Overview

The last week of July started with an interesting Supreme Court of Virginia (SCV) action granting a petition for appeal in Cappe v. Commonwealth (Com.), Record No. 240055.The SCV wants briefing and argument on 2 assignments of error. The first alleges insufficient evidence regarding identity of Cappe as the perpetrator and further insufficient evidence of an agreement to prove conspiracy. The second assignment of error revolves around the exclusion of lay opinion testimony by a witness for the defendant. Presumably the SCV's analysis will be centered on the question of harmless error, as that is identified in the assignment of error.

In stark contrast to last week's 17 criminal opinions, the Court of Appeals of Virginia (CAV) issued only 3 criminal opinions this week, 1 published and 2 unpublished. This week's 10 civil cases covered a variety of issues, including unlawful detainer, negligence/personal injury, worker's compensation, unemployment benefits, correspondence exemption, and even the Anti-SLAPP statute.

The most important/interesting case is Pegasystems, Inc. v. Appian Corp., Record No. 1399-22-4, without a doubt. This case was a 2-billion-dollar jury judgment (yes, **billion**). Appian prevailed in a corporate espionage case, but the CAV reversed, finding several abuses of discretion in the circuit court's rulings on admissibility of evidence and jury instructions. This will almost definitely be granted an appeal to the SCV.

The CAV did not issue any domestic opinions. The 2 unpublished criminal cases of Gordon v. Com., Record No. 0126-23-2, and Maxwell v. Com., Record No. 0693-23-2, reiterated the fact that as long as there is some evidence to support the conviction, the CAV will not overturn the case on sufficiency grounds. The CAV issued 2 FOIA opinions, including one affirming a writ of mandamus ordering Norfolk to produce records pertinent to a federal habeas corpus proceeding in City of Norfolk v. Zoghi, Record No. 0369-23-1.

SCV Opinions and Published Orders

Durham v. Com., Record No. 230599: (Mann, J., writing for all the Justices)
4th Amendment suppression; Rebuttable presumption; Totality of the circumstances; Automobile exception; Rule 5A:18; Statutory interpretation; Sufficiency; Reasonable hypothesis of innocence
No error in search of vehicle where totality of the circumstances demonstrated probable cause to believe that Durham was drinking while driving and search was appropriately conducted.

> Officer Labat, patrolling a familiar housing complex, observed an unknown/unfamiliar Honda Pilot. Labat ran the registration and found it belonged to Durham, whose license was suspended. Labat later encountered the pilot in a 7-Eleven parking lot, and initiated a traffic stop for driving on a suspended license. There were four occupants, including Durham. When Durham rolled down the driver's side window, Labat "was hit with the odor of alcohol coming from inside the car. Labat saw a Styrofoam cup with "amber clear liquid, possibly liquor" in the

center console. Durham handed Labat the cup, who "dumped it out in the parking lot" because he believed it to be alcohol.

Labat returned to his patrol car to confirm Durham was the owner of the Pilot, and when he re-approached, he saw a liquor bottle in the "left rear footwell." Labat ordered the occupants out of the vehicle and conducted a search, finding an open bottle of Hennessey and a second Styrofoam cup "with blue liquid which smelled of alcohol." He also located a revolver in the center console "still warm to the touch." Durham had a non-violent felony conviction and was arrested for firearm by felon, concealed weapon without a permit, drinking while driving, and driving on a suspended license.

Durham moved to suppress the firearm, arguing that "open containers seen in plain view did not establish probable cause to search the center console." The circuit court found that the lack of a source for the blue liquor gave the officer probable cause to search for the source and denied the motion to suppress. In a bench trial, the circuit court convicted Durham of possession of a firearm by a felon, concealed weapon without a permit, and drinking while driving. Durham appealed only the firearms convictions.

On appeal, Durham argued that the officer searched based on an unreasonable mistake of the law because possession of an open container is not illegal in Virginia. Therefore, "the presence of open containers alone did not create an inference that unlawful activity was afoot." Assuming that the argument was preserved, the CAV agreed that open containers are not illegal, the totality of the circumstances could lead a reasonable officer to believe that "Durham had been drinking while driving and that the vehicle contained further evidence of such conduct." (quoting Durham v. Com., 2023 Va. App. LEXIS 477, at *12-13 (July 25, 2023).

Judge Lorish dissented, finding that prior panel decisions controlled the situation and that the Commonwealth failed to demonstrate the rebuttable presumption that Durham was drinking while driving. (citing McEachin v. Com., 2023 Va. App. LEXIS 488, at *7-10 (July 25, 2023) and Com. v. Branch, 2022 Va. App. LEXIS 245, at *7-9 (June 21, 2022)). Both prior cases suppressed evidence obtained in similar searches because the Panels found insufficient evidence to implicate the rebuttable presumption outlined in § 18.2-323.1. The CAV did not sit en banc for this case or either of the others.

The SCV reiterated 2 major principles in suppression cases: (1) appellate courts look to the evidence adduced at trial in addition to the evidence admitted at the suppression hearing; and (2) "Probable cause is a 'fluid concept that is not readily, or even usefully, reduced to a neat set of legal rules.'" (quoting District of Columbia v. Wesby, 583 U.S. 48, 57 (2018) (citation omitted)). The SCV abrogated McEachin, 2023 Va. App. LEXIS 488, and Branch, 2022 Va. App. LEXIS 245, stating that the Justices "empathize with the temptation to break such an amorphous examination into a digestible checklist borrowed from a statute, that task ultimately

betrays the fluidity of the probable cause analysis." The rebuttable presumption in § 18.2-323.1 deals with guilt/innocence, and to hold the Commonwealth to that high of a burden at the motion to suppress stage is inappropriate because probable cause is much lower of a burden that preponderance of the evidence. (citing Evans v. Com., 290 Va. 277, 287 (2015)).

The SCV then dispensed with Durham's sufficiency argument, reiterating that appellate courts do not review sufficiency to determine whether the appellate court is convinced beyond a reasonable doubt. Appellate courts review only to see if "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (quoting Pijor v. Com., 294 Va. 502, 512 (2017)). The SCV found that the circuit court's factual findings were not plainly wrong or without evidentiary support and affirmed Durham's convictions.

Commentary: I use the term abrogated because the principles of law in McEachin and Branch are rejected by the SCV. However, it is hard to say that the cases are actually abrogated because unpublished cases are merely informative and not binding, even on circuit courts. That being said, I know that I, and many other practitioners, argue that unpublished cases are authoritative/instructive to circuit courts because they indicate how the CAV would treat a particular case on appeal. So, to the extent that these cases were useful previously, they no longer accurately reflect the law.

Eckard v. Com., Record No. 230333: (Kelsey, J., writing for all the Justices)
Juror misconduct; Motion to set aside a jury verdict; Rule 5:15; Writ of certiorari
No juror misconduct where a juror felt pressure to convict because evidence did not demonstrate that this was an exceptional case nor show how any discord affected the deliberative process. Portion of the record not originally delivered to CAV was not reviewable under Rule 5:15.

Eckard was convicted of 12 counts of possession of child pornography. The actual facts of the charges/depictions are irrelevant to the SCV's analysis and are thus omitted even from the SCV's opinion.

Only a few hours after the verdict, "a juror notified the Sheriff that during deliberations the juror changed his vote to guilty due to a perceived threat." This threat occurred "in the bathroom, and [made the juror feel] like he had to vote the way of the majority." The juror also complained of the trial process and having to stay late and without many breaks in the trial. The Sheriff reached out to the juror multiple times, including by hand-delivered letter. However, there was no evidence or even allegation that "the juror ever responded in person, by phone, or by mail to the Sheriff's effort to follow up on the juror's claim."

Eckard filed a motion to set aside the jury verdict but did not request a hearing on the motion. The circuit court denied the motion "holding that the allegations did not justify vacatur of the jury verdicts and did not warrant any judicial intrusion into

the jury's decision-making process." At sentencing, Eckard requested permission "to submit a written proffer on the issue" but no order was entered, and no proffer was in the record.

The CAV Panel held that there was no abuse of discretion in the circuit court's denial of the motion to set aside the verdict. While Eckard averred that a written proffer was submitted, the alleged proffer was not in the record and thus the substance of the proffer was not included in its review of the case. On the merits, the CAV stated that the conduct "at best only amounts to internal discord between two jurors, and 'there is no requirement that a jury arrive at a verdict without discord.'" (quoting Bethea v. Com., 68 Va. App. 487, 507 n.12 (2018), *aff'd*, 297 Va. 730 (2019)). The CAV did not sit en banc on this case.

In the SCV, Eckard included the written proffer and the Commonwealth's objections to the written proffer, but these documents "were not previously transmitted as part of the digital record sent to the Court of Appeals." They were included in an amended circuit court record sent the day before the petition for appeal was filed. The SCV concluded that the court could not review the written proffer because of Rule 5:15, which states that "the record in [the SCV] consists of the record as filed in the office of the clerk of the Court of Appeals."

The SCV admonished Eckard's counsel for failing to notice the error and correct the record in the lower courts, as they should have done. The SCV stated that the writ of certiorari to correct the record under § 8.01-673 is only "to remedy a defect of justice in cases obviously entitled to redress and yet unprovided for by the ordinary forms of proceedings." "If there was any error in the Court of Appeals proceeding, it was entirely Eckard's."

On the merits of the juror misconduct allegation, the SCV found no abuse of discretion in denying the motion to set aside the verdict. "Eckard's case is unusual but not exceptional." And, "only in the truly exceptional cases, should a Virginia court vacate a jury verdict because of a conflict between jurors affecting the deliberative process." (citing Manor v. Hindman, 123 Va. 767, 776-77 (1918)).

The SCV then provided instruction on the question of whether the circuit court erred "by not holding an evidentiary hearing" on the motion. The SCV reframed the question to "Could reasonable jurists agree to disagree on whether the motion and exhibits warranted an evidentiary hearing?" The SCV found that because the motion and supporting exhibits could properly exercise its discretion whether or not to receive evidence on the motion. As such, the SCV found no abuse of discretion in not holding a hearing.

Commentary: As this is an opinion by Justice Kelsey, I recommend all attorneys read it. His opinions are generally a history lesson on whatever legal principle he is applying, and this is no exception. He cites to 7 cases from the 1800s, and cites to 2 legal treatises from that time, and a reprinting of "Essays by a Farmer (IV)"

which I think is more properly identified as The Federal Farmer IV, the fourth letter by an author (or group of authors) written under a pseudonym of "Federal Farmer" in 1787 which opposed the ratification of the U.S. Constitution. Justice Kelsey quotes language from Essays by a Farmer (IV) through "The Bill of Rights Primer," thus any error in the citation is certainly not Justice Kelsey's fault.

Additionally, this is obviously a direct admonition to appellate attorneys to ensure that the record is appropriately delivered. The SCV reiterated that Eckard's counsel could have remedied this issue with the appropriate motion in the CAV, but his negligence to ensure the record is delivered caused affirmation of the circuit court's decision. The result may have been different had counsel acted timely.

CAV Published Decisions

Cosby v. Com., Record No. 1924-23-2: (Huff, J., writing for AtLee and Callins, JJ.)
Technical violation; § 19.2-306.1; "Mixed revocation"; Statutory interpretation; Plain language of the statute; "Violation vs. revocation"; Expressio unius, exlcusio alterius
CAV found that § 19.2-306.1 applies to pre-2021 violations, and no error in evaluating the pre-2021 violations as a mixture of technical and non-technical. Therefore, no error in finding Cosby's instant violations were third or subsequent technical violations.

In 1992, Cosby pleaded guilty to forcible sodomy, burglary, and malicious wounding, receiving 40 years' incarceration, all suspended for an indefinite period of supervised probation. Cosby's probation was revoked in 2004, 2013, 2018, and 2022 before the current major violation report was submitted in 2023. Importantly, in his 2022 revocation, Cosby and his counsel agreed that Cosby was "in violation of his suspended sentences 'based on a third or subsequent violation of technical conditions, also violation of special conditions."

The 2023 violations alleged failure to attend scheduled visits and testing positive for cocaine, both technical violations in nature. The Commonwealth argued that these were third or subsequent technical violations, while Cosby argued that the prior violations were not purely technical and as such did not constitute prior technical violations. The circuit court agreed with the Commonwealth and imposed 3 years.

The CAV affirmed, stating that prior "mixed revocations" constitute prior technical violations, distinguishing the term "revocation" from "violation." "There is no requirement that the trial court disregard a previous technical violation for sentencing purposes because the defendant was also in violation for having committed a non-technical violation."

The CAV found that the plain language of the statute specifically contemplates this situation: "[A]n individual commits a technical violation . . . regardless of whether the [technical] violation is adjudicated simultaneously with a separate non-technical violation." (quoting § 19.2-306.1(A)). The only time that multiple

> violations lose their individual character are when multiple technical violations are considered in the same revocation hearing. (citing Canales v. Com., 78 Va. App. 353, 366 (2023)). Even though the current statute was not in effect, the CAV reviewed the record of Cosby's prior revocations, finding that "[e]ach of these previous violations are 'technical' in nature." Therefore, the circuit court properly concluded that the instant violations were third or subsequent.

Pegasystems, Inc. v. Appian Corp., Record No. 1399-22-4: (Friedman, J., writing for Beales and Callins, JJ.) ***Disclaimer: This is a 61-page opinion reversing a 2-billion-dollar judgment. It will be reviewed en banc or appealed directly to the SCV.***

Trade secrets; Corporate espionage; Unjust enrichment; Admissibility of evidence; Jury instructions; Terms of service; License

CAV reversed judgment in favor of Appian due to the circuit court's abuse of discretion in excluding evidence regarding accessibility of Appian's platform and various versions of Pega's software that rebutted Appian's assertion that Pega altered their software using misappropriated trade secrets.

> Appian and Pega are competitors in the "Business Process Management" (BPM) industry which "enable third party business customers to build complex software applications." Appian and Pega took opposite steps to market their products to customers. Pega emphasized "scalability" and the ability to help with large, complex, and customizable projects. "Appian painted Pega's product as overly complex . . . [and] focused on ease-of-use, speed, and simplicity."
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> Pega admitted that it studies and evaluates competitors' business models and platforms. But, Pega "did not have access to Appian's platform because . . . Appian never made its software publicly available without license terms." Pega enlisted the aid of a staffing agency, specifically stating that "Pega doesn't want it getting back to Appian that Pega is doing this work." A consultant named Zou was hired, and "Pega recorded nearly 100 videos of Zou using Appian's platform, in which Zou would explain strengths and weaknesses and various features on Appian's BPM system." After Zou stopped consulting for Pega, "Pega employees accessed Appian's platform using aliases to discreetly view Appian's free trials."
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> Eventually, Pega's head of competitive intelligence, Petronio, left Pega and began consulting for Appian. Petronio informed Appian of Pega's actions with Zou and the other employees who had accessed Appian's system. Appian brought suit against Pega. Appian claimed that Pega "misappropriated its trade secrets to copy and steal Appian's user-friendly features" to appeal to a broader base of clientele. Appian further claimed that Pega learned "trade secrets regarding weaknesses in Appian's BPM platform" and "used this ill-gotten knowledge for its own advantage."
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> Pega disputed the secrecy of the information it had obtained because it had not accessed the source code of the system. And, the access Pega used was easily available and distributed by Appian's sales representatives. "Appian confirmed it

had no way of tracking usage of its software by its business partners" who Appian "granted latitude" in demonstrating to prospective customers.

At trial, the circuit court excluded evidence of "the number of users of the Appian Platform" as "irrelevant" to suggest "that these are not Appian's trade secrets." The circuit court permitted some testimony but not the number of persons who could access the system. The circuit court further excluded some evidence regarding damages based on a discovery response. The circuit court found that Pega had waived its defense on damages based on its discovery response.

The circuit court also excluded evidence of Pega's prior versions of its software that demonstrated that some of the features Appian alleged as stolen "pre-existed Pega's contact with Zou or were developed wholly independently of his demonstrations." The circuit court excluded this evidence because it was not on the original laptop Pega had delivered to Appian during discovery, even though the circuit court permitted Appian to introduce evidence of Pega's software on a different laptop. "Using a different computer might raise doubts about the software's authenticity."

Finally, the circuit court granted an instruction over Pega's objection that "instructed the jury that Appian could prove its damages simply by establishing 'Pegasystems' sales' during the relevant time frame." At that point, "the burden would shift to Pega to prove damages were unrelated to its wrongdoing."

The CAV reiterated that "whether a trade secret exists and whether certain information constitutes a trade secret are generally questions of fact." (quoting MicroStrategy, Inc. v. Li, 268 Va. 249, 264-65 (2004)). And, a trade secret (1) "derives economic value from being neither generally known nor readily ascertainable" and (2) "is the subject of reasonable efforts to maintain its secrecy." (citing § 59.1-336). Ultimately, the CAV found no error in the circuit court denying the motions to strike based on the evidence presented, and the CAV rejected Pega's request for judgment as a matter of law.

The CAV, though, found that the circuit court abused its discretion in granting Instruction 14, which "failed to place the burden of proving proximate causation on Appian." VUTSA requires that the plaintiffs prove proximate cause, but Instruction 14 "relieved Appian of its burden." The CAV stated that Instruction 14 ran afoul of the plain language of the VUTSA and binding precedent. (citing Banks v. Mario Indus., 274 Va. 438, 455 (2007)). The CAV also stated that "Virginia has rejected the burden-shifting framework adopted by the" circuit court. (citing MicroStrategy, 268 Va. at 265).

The CAV also found that the circuit court "hampered Pega . . . by precluding Pega from presenting evidence, or conducting cross-examination, to demonstrate that much of Pega's total sales revenue was attributable to products with which Appian did not compete." The circuit court had relied upon a statement by Pega in

discovery that it could not differentiate the number each version of its software sold and precluded Pega from introducing evidence of any nature that would limit Appian's damages.

Further, the CAV found that the circuit court abused its discretion in excluding Pega's evidence regarding the different features that were available in Pega's system before it engaged Zou's services and began the actions Appian alleged were improper. The CAV rejected the notion that Pega was required to use "the original, non-functional laptop" that was used in discovery. Provided Pega could properly authenticate the evidence, the exact laptop used was not pertinent to the admissibility of the evidence. "The [circuit] court . . . expressly prohibited Pega from authenticating" the evidence on a different laptop, "even though the court recognized that Pega's witness, Bixby, may be able to authenticate what's on there."

Finally, the CAV stated that the circuit court erred in excluding evidence related to the accessibility of Appian's software. The CAV agreed that "the number of people who can see the secret is not dispositive of" the issue of a trade secret, but the CAV explicitly rejected the assumption that the accessibility of the secret is "irrelevant."

Commentary: The evidentiary decisions made in this case are somewhat odd. The general consensus is that evidence should be allowed unless it is clearly inadmissible or irrelevant. In this case, I do not understand the circuit court's decision to exclude evidence about how many people accessed the software. I absolutely agree with the CAV that the number of people accessing the system is relevant but not dispositive. I also do not understand the circuit court's exclusion of the software simply because the initial laptop provided was no longer operational.

At any rate, this will not be the final opinion on the case. The CAV overturned a 2-billion-dollar judgment. Appian will absolutely petition the SCV for an appeal in this case, and it will likely be granted solely because of the amount in controversy. The SCV may in fact remand for a new trial on the exact grounds the CAV stated, but I doubt the SCV will simply let the CAV panel decision stand. The only other possibility is that Appian petitions for an en banc review which does the same. The SCV may allow an en banc decision to stand, but given that this is the highest jury award in Commonwealth history, I don't believe that to be the case. If I were the attorney, I would directly petition the SCV and argue the case there. The en banc would probably be a waste of time and the client's money. This is a unanimous panel opinion, and you would have to convince 9 judges on the CAV that this was incorrectly decided, and I don't think any of the CAV judges find that.

Rolofson v. Fraser, Record No. 0535-23-4, and Fraser v. Rolofson, Record No. 0828-23-4 (Consolidated Cases): (Frucci, J., writing for Friedman, J., and Humphreys, SJ.)
Defamation; Strategic Lawsuit Against Public Participation (SLAPP); § 8.01-223.2; Statutory interpretation; Canons of construction; Matter of first impression; Law of the case doctrine; Demurrer; Plea in bar; Absolute privilege vs. qualified privilege; Statute of limitations; Right result for a different reason; Leave to amend
CAV affirmed dismissal of defamation case under the right-result-for-a-different-reason doctrine, finding Fraser's statements in a Board of Inquiry hearing were absolutely privileged. CAV also found that one of Fraser's statements was an opinion and therefore not actionable.

Rolofson and Fraser briefly dated while they were officers in the U.S. Army. After they broke up, Fraser "made allegations about Rolofson's behavior." Rolofson's "chain of command initiated an investigation," after which Rolofson received a Reprimand. Rolofson was reprimanded for harassing Fraser and "wrongfully revok[ing] the security access of an enlisted Soldier." A General initiated a Board of Inquiry (BOI) hearing. "During the hearing, Fraser made numerous statements regarding Rolofson's behavior." Fraser's statements included that "she was in fear of her life" from Rolofson. While Rolofson was not dismissed, he may "be administratively separated from the Army" in 2025.

Rolofson filed a defamation suit. Fraser demurred and filed a plea in bar, asserting that her statements were "subject to qualified privilege and barred under Virginia's Anti-SLAPP statute." The circuit court agreed with Fraser, sustaining the plea in bar based on the statute of limitations and qualified privilege. For one statement, the April 29, 2021 statement, the circuit court found that the statement was "an expression of Fraser's opinion" and thus not defamation.

The CAV affirmed under the right result for a different reason doctrine. While the circuit court found qualified privilege, which was not defeated by a demonstration of malice, the CAV found that Fraser's statements were "absolutely privileged" and thus cannot be the basis of a defamation claim. "Qualified privilege can be defeated by a showing of malice, [but] 'the maker of an absolutely privileged communication is accorded complete immunity from liability.'" (Isle of Wight County v. Nogeic, 281 Va. 140, 152 (2011) (quoting Lindeman v. Lesnick, 268 Va. 532, 537 (2004))). The CAV found that her statements were absolutely privileged because they were made in a quasi-judicial proceeding. (citing Givago Growth, LLC v. Itech AG, LLC, 300 Va. 260, 265 (2021))

The CAV also affirmed the circuit court's conclusion that Fraser's April 29, 2021 statement that she was afraid for her life was an opinion, not actionable as defamation. The CAV found that the circuit court did not abuse its discretion in denying Rolofson leave to amend, where Rolofson failed to show how he would amend his complaint a 2nd time to accord with the circuit court's ruling.

Fraser had asserted a cross-assignment of error that the circuit court erred in finding "immunity provided under Virginia's Anti-SLAPP statute." The CAV conducted a lengthy analysis of the Anti-SLAPP statute, before stating that "the 82nd Airborne Division of the Army is clearly not a political subdivision of the Commonwealth that would be included under" § 8.01-223.2. Therefore, the CAV found no error. Finally, the CAV found no error in denying attorney fees.

Commentary: I know that I don't go into depth of the Anti-SLAPP analysis, but the reason is because it is relatively obvious that the 82nd Airborne is not a "political subdivision of the Commonwealth" as required by law. The reason the CAV goes into so much depth is because it is a matter of first impression. Matters of first impression are not to be taken lightly, especially in a published opinion, so what seems obvious still requires a thoughtful/thorough approach. See the full opinion for a complete analysis of the applicability of the Anti-SLAPP statute.

Marlowe v. Southwest Virginia regional Jail Authority, et al., Record No. 0789-23-3: (Friedman, J., writing for Ortiz and White, JJ.)
Sovereign immunity; Negligence; Gross negligence; Statute of limitations; Right result for a different reason; Rule 5A:8; Demurrer; Statutory interpretation
CAV affirmed dismissal of case under the right-result-for-a-different-reason doctrine, finding that Marlowe's status as an inmate/incarcerated person required application of § 8.01-243.2's statute of limitations. Marlowe's claims were filed untimely and were appropriately dismissed with prejudice.

Marlowe was being transferred to a regional jail from another location by Southwest Virginia Regional Jail Authority. During his trip, he was injured when the driver "failed to secure or restrain Marlow" then caused "Marlowe to be thrown forward" when she quickly applied the brakes. Marlowe told the driver that he was injured, but she continued to drive, before she had to apply the brakes "harder, forcibly catapulting Marlowe into the air and against the wall of the van, knocking him unconscious."

Defendants demurred and filed pleas in bar asserting sovereign immunity and statute of limitations. Specifically, Defendants raised § 8.01-243.2, a one-year limitation for claims brough by persons confined in a state or local correctional facility." Marlowe argued that the general two-year limit was appropriate under § 53.1-31.1 delineating standard of care for a prison authority while transporting an inmate. The circuit court dismissed the cases against the jail authority under sovereign immunity but permitted Marlowe to amend his complaint to allege gross negligence against the driver. The circuit court then dismissed the case because Marlowe's newest complaint was "insufficient to rise to gross negligence." Marlowe and the driver assigned error, with the driver asserting that the circuit court should have granted the plea in bar under § 8.01-243.2.

The CAV agreed with the driver that § 8.01-243.2 controlled. Even though Marlowe was correct that the van is not in and of itself a correctional facility, it was owned

by Southwest Virginia Regional Jail, and the driver was their employee. Marlowe, even though he was pre-trial, was an inmate and "within the custody and control of the local correctional facility." The CAV found that § 8.01-243.2 does not require that the injury take place while the inmate is within the four walls of the building. (citing Ruffin v. Com., 62 Va. (21 Gratt.) 790, 793-94 (1871) and Mabe v. Com., 14 Va. App. 439, 441 (1992) ("the term prisoner in a correctional facility refers to the status of the prisoner")).

As such, the CAV ultimately affirmed dismissal of the charges, but did so because the circuit court should have dismissed the case with prejudice before it got to the second amended complaint regarding gross negligence. Citing the right-result-for-a-different-reason doctrine, the CAV affirmed dismissal of the second amended complaint.

Citizens for Fauquier County v. Town of Warrenton, Record No. 0414-23-4: (Raphael, J., writing for Malveaux and Frucci, JJ.)
Amici curiae; FOIA; Writ of mandamus; Datacenters; Voluntary-cessation doctrine; Capable-of-repetition doctrine
FOIA only exempts 1 chief executive, so Warrenton's claims that both the Mayor and Town Manager's emails were exempt were inappropriate. CAV found error in the circuit court's finding that the sampled docs provided for in camera review were representative of the withheld documents without hearing evidence on how they were selected. Remanded case to circuit court to fully evaluate whether the other claimed exemptions are satisfied for the 3150 withheld documents.

Citizens (non-stock corporation) "grew deeply concerned" about Amazon's proposal to build a 220,000 square-foot datacenter. Citizens filed FOIA requests in July and October 2022, attempting to obtain correspondence between Amazon and the town officials. Warrenton produced some items, but withheld 3150 records based on some of the statutory exceptions to FOIA. In particular, Warrenton stated that the emails of both the mayor and the town manager were exempted because of § 2.2-3705.7(2), which excepts "working papers and correspondence of . . . the mayor or chief executive officer of any political subdivision." The Warrenton charter identifies the town manager as the chief executive.

Citizens filed for a writ of mandamus and argued that many of these emails only cc'd the mayor/town manager and that "the exemption was waived if the documents had been further disseminated to various nongovernmental, non-exempt, third parties." The circuit court held a hearing and received approximately 10 emails of each category of exemption to review in camera. Warrenton provided 50 emails of 5 categories: (1) Town Manager Correspondence; (2) Attorney/Client privilege; (3) Taxes; (4) Trade secrets; and (5) Personnel Correspondence. Warrenton did not submit evidence about how these emails were representative of the 3150 withheld items. Ultimately, the circuit court denied the writ of mandamus

The CAV stated that "FOIA's provisions must be liberally construed in favor of public access." (quoting § 2.2-3700(B)). However, the CAV reminds us that the General Assembly amended FOIA to require public bodies to "produce requested records in redacted format if the record contains both exempt and non-exempt information."

The CAV found that the correspondence exemption only allows for one person's correspondence being exempt. Warrenton could not assert the exemption for both the mayor and town manager. The CAV reiterated that the FOIA Advisory Council had already answered this question, finding the "mayor or chief executive officer" a disjunctive clause and informing local bodies of the issue. The CAV found the opinion of the council instructive. (quoting Suffolk City Sch. Bd. V. Wahlstrom, 302 Va. 188, 205 n.10 (2023)). The CAV remanded for Warrenton to choose which office would be exempt.

The CAV further found that the circuit court should have heard evidence on the sampling methodology and determined whether the emails provided were actually representative of the withheld documentation. (citing Citizens for Resp. & Ethics in Wash. v. U.S. Dep't of Justice, 955 F. Supp. 2d 4 (D.D.C. 2013) and Shannahan v. IRS, 672 F.3d 1142, 1151 (9th Cir. 2012)).

The CAV then provided the circuit court with options of what to do in the future proceedings of the case because the CAV rejected Citizens' rationale that all of the documents should be produced. The CAV understood the circuit court's reluctance of reading all 3150 documents but reminded us that in camera review of all of the documents was an option. The CAV also stated that requiring Warrenton to produce a detailed index of the documents was an option, called a Vaughn index. (citing Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973) and Virginia DOC v. Surovell, 290 Va. 255, 262 (2015)). The CAV provided a third option of random or truly representative sampling, stating that the circuit court has broad discretion to determine the appropriate method of sampling.

Finally, the CAV instructed the circuit court to answer whether emails sent to a distribution list were not included in the exemption from FOIA disclosure because the document is also disclosed to non-exempt persons. The CAV also instructed the circuit court to engage with the question of attorney fees, as Citizens requested reasonable attorney fees at trial and on appeal.

CAV Unpublished Decisions

Gordon v. Com., Record No. 0126-23-2: (Callins, J., writing for Beales, J., and Clements, SJ.)
Sufficiency; Self-defense; Malice; Rule 5A:18; Rule 5A:20
CAV affirmed Gordon's convictions where evidence supported the jury's implicit finding that Gordon did not act in self-defense. Jury's interpretation of evidence to find malice likewise supported by the evidence and not plainly wrong.

> Dalton and Cheatham were friends, and Cheatham was a drug dealer. Dalton drove Cheatham around to collect money. Dalton did not have a weapon, and he did not observe Cheatham with a weapon. Dalton did not threaten or attempt violence on those he collected debts from. On the night of the incident, Cheatham asked Dalton to drive him to an address to collect $140 from someone. They traveled to the address and Cheatham saw the individual driving away, so they followed the car until it stopped. Dalton and Cheatham got out and approached the car.
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> Dalton placed both his hands on the driver's side mirror to show that he did not have a weapon in his hands. Dalton saw Gordon as the driver, but did not know him at the time. Cheatham approached and asked, "Yo, man, you got my hundred and forty dollars?" Then, Cheatham yelled, "Gun, gun." Dalton ran, but he was shot in the back. A neighbor's camera recorded the shooting and showed Gordon leaving to a go into a nearby trailer before coming back and staying at the car until police arrived.
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> Dalton had been shot through both lungs, with the bullet stopping in his shoulder. When he fell, Dalton's ankle had been fractured. Gordon told police he had not seen any weapons before he started shooting and that he had never seen Cheatham with a weapon before. Gordon had called 911 stating he thought he was being robbed and told police that "Cheatham had brought a friend to try and rob" him.
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> At trial, Gordon testified that Cheatham had been at Gordon's girlfriend's house and was talking about a "snitch" being in the neighborhood, glaring at Gordon each time he said that. Gordon stated that he had rejected the police's request to be a Confidential Informant and that Cheatham might have heard about the police's request. Gordon also testified that he didn't really have a concern when he observed a car following him, even when he stopped the car. Gordon stated he only saw silhouettes and did not know what was happening, and he couldn't drive away because he dropped his keys. Gordon heard Cheatham say that Cheatham "was going to gut him and kill him." Then Gordon grabbed his gun and started shooting, aiming at the person "cramping his door."
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> Gordon was charged with attempted murder, use of a firearm, aggravated malicious wounding, and shooting a firearm from a motor vehicle. The jury was instructed on self-defense, malice, and heat of passion. The jury convicted Gordon as charged. After the conviction, the circuit court refused to set aside the jury verdict.

The CAV affirmed Gordon's convictions, finding that "the jury could have found that Gordon failed to prove circumstances of self-defense sufficient to create a reasonable doubt." Because there was evidence to support that conclusion, the CAV refused to set aside the jury's findings of fact because they were supported by the evidence. The CAV also rejected Gordon's contention that there was insufficient evidence of malice for the same reason.

City of Norfolk v. Zoghi, Record No. 0369-23-1: (White, J., writing for Huff and Malveaux, JJ.)
Writ of mandamus; FOIA; Attorney fees; Statutory interpretation
CAV affirmed the writ of mandamus where the circuit court properly interpreted § 16.1-301 to cover only juvenile defendants. Norfolk ordered to provide the requested documents.

Zoghi represents Juniper in a federal habeas proceeding. Zoghi requested public records related to Juniper's capital murder convictions, including investigation files. Norfolk rejected Zoghi's request and identified 860 pages of documents and 23 records that were relevant but withheld, citing § 16.1-301 because the records related to juveniles. Zoghi filed a writ of mandamus for Norfolk to produce the records.

The circuit court agreed, finding that § 16.1-301 only protected juvenile defendants, not other juveniles. Zoghi also moved for attorney fees/costs, requesting less than $1000. The circuit court granted the request for costs, and Norfolk appealed.

The CAV affirmed, finding that the circuit court's conclusions were correct regarding § 16.1-301. The CAV rejected Norfolk's argument that § 16.1-301 applies to all juveniles and not just defendants. The CAV then addressed the mandatory attorney fees/costs provision of § 2.2-3713. The CAV remanded the case for a determination for what is reasonable in this circumstance, as reasonable is dependent on the particular case.

Pineda v. Dante Siding, LLC, Record No. 1561-23-1: (O'Brien, J., writing for Huff and Athey, JJ.)
Worker Compensation Commission; Independent contractor
Because Dante Siding did not exercise control over Pineda's methods or procedures in accomplishing his tasks, Commission did not err in finding that Pineda was an independent contractor and thus not entitled to benefits/compensation.

Pineda fell about 15 feet while installing siding on a 2-story residence. His scaffold had failed, and he was hospitalized for approximately 9 days, requiring several surgeries for his right leg. Dante Siding argued that he was not entitled to benefits because he was an independent contractor. The Worker's Compensation Commission agreed that Pineda was a contractor and not entitled to benefits.

The CAV reiterated that whether an appellant is an employee or independent contractor is "a mixed question of law and fact." (quoting County of Spotsylvania v. Walker, 25 Va. App. 224, 230 (1997)). There are 4 factors to review on this issue: (1) selection and engagement of the employee; (2) Payment style; (3) power of

dismissal; and (4) Power of control over the employee's action. The CAV stated that the 4th factor is the most important. (citing Purvis v. Porter Cabs, Inc., 38 Va. App. 760, 766 (2002)). In reviewing the evidence, the CAV found that the fourth factor weighed in favor of Defendants. Defendants only looked to Pineda for results and did not manage how Pineda did his duties. Therefore, the CAV found no error in the Commission's conclusion that Pineda was not an employee because Defendants did not exercise the requisite control of methods Pineda used to accomplish his tasks.

Agnew, et al. v. 1309 Taylors Point Road, LLC, Record No. 0516-23-1: (Huff, J., writing for O'Brien and Fulton, JJ.)
Unlawful detainer; Res judicata; Issue preclusion; Claim preclusion; Doctrine of judicial restraint; Inter-panel accord doctrine; Subject-matter jurisdiction; Summary judgment
A circuit court's subject-matter jurisdiction in a GDC appeal is limited to the GDC's jurisdiction. No error in finding that the question of title was not appropriately raised in the pleadings, and the circuit court did not err in granting TPR, LLC immediate possession of the property.

The Richmond City circuit court ordered that the property located at 1309 Taylors Point Road be sold at public auction. FRP, LLC purchased the property on March 9, 2021. The special commissioner's deed conveying the property was recorded April 14, 2022. FRP subsequently transferred the property to 1309 Taylors Point Road, LLC (TPR), which FRP maintained a majority interest in. The circuit court entered a final order confirming the sale on June 1, 2022.

TPR issued a notice to vacate on August 23, 2022, including a copy of the June 1, 2022 order. Appellants did not vacate the property, so TPR filed an unlawful detainer against Appellants in the GDC. In their response, Appellants raised affirmative defenses that TPR could not possess the property and that TPR's claims were barred because the sale was fraudulent. The GDC granted TPR immediate possession and $40,000 in damages.

The circuit court, on de novo appeal, also granted TPR immediate possession and awarded $89,060 in holdover rent. The circuit court stated that Appellant's argument regarding fraud was related to the legality of the title and was not properly before the court because the issue in GDC was purely who had rightful possession of the property, not title. TPR demonstrated a prima facie case through the June 1, 2022 order, and Appellants did not rebut the evidence.

The CAV found the same. (citing Parrish v. Fannie Mae, 292 Va. 44 (2016)). The CAV expressly limited its holding to determining the possession issue because GDC did not have the authority to determine title. Because the circuit court sitting on appeal only has the jurisdiction that was appropriately before the GDC, the circuit court also did not have the authority to determine title.

The CAV held that, while sufficiently pleaded defenses related to title may divest the GDC of authority to rule on the unlawful detainer and require the GDC to dismiss the case without prejudice for filing in circuit court, Appellants here failed to meet the burden. As such, there was no error in the GDC ruling on the case. (citing Parrish and Warwick & Barksdale v. Mayo, 56 Va. (15 Gratt.) 528 (1860)).

Finally, the CAV held that the evidence clearly supported TPR's possession of the property and upheld the circuit court's order granting TPR immediate possession of the property. The CAV also affirmed the award of holdover rent.

Maxwell v. Com., Record No. 0693-23-2: (Decker, CJ., writing for Beales and Lorish, JJ.)
Sufficiency; Speedy trial; Waiver of AOE; Reasonable hypothesis of innocence
CAV affirmed Maxwell's convictions of larceny and property damage, finding that the evidence supported the jury's implicit rejection of Maxwell's hypothesis of innocence.

Bryan Harris owned a car repair business, and Wilkerson dropped off a Chevy Cavalier to be repaired. Maxwell came into the business and asked if Bryan had any cars for sale. Bryan told him no, and Maxwell left. A few days later, Bryan's brother, Marvin, dropped off a Pontiac at the shop, while Bryan was on vacation.

When Bryan returned from vacation, he saw that the Cavalier was gone. But, Bryan did not report the car as stolen because he thought Wilkerson picked it up with a spare key. Wilkerson returned to retrieve his car, and Bryan realized that the keys were missing from Bryan's office. They reported the Cavalier as stolen. Police found no evidence of forced entry but found that the locks were easy to open with a credit card.

Sergeant Adams saw the Cavalier just a few days after it was reported stolen. When Adams tried to stop the vehicle, a high-speed pursuit took place. Eventually, the Cavalier came to rest in a yard, and Maxwell tried to flee on foot but was arrested. He was the sole occupant of the Cavalier. Officers noticed that the license plate on the Cavalier belonged to Marvin's Pontiac. The Cavalier was in a much worse state than it was, with "some of the air vents . . . busted out, and the radio . . . removed."

At trial for grand larceny, burglary, property damage, and petit larceny, Maxwell testified on his own behalf and presented evidence from another witness. Both Maxwell and the other witness were convicted felons. Maxwell testified that he purchased the Cavalier from an acquaintance and that it was in the same state when he bought it. Maxwell also stated that he wasn't the one driving the Cavalier when Adams arrested him. He claimed it was "R.J." who had active warrants and successfully fled on foot. "He also claimed he received a bill of sale proving that he bought the Cavalier from [the seller] but had misplaced it and [the seller] died before trial." The jury convicted Maxwell of grand larceny, property damage, and petit larceny.

The CAV affirmed, reiterating, "If there is evidentiary support for the conviction, the reviewing court is not permitted to substitute its own judgment, even if its opinion might differ from the conclusions reached by the finder of fact at the trial." (quoting McGowan v. Com., 72 Va. App. 513, 521 (2020)). Specifically, "whether an alternative hypothesis of innocence is reasonable is a factual question that will be reversed on appeal only if plainly wrong." (quoting Rams v. Com., 70 Va. App. 12, 28 (2019)). "An appellate court may neither find facts nor draw inferences that favor the losing party that the factfinder did not." (quoting Com. v. Garrick, ___ Va. ___, ___ (2024)). The CAV stated that, "taken as a whole, the evidence, including the appellant's actions and testimony" supports his convictions.

Axios Partners, LLC v. Northampton Bd. of Supervisors, et al., Record No. 0815-23-1: (O'Brien, J., writing for Huff and Fulton, JJ.)
Special use permit; Fairly debatable standard; Statutory interpretation; Harmonious reading; Arbitrary and capricious; Unconstitutional condition
No error in Board of Supervisor's use of dwelling density restriction to deny Axios's petition for a special use permit. Board's decision was not arbitrary and capricious.

Axios applied for a special use permit to build 6 (initially 12) "tourist cottages" on property in Northampton County. Under the zoning ordinance "the maximum density in an Agricultural/Rural Business (A/RB) district was 1 dwelling unit per 20 acres." The lot was only 48 acres large, and thus the permit was denied because the use exceeded the dwelling density. In particular, to obtain a special use permit the petitioner must address 11 criteria. The Board of Supervisors issued a report finding Axios's proposal was deficient in 10 of 11 of the criteria.

Axios appealed to the circuit court, which conducted a hearing on the issue. The circuit court found that "the issue in this matter was fairly debatable," so the circuit court did not overturn the Board's decision. It agreed that a "tourist cottage is a type of dwelling" and that it was appropriate to consider the dwelling density restriction.

The CAV found no error in using the dwelling density factor as a reason for denying the petition. The CAV rejected Axios's statements that "tourist cottages are exempt from density considerations." The CAV found no action arbitrary and capricious and engaged with Axios's allegation of an unconstitutional condition, finding no support for Axios's position. Finally, the CAV held that a verbal slip of the circuit court mis-articulating the fairly debatable standard was not dispositive because the record demonstrated it was a purely verbal error. The CAV found that the circuit court properly applied the standard.

Uninsured Employer's Fund v. Thacker, Record No. 1410-23-3: (Raphael, J., writing for Fulton and Causey, JJ.)
Worker's Compensation Commission; Burden of proof
Commission's finding that Thacker was entitled to temporary total benefits was supported by the record and did not divest Thacker of his burden of proof or misplace the burden of proof on UEF.

> On January 24, 2022, Thacker was working for A Chimney Expert when he slipped and fell on icy steps. He was later diagnosed with a tailbone fracture. He had initially only complained of back pain, but in April he began complaining of neck and shoulder pain. He went to several appointments, including specialists, because, despite medication, his lower back, neck, and shoulder pain persisted. In May, he was diagnosed with a torn rotator cuff and received surgery in August 2022.
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> The deputy commissioner found that he was only entitled to temporary total disability only from January to February because the commissioner found that his neck and shoulder pain were too remote to be related to the January fall. The full Commission reversed in part, finding that the shoulder pain was caused by the incident but not the neck pain. The Commission granted temporary total disability for January – February and from May 2022 continuing.
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> The CAV affirmed, rejecting UEF's argument that the Commission "improperly saddled [UEF] with the burden to disprove causation." There was sufficient evidence for the Commission to find that the shoulder injury was caused by the January slip-and-fall.

Goode v. Huguenot Springs, LLC, et al., Record No. 1497-23-2: (AtLee, J., writing for Beales and Malveaux, JJ.)
Negligence; Demurrer; Duty to warn; Invitee; Cognizable special relationship
No special relationship between Huguenot and any other party. Huguenot did not have a duty to warn/protect Goode from third party's criminal assault. Therefore, case appropriately dismissed.

> Goode obtained permission to fish in a pond owned by Huguenot Springs. Huguenot did not tell Goode that it was leasing the property where the pond was located to Jacob and Jesse Moore. Huguenot did not tell the Moores that it had given Goode permission to fish in the lake.
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> Goode went to go fish and saw the Moores at the pond. The Moores began yelling at Goode and told Goode that because the Moores stocked the pond with fish, "the fish belonged to them." After a subsequent "heated discussion," the Moores attacked Goode with a knife, breaking the tip of the knife off in Goode's skull. Goode suffered significant injuries, resulting in $600,000 in medical bills.
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> Goode alleged in his complaint that Huguenot had a duty to warn/protect him from the Moores because Goode was an invitee. Goode accused Huguenot Springs of

"orchestrat[ing] a dangerous environment" to antagonize the Moores resulting "in an unreasonable risk of harm." Huguenot demurred, arguing that no cognizable special relationship was formed by giving Goode permission to fish. Huguenot also argued that it was unaware that there was "an imminent probability of harm." The circuit court agreed, finding no special relationship or duty to warn or protect "because the criminal assault was not reasonably foreseeable."

The CAV affirmed, quoting Terry v. Irish Fleet, Inc., 296 Va. 129, 135 (2018): "As a general rule, there is no duty to warn or protect against acts of criminal assault by third parties." However, the plaintiff can demonstrate "a special relationship" between a defendant and the third parties as a "threshold requirement" to the circuit court finding that a defendant a duty to warn/protect plaintiff. (quoting id. at 136).

This type of special relationship "is almost always limited to a defendant's exercise of a legal duty to control the actions of a person in custody or on parole." (quoting Yuzefovsky v. St. John's Wood Apts., 261 Va. 97, 107 n.3 (2001)). Where the parties simply have a landlord/tenant relationship, "there generally is no special relationship . . . that would impose a common law duty . . . to protect . . . from an intentional criminal act of an unknown third person." (quoting Holles v. Sunrise Terrace, 257 Va. 131, 136-37 (1999)).

The CAV found that the circuit court did not err in finding that there was no special relationship between any of the parties to impose a duty to warn Goode of the Moores. The CAV further found that Huguenot did not voluntarily accept any duty to warn/protect because a "voluntary assumed duty to warn or protect against the danger of criminal assault by a third person" only exists "if the duty is an express undertaking." (quoting Terry, 296 Va. at 138).