court had jurisdiction over the case at this stage.

There is also the possibility that Judge Athey did concur in the subject-matter jurisdictional question. Judge Athey stated that his "agreement extends only to the majority's analysis that the Department failed to provide clear and convincing evidence that father failed to remedy his situation." But, Judge Callins's opinion states, "I agree with my colleagues that father has failed to show that the circuit court was deprived of legitimate subject matter jurisdiction." One of these Judges (or both) have made typographical errors that confuse the situation.

I find that SCOTUS opinion construction make the most sense, where Justices cite to the sections of the opinion of the Court with which they agree/disagree. This opinion would benefit from such a construction, and I don't think there are any situations that would be made more confusing in that structure. Clarity is important.

Critchley v. Com., Record No. 2222-23-3: (Huff, J., writing for Athey and Fulton, JJ.)
Admissibility of evidence; Propensity for violence; Character evidence; Harmless error
Murder conviction affirmed where Critchley's proposed and excluded evidence did not bear on the victim's propensity for violence. Any error in rejecting the evidence was harmless.

Taylor, the victim, lived with Critchley's mother, Tracy. Police arrived to the house at night and found Critchley and Tracy outside with a .45 caliber handgun. Taylor was found dead on the living room floor. He had been shot 5 times (twice in the head), and a "shotgun was in his left hand with an open palm grip" which was an "odd" resting position, with an officer testifying that "he had never seen a gun rest in a hand like that" in years of policework. The bullets recovered from Taylor's body matched to the .45 handgun that was outside with Critchley and Tracy. Critchley was charged with Taylor's murder.

At trial, Tracy testified that Taylor was intoxicated and arguing with Tracy. Taylor "tried to start a fire in the middle of the living room," and Tracy had to put the fire out. Tracy packed her things to leave and called her daughter. Tracy's daughter called Critchley and told him about the situation. Taylor, in the meantime, grabbed a gun and threatened Tracy not to call the police or she "would be dead before they got there."

When Critchley came to the house, he helped Tracy pack her items. Tracy went into the bedroom and noticed that Taylor (in the living room) did not have a gun in his hands. Then, she heard Taylor cursing at Critchley before Critchley yelled, "Ma." Tracy then heard gunshots, and Critchley came to escort Tracy out of the house.

Critchley attempted to admit a photograph of a paper plate with writing on it that read "I hate nigger loves[.] They are here to destroy white folks get it! Hope they die!" Critchley stated that Tracy would identify the handwriting as Taylor's. The circuit court excluded the photograph finding that "the prejudice of the photograph substantially outweighed any tenuous relevance" it may have. The jury convicted Critchley of second-degree murder and use of a firearm.

The CAV affirmed. The CAV found that the message, assuming it was written by Taylor, "had no tendency to prove any matter at issue." Therefore, it was irrelevant under Rule 2:401 and 2:402. The CAV also found, even if it was relevant, it was unduly prejudicial. Finally, the CAV determined that the message had no bearing on Critchley's "defense of others argument" because it only pertained to Taylor's belief on race, not propensity for violence. The CAV further stated that any error was harmless.

Burrus v. Com., Record No. 1349-23-1: (Per Curiam Opinion; Beales and Causey, JJ., and Petty, SJ.)
Sufficiency
PWID and miscellaneous convictions affirmed without oral argument where Burrus admitted to distributing narcotics and living in the apartment where narcotics and firearms were located.

> The CAV rejected Burrus'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).
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> Officers were conducting surveillance on an apartment "for many months" based on complaints received for approximately 2 years. Throughout the months, "the one person that [police] saw on the regular was Mr. Burrus." Officers obtained a search warrant for the apartment and found Burrus and a female occupant. While being escorted out, Burrus volunteered, "I don't know what's going on. I just live here."
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> Officers found cocaine, guns, cutting agents, and digital scales. Other items that had Burrus's name on them were found near paraphernalia. In an interview, where Burrus waived his Miranda rights, Burrus admitted that he distributed cocaine and other narcotics for "G" or "Big man."
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> At trial, Burrus identified "G" as his friend's father, who owned the apartment. Burrus contested that he had previously told officers that he distributed narcotics. Burrus moved to strike the evidence, which was denied. The circuit court convicted Burrus of PWID schedule I/II, possessing a firearm with Sch. I/II, and possession of a firearm by a felon.
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> The CAV reiterated that "constructive possession may be established by evidence of facts, statements, or conduct by the defendant or other facts and circumstances proving that the defendant was aware of the presence and character of the contraband and that it was subject to his dominion and control." (quoting Smallwood v. Com., 278 Va. 625, 630 (2009)). Burrus's statements, along with the other circumstantial evidence, provided sufficient evidence for a rational factfinder to conclude that Burrus was guilty.

Parrish v. Com., Record No. 2008-23-2: (Per Curiam Opinion: Athey, White, and Frucci, JJ.)
Sufficiency
Malicious wounding and abduction convictions affirmed without oral argument where victim sustained minor injuries and was choked for a significant amount of time.

> The CAV rejected Parrish'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).

> Parrish and Mayberry were in a romantic relationship. One day, Parrish threatened Mayberry when she came back from buying cigarettes. For hours, Parrish tormented and choked Mayberry in the kitchen. Then, Parrish held a knife against her throat, drawing blood. Mayberry escaped, but Parrish caught her and choked her again. Mayberry escaped again and got to the neighbors and called the police. Parrish fled in Mayberry's car. Officers observed "superficial skin breaks" and "multiple bruises."
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> At trial, Parrish testified in his own defense, admitting to having a knife but denying that he cut her. In his motion to strike, Parrish argued that the malicious wounding charge should be struck because there "wasn't enough of a wound to support a conviction." The circuit court disagreed and convicted Parrish of malicious wounding and abduction.
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> The CAV affirmed, reiterating "[t]o prove a bodily injury, the victim need not experience any observable wounds, cuts, or breaking of the skin. Nor must she offer proof of broken bones or bruises." (quoting Ricks v. Com., 290 Va. 470, 479 (2015)). The CAV found sufficient evidence for a rational factfinder to conclude that Parrish caused bodily injury with the intent to maim disfigure or kill.

Cooley v. Com., Record No. 1243-23-3: (O'Brien, J., writing for Decker, CJ., and Causey, J.)
Self-defense
Assault & Battery conviction affirmed where there was no evidence that Cooley was in reasonable apprehension of bodily injury required for self-defense claim.

> Cooley's car was in a parking garage in Roanoke, when another driver crashed into it. Cooley accosted the driver and accused her of trying to flee the scene. The driver had three people with her, including Short, the victim. Cooley was intoxicated and aggressive, throwing a beer can at Short, striking her in the chin and leaving a bruise.
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> At trial, Cooley argued that he was acting in self-defense, stating that Short was "very aggressive" and that Cooley just "made a split-second decision and threw the beer can at her." The circuit court rejected his defense and convicted Cooley of assault and battery.
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> The CAV affirmed, reiterating that a defendant must "prove circumstances of self-defense sufficient to create a reasonable doubt of his guilt." (quoting Washington v. Com., 75 Va. App. 606, 617 (2022)). The CAV outlined the 2 types of self-defense (1) justifiable and (2) excusable. The CAV determined that Cooley found "no evidence that appellant reasonably feared bodily injury." Therefore, he failed to demonstrate a self-defense claim, and the circuit court's rejection of that defense was not plainly wrong.

Gallardo v. Carranza, Record No. 1040-23-4: (Friedman, J., writing for Frucci, J., and Humphreys, SJ.)
Divorce; Equitable distribution; Rule 5A:18; Admissibility of evidence; Attorney fees
Circuit court did not abuse its discretion in its equitable distribution or award of spousal support. Circuit court did not abuse its discretion in excluding evidence of Husband's financial records from 2-4 years prior to the marriage because they were irrelevant.

Appellant is Husband, and before the parties married in 2012, Wife sponsored Husband's residency application for the United States. After the marriage, Wife lived on her own with her adult children, and Husband lived with his parents and brother. Wife would stay at the Husband's home approximately 3 or 4 days a week and helped care for Husband's parents.

In 2014, Wife opened a house cleaning business, and Husband worked in the business, managing the finances. Husband also managed the personal finances, and while they shared bank accounts, Husband also had a bank account solely in his own name. Husband eventually stopped working in the business in 2018.

Parties countersued for divorce in 2021, after separating in 2020. The circuit court heard evidence of financial records, but rejected Husband's evidence from between 2008 and 2010 because it was not from the years immediately preceding the marriage and were irrelevant.

The circuit court found that the Husband's property was marital property, since it was purchased during the marriage, and valued Wife's contribution to the property as $60,000, ordering the Husband to pay the Wife for her contributions. Wife also had health problems and was 59 years old, while Husband was 37 and healthy. The circuit court awarded $1,000/month in spousal support for 4 years.

The CAV affirmed, finding that the circuit court properly evaluated the equitable distribution under Sobol v. Sobol, 74 Va. App. 252, 273 (2022): (1) classify the property as marital or separate; (2) assign value; and (3) distribute the property, taking into consideration the factors in § 20-107.3(E). The CAV found no abuse of discretion in the circuit court's decisions.

The CAV likewise found no abuses of discretion in the exclusion of the financial records from 2008 and 2010 or the award of spousal support. Finally, the CAV reviewed Wife's request for attorney fees. The CAV stated, "While wife has prevailed in this appeal, husband has raised legitimate and non-frivolous issues" and denied the request for attorney fees.

Mayes v. Catalyst Operations & Analytics, LLC, et al., Record No. 1064-23-4: (Frucci, J., writing for Malveaux and Raphael, JJ.)
Personal injury; Demurrers; Vicarious liability; Negligent hiring
Dismissal of case against employers affirmed where pleading did not adequately allege negligent hiring, and vicarious liability did not apply where the individual defendant sexually assaulted the victim, which was clearly outside the scope of his employment.

Main Appellees are government contractors Catalyst Operations & Analytics (Catalyst) and Applied Fundamentals Consulting, LLC (Applied).

Mayes worked for "Catalyst and/or Applied" in 2018. During October 2018, both companies sent a group of people to Boston to "conduct countersurveillance." Mayes became ill at an after-work function, and Gibson, an employee of "Catalyst and/or Applied" sexually assaulted Mayes and took nude photographs of her without her consent.

Mayes sued Gibson, Catalyst, and Applied. Gibson had a history of assaultive behavior and had been barred from other industry contracts, losing his security clearance at least 1 time. Mayes alleged that Catalyst and Applied should have known about Gibson's behavior and negligently hired him.

Gibson never responded to the suit, and Catalyst and Applied demurred. The circuit court sustained the demurrers and dismissed the causes of action against Catalyst and Applied. The circuit court granted default judgment against Gibson.

The CAV affirmed, reiterating that while courts assume the facts pleaded in the complaint at the demurrer stage, courts "disregard allegations that are inherently impossible or contradicted by other facts pleaded and reject inferences that are strained, forced, or contrary to reason." (quoting New Age Care, LLC v. Juran, 71 Va. App. 407, 429 (2020)).

The CAV rejected Mayes's arguments that she had adequately pleaded vicarious liability because Gibson "was not acting within the scope of his employment when he committed the act." (quoting Plummer v. Center Psychiatrists, Ltd., 252 Va. 233, 235 (1996)). Any inference to the contrary "would be strained, forced, or contrary to reason." (quoting Patterson v. City of Danville, 301 Va. 181, 197 (2022)).

The CAV likewise rejected Mayes's allegations of negligent hiring. Mayes's allegations that Gibson had a physically assaultive history did not extend to a history of sexually assaultive behavior. Thus, the pleadings did not adequately allege that Catalyst or Applied knew that Gibson had a propensity for sexual assault and therefore did not negligently hire him. Mayes's other arguments were waived under Rule 5A:18 for failure to timely object.