Overview

The Supreme Court of Virginia issued a lone published order today, denying a petitioner's request for a writ of habeas corpus. More on that below, but it was not groundbreaking in any significant way. More of a reminder that the plain and unambiguous language of a statute is to be applied. White v. Dotson, Record No. 240105.

The CAV issued 4 published opinions. 2 revolved around probation violations, including an *en banc* opinion outlining the difference between failing to follow a probation officer's instruction and violating a vague court-issued special condition that is being administered by the probation officer in Shifflett v. Com., Record No. 0675-22-2. The CAV also set out a rule that defendants/defense counsel must raise the issue of an improper revocation sentence with specificity because the imposition of a sentence outside the statutory range of § 19.2-306.1 is not void ab initio. Terry v. Com., Record No. 1682-23-3.

On the civil side, the CAV determined that the JDR and circuit courts did not have the authority to enter custody and adoption orders related to an Afghan infant located on a battlefield in A.A., et al v. J.M., et al., Record Nos. 1855-22-2; 0876-23-2; 0940-23-2; 0953-23-2. The CAV also decided a First Amendment case in Episcopal Diocese of Southern Virgina, et al. v. Marshall, et al., Record No. 1955-23-2, holding that the ecclesiastical-abstention doctrine or ministerial exception precluded the circuit court or a jury from weighing in on internal church matters, even if they relate to sexual misconduct because the factfinder would have to intrude upon the church's interpretation of its canons.

In unpublished cases, the CAV issued 11 opinions. These had a vast range of issues, and I do not delve into them here, in an effort to get this update out timely. Please read the bolded portion for a quick summary of each case's holdings.

SCV Opinions and Published Orders

White v. Dotson, Director of VDOC, Record No. 240105: (Published Order)
Writ of habeas corpus; Due process
SCV denied White's petition for a writ of habeas corpus where his situation was not contemplated or covered by the earned sentence credit statute. Due process not violated because White failed to demonstrate a legitimate and established right that was being deprived.

> White is serving a 9 year prison sentence and challenged VDOC's "failure to use the date of his arrest on one of the charges that predicates his current incarceration as the starting point for his accrual of Earned Sentence Credit." Instead, VDOC allegedly used a date well after his arrest as the starting point, depriving him of "a significant amount of ESC." He alleged due process violations based on the same action.
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> The SCV rejected White's argument, finding that the plain language of the statute did not cover White's situation. Further, his due process rights under the U.S. and

Virginia constitutions only protect "a substantive interest to which the individual has a legitimate claim of entitlement." (quoting Olim v. Wakinekona, 461 U.S. 238, 250 (1983)). White failed to demonstrate the deprivation of a legitimate and established right. "Merely labeling a governmental action as arbitrary and capricious, in the absence of the deprivation of life, liberty, or property, will not support a substantive due process claim." (quoting Singleton v. Cecil, 176 F.3d 419, 424 (8th Cir. 1999)).

CAV Published Decisions

Shifflett v. Com., Record No. 0675-22-2: (Ortiz, J., writing for the CAV *en banc*; Causey, J., concurring in part and dissenting in part; Chaney, J., dissenting)
Special conditions; Technical vs. non-technical violations; § 19.2-306.1; Sex offender conditions
The CAV reversed a panel's opinion and affirmed the circuit court's finding that Shifflett violated 2 special conditions of probation. A probation officer's administration of the circuit court's special conditions can be incorporated into the special condition.

Shifflett pleaded to aggravated sexual battery pursuant to N.C. v. Alford, 400 U.S. 25 (1970). The circuit court imposed conditions on the suspended portion of Shifflett's sentence, including 200 hours of community service and that Shifflett "successfully complete any screening, assessment, testing, treatment and/or education as directed by the probation officer." The circuit court also imposed a condition that Shifflett "immediately enroll in counseling . . . with a licensed sex offender provider/counselor."

Shifflett began sex offender counseling in 2020 but was discharged "due to his lack of progress and therapy-interfering behavior." Specifically, Shifflett refused "to accept accountability for his offense." Shifflett also failed to properly complete the 200 hours of community service as he had not gotten probation's permission to perform community service at a particular church, where he claimed he completed 161 hours. Probation filed a major violation report.

Shifflett conceded that he violated the terms of his probation, again pursuant to Alford. However, Shifflett argued that he could not be incarcerated under § 19.2-306.1. The circuit court disagreed, finding that the community service and sex offender treatment conditions were special conditions. The circuit court imposed 3 months and re-suspended 9 years and 9 months.

The CAV panel reversed, with 2 judges (Chaney, J., and Haley, SJ) finding that the conditions were technical in nature and Judge Ortiz dissenting. The panel majority found that the violations were more accurately described as failing to follow the instructions of the probation officer, which is an enumerated technical violation. The Commonwealth petitioned for a rehearing *en banc*.

En banc, the CAV vacated the panel decision and affirmed the circuit court's ruling. The CAV reiterated that the only technical violations are those enumerated in

§ 19.2-306.1. Any condition that prohibits behavior not covered by the 10 technical violations is a special or non-technical condition. (citing Burford v. Com., 78 Va. App. 170 (2023)). Shifflett maintained his argument that the violations were merely failing to follow the probation officer's instructions, but the CAV rejected his arguments.

The CAV stated that the sex offender treatment and community service are not covered by the 10 enumerated technical violations. Specifically, the CAV found that "the decision to require community service is within the sole province of the court, not the probation officer." (citing § 19.2-303). The CAV also found that the sex offender counseling condition specifically required Shifflett to complete the program and not just enroll in it.

Concurrence in part and dissent in part by Causey, J.: Judge Causey concurred in the portion of the opinion regarding community service. However, Judge Causey believes that the majority's opinion eliminates a circuit court's "discretion over specialized conditions." Judge Causey also stated that "probation in Virginia has now changed to only being supervised and administered by probation officers." Judge Causey stated that the majority read extra information into the sentencing order, finding that "the phrase 'sex offender treatment' does not appear in the court's sentencing order at all." Judge Causey believes that the majority's opinion relies on an interpretation of § 19.2-306.1 that causes an absurd result "by giving probation officers additional authority to add to judge-ordered special conditions." Judge Causey believes the difference between "counseling" and "treatment" require the CAV to find that the circuit court ordered "counseling" while the probation officer instructed "treatment."

Dissent by Chaney, J.: Judge Chaney signed onto Senior Judge Haley's panel opinion in this case and issued a dissent in the *en banc* rehearing. Judge Chaney believes that Shifflett's actions were purely violations of the probation officer's instruction. The court ordered Shifflett to enroll in counseling, which Shifflett did. The probation officer instructed Shifflett to complete the treatment, which Shifflett did not do. Further, Shifflett completed over 200 hours of community service, but he failed to obtain prior authorization from his probation officer as to which organization he served. This, too, Judge Chaney believes, is a purely instructional violation and not a willful violation of the circuit court's orders.

Commentary: Judge Chaney is basically asking the question: "To what extent may a court delegate the administration of a special condition to a probation officer?" In the instant case, the circuit court ordered Shifflett to enroll in sex offender counseling and in the "supervised probation" section of its sentencing order, directed Shifflett to "successfully complete any screening, assessment, testing, treatment and/or education as directed by the probation officer." Judge Chaney then distinguishes this case from Burford because the court in Burford specifically ordered Burford to complete the treatment recommended by the mental health evaluator, not the probation officer. Judge Chaney's dissent boils down to reading

the language of "follow the instructions of the probation officer" broadly. The majority, in contrast, reads all technical violations quite strictly, giving broader scope to the circuit court's ability to craft special conditions.

The only question I would have for both Judge Chaney and Judge Causey pertains to the review of whether the circuit court ordered "sex offender treatment" and the definition of treatment vs. counseling. While these two terms may have specific and fundamentally different definitions, the question of whether the circuit court ordered "sex offender treatment" is more appropriately reviewed as a factual determination, not subject to de novo review and instead reviewed for plain error. The circuit court found that it had ordered "sex offender treatment" as a special condition, and the sentencing order refers to both "treatment" and enrolling with a sex offender counselor. Therefore, the circuit court's factual determination has support and is not plainly wrong or without evidentiary support. My position is that once that determination has been made, the question of whether the condition falls within the technical conditions is conducted under a de novo review, as that is statutory interpretation. So, I would really only disagree on that aspect of the dissent(s). Judge Chaney and Judge Causey's concern regarding delegation of administration of special conditions to the probation officer is well-taken, and a question that I believe the SCV will have to answer at some point.

A.A., et al v. J.M., et al., Record Nos. 1855-22-2; 0876-23-2; 0940-23-2; 0953-23-2 (Consolidated Cases): (Ortiz, J., writing for Fulton and Lorish, JJ.)
Amicus briefs; Void ab initio; Subject matter jurisdiction; Power to render; Summary judgment; Plea in bar; Demurrer; Statutory interpretation; 28 U.S.C. § 517; Interlocutory appeal; § 8.01-675.5; § 20-146.4; § 63.2-1216; Federal preemption
The CAV held that the JDR court did not have jurisdiction to enter a custody order and that the circuit court, while it had subject-matter jurisdiction, did not have the power to render a judgment in an adoption dealing with a foreign national whose government had not waived jurisdiction and had already given custody under its own law. Also, dicta related to federal preemption.

The child at issue in this dispute was located in September 2019 by the United States military on a battlefield in Afghanistan, appearing to be six to eight weeks old. The child had sustained serious injuries, and the servicemembers brought the child to the nearby base for medical treatment. A joint task force between the Red Cross, U.S. military, and the Afghan government conducted a search for the child's parents. J.M. was a JAG in the Marines and became familiar with the situation, attending a meeting with the Red Cross. The Red Cross indicated it may have found relatives of the child but needed to conduct further investigation.

In October 2019, J.M. arranged for the child to come to the U.S. to obtain better medical treatment. J.M. petitioned the JDR court for custody, stating that the Afghan government waived jurisdiction. No document confirming waiver of jurisdiction was provided to the court. But, the JDR court granted the custody order. Only four days later, the circuit court entered an interlocutory adoption order

granting emergency adoption to J.M. and his spouse (the M.s). The petition for adoption claimed that the child was stateless and that no relatives had been located. The rationale for the emergency order was that if the child was J.M.'s dependent, the child could be transported to Virginia for better medical care. The child was not transported out of Afghanistan, though.

In December 2019, the Afghan government confirmed that it had located relatives of the child, specifically M.I. who was the child's paternal uncle. The Afghan government granted M.I. custody under Afghan law. "The United States determined the Ministry had properly verified the child's family" and decided to transfer the child to the Afghan government.

The M.s filed for a Temporary Restraining Order in WDVA, stating that they had custody of the child pursuant to the JDR order. They did not disclose the interlocutory adoption order and stated that they were not planning on adopting the child. WDVA denied the TRO request, stating "that the M.s were unlikely to succeed on the merits because the custody order was based on Afghanistan's waiver of jurisdiction and Afghanistan had not yet waived jurisdiction. The child was delivered to M.I., who transferred custody and guardianship to A.A., his son, and F.A., A.A.'s partner (the A.s).

The M.s went back to the circuit court and requested a final adoption order, failing to inform the circuit court that the TRO had been denied, that Afghanistan never waived jurisdiction, or that the child had been placed with its relatives. The circuit court issued a final adoption order "based on the recommendations of the Fluvanna County [DSS] and the guardian ad litem's recommendation—neither of which had ever met the child." The A.s were never notified of the adoption proceeding.

During this proceeding, the Taliban was overthrowing the government of Afghanistan. The M.s attempted to get the A.s to send the child to the U.S. for medical treatment. The A.s responded that the Taliban denied the request to send the child to the U.S. The M.s then proposed that the A.s come to the U.S. with the child, which was accepted. J.M. "falsely informed U.S. personnel that the child was his daughter per both Afghan and U.S. court orders" and providing a fraudulent document claiming the same. The A.s traveled to Virginia.

In 2021, "police officers knocked on the A.s' door and told them they were being moved to a different apartment." The officers transported the A.s to an interview and took the child from F.A. F.A. was told that because the A.s were not the child's biological parents, they could not keep the child. F.A. "begged the woman, saying "Please give me my daughter. She is my daughter. Please give her to me." The child was given over to the M.s pursuant to the adoption order, and the A.s were informed of the adoption order.

Shortly after, the A.s petitioned to vacate the final adoption order. The U.S. filed statements of interest and motions to intervene. The circuit court vacated the final

adoption order, stating the A.s were entitled to due process which was not given. The circuit court did not vacate the interlocutory order granting emergency adoption nor the custody order by the JDR court. The circuit court certified the interlocutory order for appeal.

The CAV affirmed in part and reversed in part, overturning the adoption and custody orders in the case. The CAV found that the JDR court did not have subject-matter jurisdiction to entertain the case, as a court of limited jurisdiction. The CAV found that while the circuit court did have subject-matter jurisdiction, the circuit court did not have the "power to render" a judgment in the case. (see n.23 for a full analysis of these two doctrines).

The CAV reviewed the preference for finality in adoptions under § 63.2-1216, which generally precludes any "collateral or direct" attack on a final adoption order "for any reason, including but not limited to fraud, duress, . . . or lack of jurisdiction over any person." Because of "the unique nature of subject-matter jurisdiction and the power to render" the CAV found that § 63.2-1216 does not bar collateral attack based on those grounds. "Subject-matter jurisdiction is so central to a court's decision-making power that acts undertaken without it are void ab initio." The CAV reasoned that the same was true for actions taken without proper "power to render." The CAV also cited to the federal preemption doctrine, finding that the federal government had taken explicit action in this case, transferring custody of the child to the Afghan government. Further, the CAV implied that "the dormant foreign affairs doctrine" would require § 63.2-1216 to bend to foreign diplomacy and the recognition of foreign government's authority over its citizens.

Commentary: This is a fascinating situation, and, while it will impact nearly no attorney's local practice given the unique nature of the case, it was an interesting case to read. Judge Ortiz delivers a great opinion with in-depth analysis on several f long-standing doctrines. I doubt the SCV takes the case on a petition for an appeal, but in the event that they do, I would expect the opinion to be nearly identical to this one.

Terry v. Com., Record No. 1682-23-3: (Decker, CJ., writing for O'Brien and Causey, JJ.)
Procedural default; § 19.2-306.1; Judicial restraint; Best and narrowest grounds; Voidable vs. void ab initio; Rule 5A:18
Assuming error in the circuit court's interpretation of § 19.2-306.1, the circuit court found that Terry's argument was not preserved under Rule 5A:18 and a misinterpretation of § 19.2-306.1 does not render a circuit court's revocation order void ab initio.

Terry was initially convicted of failing to register or re-register as a sex offender. His 5-year sentence was entirely suspended with supervised probation, with the only condition being "that Terry must comply with all the rules and requirements set by the probation officer." Terry failed to promptly contact his probation officer and also did not appropriately inform the office of his residence, as he only "stopped by [his listed residence] only periodically."

At his scheduled probation orientation 11 days after his conviction, Terry received his required GPS tracker and signed his rules and special sex offender instructions (which included a curfew beginning at 7:00 pm and express prohibition of leaving the Commonwealth). Later that day, Terry went to North Carolina. The next day, Terry tested positive for amphetamines. 9 days later, Terry cut his GPS tracker off, claiming it fell off when he was "jumped while on a walking trail" and tossed into a river. Terry met with his probation officer, who observed the odor of alcohol. Terry refused to submit to a breathalyzer and claimed the "attackers threw beer cans at him."

Probation issued a major violation report, citing the sex offender special instructions, his GPS violations, drinking alcohol, and using illegal substances. The circuit court found Terry in violation as cited in the revocation report. The circuit court specifically mentioned the GPS violation as the major factor for imposing 1 year and 6 months. Terry did not object and in fact acknowledged that the GPS violation was a special condition.

The CAV affirmed but did not fully review the merits of Terry's case, finding that Terry failed to preserve his assignment of error under Rule 5A:18. Terry did not argue for the exceptions to Rule 5A:18 and instead argued that the revocation was void ab initio because it was outside the range of § 19.2-306.1, citing Rawls v. Com., 278 Va. 213 (2009) (holding that a sentence outside the statutory maximum range is void ab initio because the court does not have the authority/power to render such a judgment). The CAV rejected this argument, finding that the Rawls rule cannot be extended to revocation proceedings. "The punishment is—and was—determined at the original criminal sentencing." Revocation proceedings are "a new sentencing event but it is not a new sentence." (quoting Canty v. Com., 57 Va. App. 171, 179 n.9 (2010)). Therefore, the Rawls rule is not appropriately extended to these types of cases.

As such, the revocation order is not void ab initio and instead was merely voidable. Voidable orders are where the court errs but remains in its bound of authority. The CAV assumed that the circuit court misinterpreted § 19.2-306.1, finding that "any such error . . . constituted a simple misapplication of the statute." Therefore, it was not void ab initio, and Terry was required to object timely and specifically. He failed to do so, so he was procedurally defaulted from raising the issue on appeal.

Episcopal Diocese of Southern Virgina, et al. v. Marshall, et al., Record No. 1955-23-2: (Raphael, J., writing for Decker, CJ., and White, J.)
Ecclesiastical-abstention doctrine; First Amendment; Free Exercise; Defamation; Plea in bar; Interlocutory appeal; § 8.01-675.5; Virginia Constitution Article I Section 16; Ministerial Exception
CAV interpreted and applied religious freedom clauses of the First Amendment, finding that the ecclesiastical-abstention doctrine precluded a circuit court or a jury from interpreting religious canons and a finding of alleged defamation where a priest was terminated for sexual misconduct.

Marshall was a priest and rector for the Episcopal Church in Chesterfield County. As part of his duties, he interviewed a prospective employee, Doe. At the conclusion of her interview, "Marshall placed his hand on the small of her back as he ushered her out." Another employee, Roe, observed this and believed it to be inappropriate. Over the course of the next several months, Marshall repeatedly made unwanted sexual advances towards Doe.

Doe filed a "Title IV complaint" which implicated the "canons that govern ecclesiastical discipline in the Episcopal Church" claiming sexual misconduct. Bishop Haynes placed Marshall on administrative leave pending an investigation. The investigator determined that either "Marshall was trying to avoid the consequences" or "Marshall truly did not understand that his behavior could be construed as sexual misconduct."

Marshall agreed to go to a "one-week fitness to practice evaluation in Kansas" to determine his future in the Diocese. The day he left, Bishop Haynes met with Marshall's congregation and explained the investigation with the parishioners. Bishop Haynes explained that "Marshall was the subject of a complaint that involved sexual harassment and specifically, boundary violations of a sexual nature." A few months later, the Vestry decided to sever ties with Marshall and "bypass the remainder of the Title IV process."

Marshall filed suit, complaining that Bishop Haynes's statements were demonstrably false and that the Vestry improperly terminated him. All the defendants filed pleas in bar claiming ecclesiastical abstention. The circuit court granted the pleas in bar, except as it related to the defamation claims against Bishop Haynes. Haynes requested the circuit court certify the order for appeal pursuant to § 8.01-675.5.

"First Amendment jurisprudence is clear that civil courts are not a constitutionally permissible forum for a review of ecclesiastical disputes." (quoting Bowie v. Murphy, 271 Va. 127 (2006)). The CAV reiterated that "the Virginia Constitution provides more robust protections for religious liberty than the First amendment." (citing Vlaming v. W. Point Sch. Bd., 302 Va. 504, 544 (2023)). The CAV was careful to state that "a secular court may adjudicate controversies arising in religious settings if it can do so based on neutral principles of law that are

completely secular in operation." (quoting Jones v. Wolf, 443 U.S. 595, 602-03 (1979)).

But, the CAV found that the evaluation of the defamation claim would necessarily require a jury or judge to "inquir[e] into whether the Church has followed its own procedures" which "intrudes into quintessentially religious controversies." Specifically, the evaluation of the claims would require an analysis of the Episcopal Church's definition of sexual misconduct or sexual harassment, which is broader than the secular legal definition. The CAV also found that "the dispute here arose in the context of a church-disciplinary investigation . . . "a decision at the core of a church's self-governance." Finally, the CAV found that "Canon 19 of Title IV" of the Episcopal Church includes a provision that "no member of the Church may resort to a secular court to address a dispute arising under the Episcopal Church's Constitution and Canons."

CAV Unpublished Decisions

Com. v. Jones, Record No. 0360-24-1: (Lorish, J., writing for Beales and Fulton, JJ.)
Commonwealth's Appeal; Fourth Amendment motion to suppress; Reasonable articulable suspicion; Terry stop
Officers maintained reasonable articulable suspicion that Jones was stealing gasoline, but the CAV remanded the case for an evaluation of whether the officers used excessive force in a Terry stop.

A group of both on-duty police officers were working security at a nightclub called "The Alley" along with a private security team. Officer Smith observed Jones carrying a red gas can and walking away from a member of the security team that was following Jones. Smith asked the security member "What do you guys have on him?" The security member stated that Jones was "siphoning gas." Within 30 seconds, Smith took Jones to the ground and handcuffed him. Only after handcuffing Jones did Smith identify himself as a police officer. Officers located a firearm on Jones's person and determined that Jones was a convicted felon.

Jones moved to suppress the firearm in his possession of a firearm by a convicted felon case. The circuit court granted the motion to suppress, finding that Smith did not have reasonable articulable suspicion for conducting a seizure pursuant to Terry v. Ohio, 392 U.S. 1 (1968). The circuit court also commented that "this was not the type of brief investigatory detention that was envisioned by" SCOTUS in Terry but limited its holding to a lack of reasonable suspicion.

The CAV reversed the circuit court. The CAV reiterated that "to have reasonable suspicion, a police officer need only have a 'minimal level of objective justification for making a stop.'" (quoting Branham v. Com., 283 Va. 273, 280 (2012) (citation omitted)). This belief "need not rule out the possibility of innocent conduct." (quoting Turay v. Com., 79 Va. App. 286, 298 (2023) (*en banc*) (citation omitted)).

The CAV found that under the totality of the circumstances, Smith had reasonable articulable suspicion that Jones had just stolen gas from a vehicle in the parking lot. Two members of the security team had informed Smith that Jones had siphoned gas, and Smith observed that Jones had a red gas can and was walking away from the security members. The recency/proximity of the alleged crime and the reporting of the crime to Smith, as well as the corroborating evidence that Jones was carrying a gas can rose to the level of reasonable articulable suspicion. The mere facts that Jones may be innocent or the security team made a false report did not defeat the reasonableness of the suspicion.

However, the CAV remanded the case for factual findings regarding the use of force in the stop. The CAV found that "the trial court expressly refused to decide whether the amount of force used in the detention was excessive." Because the CAV reversed the circuit court on the finding of reasonable articulable suspicion but could not determine whether the use of force was excessive given the circumstances, the CAV remanded for a new hearing on the motion to suppress.

Mehari v. Mesfun-Mehari, Record No. 0361-23-4: (Per Curiam: Malveaux, Raphael, and Frucci, JJ.)

Child support; Arrearages; Equitable distribution; Attorney fees

No error in the circuit court's determination of alternate valuation dates of accounts, child support orders, and finding of arrearages.

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

Mehari (Husband) and Mesfun-Mehari (Wife) married in 2002 and had 3 children. The couple separated in 2019, and Wife initiated divorce proceedings in 2021. During the divorce proceedings, the circuit court found that Husband had improperly dissipated funds from marital bank accounts and valued the bank accounts accordingly, ordering Husband to pay Wife her portion of the valuations. The circuit court also made specific findings about Husband's retirement accounts and the jointly owned real estate. Ultimately, the circuit court ordered child support in the amount of $2,990, backdated, finding Husband in arrears of $18,373. The circuit court also ordered Husband pay wife $13,654 in out-of-pocket healthcare expenses and additional funds for private school tuition for one of the children.

The CAV affirmed without oral argument. The CAV reiterated that these types of determinations are fact driven and reviewed for either abuse of discretion (child support, classification of accounts/property, alternate valuation, etc) or plain error (determination of income), depending on the particular question posed. No errors or abuses of discretion in the circuit court's findings/order.

Goss v. Com., Record Nos. 0423-23-4; 0425-23-4; 1463-23-4 (Consolidated Cases): (AtLee, J., writing for Decker, CJ., and Haley, SJ.)
Probation violation; § 19.2-306.1; Course of conduct; Rule 5A:8
CAV held that Arlington circuit court did not err in separating Goss's probation proceedings into 3 or 4 hearings, even though there was only 1 major violation report submitted. No error in finding multiple courses of conduct.

Goss was originally convicted of grand larceny and related charges in 2021. While incarcerated, Goss was ordered to complete the ACT (Addiction, Corrections, and Treatment) unit. When he completed it, the circuit court suspended the balance of Goss's active sentence. Upon releasing Goss, the circuit court ordered that Goss complete "any and all substance abuse counseling, testing and/or treatment as directed by the probation officer."

Goss struggled in adjusting to probation, testing positive for cocaine in September, October, November, and December (also testing positive for PCP). Goss failed his IOP and individual therapy, missing multiple appointments. Goss also failed to meet with his probation officer in December, later becoming "uncooperative and disrespectful" after being told to report to withdrawal management.

The circuit court separated the revocation proceedings into 5 separate case numbers and categories. Goss admitted to violations -02 through -06 and requested that they all be heard the same day because they were on a single major violation report. The circuit court disagreed and conducted multiple hearings. The circuit court found that the -02 was a special condition violation and imposed 5 months. On the -03 and -04 charges, the circuit court found that they were the same course of conduct but that they were first technical violations, imposing no active time. The circuit court initially found that the -05 and -06 were the same course of conduct and later entered separate orders, finding Goss in violation on both charges, imposing no time on the -05 and 8 months' active incarceration on the -06.

The CAV affirmed the circuit court's handling of the probation violations. Importantly, Goss failed to present a necessary and indispensable transcript to the review of the -06 charge; thus, the CAV could not review the -06 revocation and sentence. Also, the CAV found that the -02 was a non-technical violation and therefore found no error in the imposition of the sentence. (citing Burford v. Com., 78 Va. App. 170 (2023)).

So, the CAV was left with the -03, -04, and -05 charges. The CAV found that there was at least 2 courses of conduct, rejecting Goss's argument of a single course of conduct. (citing Canales v. Com., 78 Va. App. 353 (2023)). The CAV also rejected Goss's argument that the circuit court held an adjudicatory hearing in January prior to separating the charges, finding that the circuit court was specific that the January

hearing was a status hearing. No error in separating the circuit court separating the charges the way that it did.

Commentary: This is the latest in a string of probation violation cases emanating from Arlington County. Importantly, the CAV cited to Canales, which is currently pending before the SCV in the briefing stage. I noted in a June appellate update that if the SCV reverses it will drastically alter how Arlington has been conducting its probation revocation proceedings. It could also lead to a potential flood of SCV petitions to correct/clarify the outer bounds of § 19.2-306.1.

Random Pinecone, LLC et al. v. Davies, et al., Record No. 0428-23-4: (AtLee, J., writing for Decker, CJ., and O'Brien, J.)
Landlord/tenant law; Habitability; Attorney fees; Rule 3:25; Rule 5A:18; Inter-panel accord doctrine
Landlord was on notice to remedy a defect in the property that "constituted a serious threat to the life, health, or safety of the Tenants." Landlord failed to timely remedy the error. No issue of granting attorney fees.

Random Pinecone owns and leases one-half of a duplex in Fairfax, with the Tenants renting the property. Tenants were cooking on the stove on September 30, 2019, when a carbon monoxide alarm went off in the basement. Tenants evacuated the home and called the fire department, which noted an extremely high level of carbon monoxide in the residence. The firefighters identified the stove as the source of the monoxide leak.

Pinecone organized for technicians to come and evaluate the stove and furnace. The HVAC mechanic observed an abandoned chimney crock that did not have a cap. Over the course of several months, the relationship between Pinecone and Tenants deteriorated, and Tenants complained to the County for Pinecone's failure to seal the chimney crock and obtain permits for appliance replacement. Eventually, Tenants filed a Tenant's Assertion and Complaint under § 55.1-1244. The GDC found in favor of Tenants, and Pinecone appealed.

The circuit court conducted a trial and issued a letter opinion, concluding that the chimney "constituted a serious threat to the life, health, or safety of the Tenants." The circuit court also found that Pinecone was well aware of the issue and failed to remedy it in a reasonable time period. Tenants requested attorney fees, and Pinecone argued that Tenants failed to plead the basis of the attorney fees as required under Rule 3:25. Tenants asserted that it had identified the statutory basis and requested leave to amend under Rule 1:8 if the circuit court found that the reference to the statute was insufficient. The circuit court granted attorney fees.

The CAV affirmed, finding some of Pinecone's substantive arguments not properly preserved under Rule 5A:18. Further, the CAV found evidentiary support for the circuit court's conclusions and findings of fact. In light of the circuit court's factual findings, the circuit court did not err in its application of the law to the facts. Finally,

> on the issue of attorney fees, the CAV found that Pinecone's concession that it knew the basis of the request for attorney fees precluded review, as Pinecone waived its argument.

C&M Truck Repair, LLC v. Morgan Freight Services, LLC, Record No. 0660-23-3: (Chaney, J., writing for Friedman and Lorish, JJ.)
Nonsuit; Demurrer; Failure to file a brief; Economic loss rule; Rule 1:1
Circuit court's order sustaining demurrer and granting leave to amend disposed of claim because Morgan Freight failed to timely file an amended claim. Nonsuit as to the demurred claim was inappropriate.

> Morgan Freight filed suit against C&M for damages emanating from negligent vehicle repairs and loss of income from the delay in seeking a second company to repair the vehicle. C&M demurred on the loss of income claim, arguing the economic loss rule precluded a loss of business/income claim in a tort suit. The circuit court agreed but granted Morgan Freight leave to amend. Morgan Freight never filed an amended complaint and later moved to nonsuit its case. C&M requested that the nonsuit be "limited to Morgan's currently pending claims." The circuit court denied the request and granted a "general nonsuit."
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> The CAV reversed the circuit court, finding that the loss of income claim was not pending at the time. In particular, the CAV relied upon Rule 1:1(c) which makes it clear that a demurrer, without a filing of an amended complaint within the time prescribed, operates to dispose of the claim. Therefore, the claim of loss of income was disposed of, even though the order did not "expressly dismiss the claim."

Bailey v. Com., Record No. 0785-23-2: (Malveaux, J., writing for Beales and AtLee, JJ.)
Sufficiency; Principal in 2nd degree; Conspiracy; Definition of "robbery"; Rule 5A:20
No error in finding that Bailey was a principal in the 2nd degree of robbery and using a firearm in the commission of robbery. Sufficient evidence presented for the fact-finder to infer his complicity.

> Swann (victim) and his Mother, Sister, and Uncle, lived in Chesterfield County, where Swann sold narcotics. Bailey and his girlfriend, McNeil, came to Swann's house for McNeil to purchase narcotics. Around 10:30 pm, Uncle heard a noise followed by a gunshot. Swann had been shot once in the head, and several items from the house had been stolen, including Swann's phone. Officers located blood in the house, as well. A witness stated that a light-colored sedan was driving away from the scene.
>
> Officers located Swann's phone by calling it and identifying the cell tower it was pinging. They found Swann's phone in the woods near a light-colored sedan belonging to Greene that was parked across from an apartment complex where Greene lived. Officers surveilled the area until Greene and another individual came out of the apartments and entered the light-colored sedan.

Investigation into the cell phone records of the identified individuals revealed that McNeil had called Swann 3 times mere minutes prior to his death. McNeil was also in consistent contact with Greene and Jones. Officers obtained historical cell-site location information for all of the phones and tracked them on the day of the incident. McNeil and Greene were just north of Swann's house around 10:00 pm. Shortly after, both phones traveled south to Swann's house before McNeil called Swann's phone around 10:22. The phones then left the area. Around 12:45 am, McNeil and Bailey arrived at a 7-Eleven store. Greene and Jones arrived around 1:00 am, and Bailey entered Greene's light-colored sedan.

Officers interviewed everyone. Bailey admitted to the narcotics transaction and to using McNeil's phone to call Jones and Greene multiple times. Bailey stated that McNeil only used her phone to call Swann. Bailey told officers that Jones and Greene "had entered Swann's house," shot Swann, and "did some stupid shit." Bailey later changed his story and denied knowing Greene in any way.

A jury convicted Bailey of robbery, conspiracy to commit robbery, and using a firearm in a robbery. Bailey's robbery conviction was as a principal in the second degree. Bailey introduced no evidence in his trial. Bailey argued that the evidence only demonstrated that "he was merely present outside Swann's home."

The CAV reiterated that "mere presence when a crime is committed is, of course, not sufficient to render one guilty as aider or abettor." (quoting Pugliese v. Com., 16 Va. App. 82, 93 (1993)). But, "'proof that a person is present at the commission of a crime without disapproving or opposing it, is evidence from which, in connection with other circumstances,' a fact-finder could infer 'that he assented thereto, lent to it his countenance and approval, and was thereby aiding and abetting the same.'" (quoting id. at 93-94).

The CAV concluded that because uncontroverted evidence demonstrated that Bailey was the only one to use McNeil's phone to call Greene and Jones, and Bailey admitted that he went to Swann's house and to the 7-Eleven, "a reasonable fact-finder could infer . . . that Greene had asked appellant . . . to participate in Swann's robbery." Further, Bailey admitted that he had changed his story, and the CAV reminded us that "a reasonable fact-finder could infer from [Bailey's] inconsistent statements that he possessed a consciousness of guilt."

The CAV also found that Bailey's argument contested his conspiracy to commit robbery conviction. However, Bailey's designation of the assignments of error "encompasses only those offenses for which he was convicted as a principal in the second degree, and he was not so convicted for conspiracy." Thus, the CAV could not review his conspiracy conviction.

Everett v. Parson, et al., Record No. 0995-23-2: (Malveaux, J., writing for Beales and AtLee, JJ.)
Demurrer; Adverse possession; § 8.01-236
CAV held that the circuit court improperly found that mistaken belief that Everett was deeded the property required dismissal of adverse possession claim. Order sustaining demurrer reversed and remanded for further proceedings.

Parson (Senior) owned 3 parcels of land totaling 74 acres. 2 of these parcels "contained approximately 24 acres lying east of Route 619 (Everett Farm)." Parson (Junior) acquired the Everett Farm when Senior died. Everett is Junior's daughter. Junior leased the mineral rights of the land to RGC Minerals Inc., including the Everett Farm. Subsequently, Everett and her husband began farming operations on the Everett Farm with Junior's consent, and later "conveyed the Everett Farm to Everett" by deed of gift. Junior also conveyed his rights and obligations under the mineral leases to Everett. Everett consented to the beginning of mining operations on the property.

Relatives filed suit against the mining company, "claiming damages for trespass, waste, and breach of contract." Further the Relatives argued that "a triangular part" (Triangle) of Everett Farm had passed under a residuary clause to Senior's wife, Virgie. Virgie had then devised the Triangle to her children, and Relatives claimed ownership of the Triangle. Everett filed a complaint to quiet title, claiming, among others, that she acquired all of Everett Farm, including the Triangle, by adverse possession through Junior's and Everett's actions. Relatives demurred, and the circuit court sustained the demurrer, holding "that Everett's amended complaint failed to state a claim for adverse possession because" it was predicated "under the mistaken belief that it was conveyed to her."

The CAV stated that "a claimant must prove actual, hostile, exclusive, visible, and continuous possession, under a claim of right, for the statutory period of 15 years" by "clear and convincing evidence." (quoting Harkleroad v. Linkous, 281 Va. 12, 18 (2011) (citation omitted)). While clarifying that "mistake **may** . . . negate hostile possession," the CAV stated that "where a party has 'a definite and positive intention to occupy, use, and claim the land,' the hostile character . . . is not 'undercut by the fact that she mistakenly believed the land was hers." (quoting Quatannens v. Tyrrell, 268 Va. 360, 372-73 (2004)).

The CAV applied "the practical test" stated in Hollander v. World Mission Church, 255 Va. 440 (1998), which is the question of "whether the positive and definite intention to claim as one's own the land up to a particular and definite line on the ground existed." The CAV distinguished Chaney v. Haynes, 250 Va. 155 (1995), in part by finding that the right at issue in Chaney was an easement, which is not an ownership interest but a privilege. The CAV also rejected the finding that Everett and Relatives were "co-tenants" as the complaint does not allege any joint ownership interest. Therefore, the CAV reversed and reinstated the case, holding that the circuit court erred in sustaining the demurrer.

Hedrick v. Com., Record No. 1014-23-3: (Friedman, J., writing for Ortiz and White, JJ.)
Sufficiency; Bona fide claim of right
CAV affirmed trespassing conviction even where Hedrick testified he was invited to complex because no corroborating evidence of his testimony. Therefore, circuit court's finding that Hedrick willfully trespassed was not plainly wrong or without evidentiary support.

The Maple Grove Apartment complex in Roanoke has 40 apartment units spanning multiple buildings, each marked with "no trespassing signs." Maple Grove also has had a problem of break-ins, and 3 units in one building were vacant because of the break-ins. One night, Officer Harris arrived at Maple Grove and discovered Hedrick and several other people in one of the vacant units. Various belongings were strewn about the unfurnished apartments, and the utilities were not turned on. Harris cited each of the individuals for trespass.

At a bench trial, the manager admitted that she had never had Hedrick served with trespass notification but testified that Hedrick had never been a tenant of the property and that the unit was not leased to anyone. Hedrick testified in his defense and claimed that he had been invited to the apartment by a friend. He did not mind that the apartment was unfurnished and did not notice that there was no electricity or running water. The circuit court found that Hedrick may have had a right to come onto the property by the invitation but that a reasonable person would not have believed he had a right to remain on the property "once the door was open" because the individuals were clearly homeless and not tenants of the complex.

The CAV affirmed the conviction, stating that the circuit court's finding of guilt was not plainly wrong or without evidentiary support. Whether a defendant has demonstrated an affirmative defense is a "question of fact" entitled to great deference. (quoting Smith v. Com., 17 Va. App. 68, 71 (1993)). Here, the circuit court did not err in finding that Hedrick failed to prove his affirmative defense where Hedrick presented no corroborating evidence or the name of the individual who invited him.

Commentary: I doubt anyone else knows about Kartozia v. Com., Record No. 1633-22-4 (Mar. 5, 2024), but this is the second claim of right case to be decided in the last 6 months. However, they resolved on different grounds. In Kartozia, the Commonwealth objected to a claim of right jury instruction. The circuit court denied the instruction, even though Kartozia identified a tenant, and the tenant testified that while the tenant did not know Kartozia was coming, he would have invited Kartozia to his apartment had anyone informed him Kartozia was there. It was slightly more complex than that, but that was the crux of the case.

This case, though, was a case on the merits of the affirmative defense, and it highlights one of many distinctions between jury and bench trials. There are far more errors possible in a jury trial as opposed to a bench trial. Admissibility of evidence is at play, jury instructions, sufficiency of affirmative defenses, etc. That being said, it is a double-edged sword because defense counsel will have to be far

more specific in their arguments during a jury trial in order to preserve issues for appellate review. Arguments made during closing to a jury do not preserve the same arguments in an appeal of the denial of a motion to strike. You must raise with specificity the argument in the motion to strike itself. That is not the case in a bench trial, as closing arguments have been found to preserve an argument in that circumstance.

Had Kartozia been a bench trial, the CAV would have likely affirmed his conviction. Had Hedrick been a jury trial and the judge denied the instruction on claim of right, the CAV would have likely reversed, finding more than a scintilla of evidence to instruct the jury.

Scott v. Com., Record No. 1654-23-1: (Ortiz, J., writing for Athey and Chaney, JJ.)
Sufficiency; Admissibility of evidence; Refresh recollection; Rule 2:801; Rule 2:802; Prior inconsistent statements vs. prior consistent statements
No abuse of discretion in excluding hearsay affidavit in support of protective order. No error in sufficiency of evidence of involuntary manslaughter, shooting from a motor vehicle, or unlawful wounding in commission of a felony.

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

Scott was dating Darlene Boone, who had separated from her husband Kevin Boone, but neither of them had instituted divorce proceedings at the time. Scott and Darlene met up at Ocean's 11 (a club). Kevin happened to be at Ocean's 11, too. Scott got into multiple disagreements with Darlene's friend and Kevin throughout the night, and both Scott and Kevin were escorted out of Ocean's 11. "Kevin grabbed Scott's necklace and pulled the charm off it." They were then separated, and security had to hold Scott back as Kevin walked away. Later, Kevin was driving past Scott, and Scott reached into his car and grabbed a firearm. Security held Scott back, and Scott and Darlene left together.

On Oceana Boulevard, three cars drove through the same intersection. Kevin's car was first, an unrelated SUV driven by Morey was second, and Scott's car was third. Scott was driving at a high rate of speed. Morey saw that Kevin's car began swerving significantly before crashing. Morey called 911. Officers arrived and found Kevin, dead from gunshot wounds. There were two bullet holes in the right rear quarter panel of the vehicle, and the front passenger window was rolled down. Officers found a Glock 23 (.40 caliber) next to Kevin.

Officers found seven cartridge casings on Oceana Boulevard and two cartridge casings from Kevin's vehicle. Officers seized Scott's car and executed a search warrant, finding a Sarsilmaz 9mm handgun under the driver's seat and three cartridge casings "in the windshield channel." DFS confirmed that the seven casings on Oceana Boulevard and the three cartridge casings in Scott's car were fired from the 9mm. The two casings from Kevin's vehicle were fired from his

Glock 23. Scott was charged with maliciously shooting at an occupied vehicle, second-degree murder, and unlawful wounding during the commission of a felony.

Kevin had been previously convicted of a non-violent felony and had a protective order issued against him by Darlene. The Commonwealth filed a motion in limine to prevent Scott from referencing those legal documents. The Commonwealth believed that Scott would do so to raise the issue that Kevin was prohibited from possessing a firearm and that Scott would attempt to prove propensity for violence. The Commonwealth argued that the underlying facts related to the protective order could be referenced but not the actual existence of a protective order.

The circuit court held that both the underlying allegations of the protective order and the existence of a protective order were admissible, given foundation. However, the circuit court held that Kevin's inability to own or possess a firearm was irrelevant and inadmissible. The circuit court also held that the physical document of the protective order was inadmissible.

At trial, Darlene testified, and Scott's counsel questioned her at length regarding the allegations underlying the protective order. At one point, Scott's counsel attempted to present Darlene with a copy of the affidavit, and the Commonwealth objected, stating that Darlene had not stated she could not recall what she had read in the affidavit. Eventually, Darlene did say she did not recall other allegations, but Scott's counsel asked no further questions. The jury convicted Scott of shooting from a motor vehicle, involuntary manslaughter, and unlawful wounding in the commission of a felony, acquitting Scott of two counts of maliciously shooting into an occupied vehicle.

The CAV affirmed the convictions. The CAV reiterated that the admissibility of evidence is in the discretion of the circuit court, and that "the abuse of discretion standard . . . demarcates a region . . . between the legal error that a reviewing court may always correct, and the simple disagreement that, on this standard, it may not." (quoting Jefferson v. Com., 298 Va. 1, 10-11 (2019) (citation omitted)). The CAV found no abuse of discretion in refusing to admit inadmissible hearsay, finding that the affidavit was not a prior inconsistent statement. Further, the CAV found that Scott failed to present the affidavit when he could have used the affidavit to refresh Darlene's present recollection. Finally, the CAV affirmed the sufficiency of the evidence, finding that the jury's conviction was supported by the evidence.

Carmello v. Cockrill, et al., Record Nos. 1818-22-4 and 1819-22-4 (Consolidated cases): (Chaney, J., writing for Callins and White, JJ.)
Withdrawn opinion; Re-issuance of opinion; Demurrer; Negligence; Common law; Private enforceability; Duty to inspect; § 1-200
The CAV confirmed that personal property owners do not have a duty to passersby on roadways from natural conditions, affirming dismissal of a suit for wrongful death where a tree fell onto a motor vehicle. Criminal/citation statutes do not create private enforceability.

Carmello was driving in Loudoun County near property owned by Cockrill. A tree fell from Cockrill's property and onto Carmello's car. Carmello died as a result of his injuries, and a wrongful-death suit followed, as well as a personal injury claim, asserting various theories of negligence. Cockrill demurred (along with her sister), "arguing that she had no duty to prevent the tree from falling into the roadway" as "the tree was a natural growth on her property" and "Virginia law imposed no duty to regularly" inspect the property. The circuit court sustained the demurrer and dismissed the suits with prejudice.

The CAV found that Cline v. Dunlora South, LLC, 284 Va. 102 (2012), controls this case, "This Court has never recognized, nor do our precedents support, a ruling that a landowner owes a duty to protect travelers on an adjoining public roadway from natural conditions on his or her land." (quoting id. at 110). Further, "the law punishes misfeasance, not nonfeasance." (citing Tingler v. Graystone Homes, Inc., 298 Va. 63, 83-84 (2019)). The CAV distinguished the instant case from one in which the defendants "made it more likely that the tree would fall and hurt people." Failure to inspect is not enough to create tort liability in these circumstances.

The CAV rejected Carmello's claims that English Common Law allowed for a suit under this theory and reminded us that the incorporation of English Common Law under § 1-200 is only applicable when there is no conflict between the common law and Virginia law. "Where there is a conflict between English and Virginia common law, Virginia law controls."

The CAV also rejected Carmello's arguments that § 33.2-801 and Loudoun Ordinance § 648.07 allowed for private enforcement of the code sections and that Cockrill was in violation of the code. "However, a statute setting the standard of care does not create the duty of care." Steward v. Holland Fam. Props., LLC, 284 Va. 282, 286 (2012). These statutes may have allowed the County or the Commonwealth to cite Cockrill, but they do not allow private citizens to sue.

Commentary: So, this is the re-issued opinion of Carmello v. Cockrill that had previously been withdrawn after its initial issuance on June 18, 2024. I neglected to save a copy of that opinion and thus cannot make a direct comparison to determine why it was withdrawn and re-issued. I believe that several footnotes were added, as I do not recall this many footnotes in the initial opinion.

I believe that the additional discussion of the construction of § 1-200 and § 1-201 as well as the development of the Common Law in Virginia are the additions of importance here. I think the additions are mere dicta and do not alter the holding of the case. But, I believe that the additions recognize the development of law in Virginia and do a more thorough job of informing us how the CAV reads SCV precedent and the Common Law.

I was concerned that the CAV would just issue an order affirming on some other grounds rather than re-issuing an opinion. I think this means that either another

> *Judge, Justice, or law clerk noticed a deficiency in the opinion and wished to correct it. But, that is mere speculation. It is equally possible that Judge Chaney noticed a few clerical errors or simply wished to expand on certain theories. There is also the completely remote possibility that there was a subsequent discussion of whether to publish the opinion. This is a question for Judge Chaney or one of the other judges on the CAV, and I will certainly ask her the next time I see her.*

Martinka v. PHI Group, Inc., et al., Record No. 1990-22-4: (Decker, CJ. writing for O'Brien and Causey, JJ.)
Worker's compensation commission; Admissibility of evidence; Unlawful termination; Due Process; Rule 5A:18
Martinka not owed compensation where she failed to market her residual capacity. Commission's findings owed similar deference as a jury verdict. Since a rational factfinder could have found as the Commission did, no error.

> Martinka was a flight paramedic for PHI when she injured her back lifting a patient into a helicopter. She went to an urgent care facility, where a Physician's Assistant "instructed that she remain off work until a reassessment" was conducted. The PA again instructed her to cease working and referred her to an orthopedist (Dr. Cohen), whom she could not see for 6 months because of an issue with insurance.
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> During those 6 months, Martinka began taking online and in-person classes at Harvard. Once a week, Martinka drove to an airport to fly to Boston for class, carrying "a notebook, laptop, and backpack while travelling." She considered herself a full-time student, with at least 30 hours of studying/classwork each week. After finally seeing Cohen, she had physical therapy, and Cohen told her to "remain out of work until her next visit in 8 weeks."
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> At the follow-up, Martinka admitted that her pain was nominally better and that she could "carry out sedentary duties such as teaching." Cohen permitted her to return to work for 6 weeks in that aspect but only for "one or two days per week." She began to teach "EMT classes one or two days per week, eight hours per day, and performed clerical work for a business that she and her husband operated." She claimed to still have pain while riding in a car for an hour or more, and she took breaks often while teaching.
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> Martinka experienced several other unrelated medical issues and was hospitalized multiple times. Cohen saw her only one more time and advised her to get lumbar injections. Martinka did not return to see Cohen nor did she get the lumbar injections. Martinka went to her primary care physician (Dr. Haley) who diagnosed her with disc herniation but did not comment on Martinka's ability to work, referring her to another orthopedist (Dr. Simon) for a second opinion.
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> 2 years after the injury, Martinka was still suffering from back pain. She was wearing a lumbar brace often and receiving acupuncture therapy. Haley told Martinka she could only work 1-2 days per week and was limited to lifting only 15

pounds. Martinka then made an appointment to see Simon, who diagnosed her with lumbar radiculopathy. 3 years after the incident, Simon discussed the possibility of a "partial discectomy." Martinka filed worker's compensation claims.

The Commission found that Martinka was owed temporary total disability benefits for the first 2 months of her unemployment. But, after that period, Martinka had displayed "insufficient marketing efforts" to utilize her residual capacity. The Commission found that some of her restrictions were self-imposed rather than medically necessary. Therefore, the Commission found that while she was entitled to partial disability for some of her time and not entitled to benefits for other parts, she had waived entitlement to benefits by failing to properly market her residual capacity.

The CAV affirmed, finding that the Commission's determination was supported by the record. The CAV stated that "we do not retry the facts before the Commission, nor do we review the weight, preponderance of the evidence, or the credibility of witnesses." (quoting Jeffreys v. Uninsured Employer's Fund, 297 Va. 82, 87 (2019) (citation omitted)). Even where "there is evidence in the record that would support a contrary finding" the CAV does not invade the province of the Commission, "as long as there was credible evidence presented such that a reasonable mind **could** conclude that the fact in issue was proved." (quoting Artis v. Ottenberg's Bakers, Inc., 45 Va. App. 72, 83-84 (2005) (en banc) (citation omitted)).

The CAV also reminds us that "to demonstrate total disability, a claimant must prove that the compensable injury 'effectually closed the labor market to' her." (quoting Pocahontas Fuel Co. v. Barbour, 201 Va. 682, 684-85 (1960)). Therefore, the CAV found no error in the Commission's findings that the labor market was not closed to Martinka, where she did find gainful employment and was not limited in the amount of work, only the type of work. Ultimately, "Martinka's failure to seek light duty employment . . . foreclosed a partial disability award."

Finally, Martinka alleged constitutional error and an argument related to unlawful termination. The CAV found that Martinka failed to raise this in front of the Commission. Therefore, she had not preserved these arguments for appellate review.