

Overview

In stark contrast to last week, the CAV issued no published decisions and only 8 unpublished opinions. In the unpublished opinions, we received 6 opinions on civil and domestic relations cases, and 2 in the criminal context. In general, the best and narrowest grounds doctrine was a clear winner, being applied in 3 of the 8 opinions, covering both contract disputes and criminal law. One can also argue that the “alternative grounds” doctrine is an analogous doctrine to the best and narrowest grounds, which would add 1 more opinion to that tally.

The 2 contract cases decided this week involved allegations of anticipatory breach, with the CAV again declining to adopt the doctrine of reasonable assurances in Under Wild Skies, Inc. v. National Rifle Association of America, Record No. 1956-22-4, and National Rifle Association of America v. Under Wild Skies, Inc., Record No. 1965-22-4, (Consolidated cases). In the other contract case, Dexis Interactive, Inc., v. International Business & Technical Consultants, Inc., Record No 689-23-4, the CAV again reiterated that the plain and unambiguous language of the contract governs the agreement and found that Dexis was not owed any of the workshare of additional funding to a Prime Contract, when it was just the subcontractor and the subcontract did not contemplate additional funding.

The only criminal case of note is Paige v. Com., Record No. 0091-23-2, where the CAV applied the best and narrowest grounds doctrine to find constitutional harmless error and that any error in a warrantless search did not implicate the exclusionary rule. Therefore, there was no error in denying Paige’s motions to suppress nor in convicting Paige of PWID Sch. I/II.

The CAV also reviewed both a Worker’s Compensation Commission claim (Hanover County, et al. v. Moore, Record No. 0715-23-2) and a civil commitment of a sexually violent predator (Amerson v. Com., Record No. 1070-23-1), finding no errors in either of the tribunals’ decisions. The last 2 cases were termination of parental rights decisions. Neither decision should be of much precedential value, but they reiterate many of the established principles in those determinations.

CAV Published Decisions

No published decisions this week.

CAV Unpublished Decisions

Under Wild Skies, Inc. v. National Rifle Association of America, Record No. 1956-22-4 and National Rifle Association of America v. Under Wild Skies, Inc., Record No. 1965-22-4 (Consolidated cases): (Athey, J., writing for Causey and Callins, JJ.)

Jury instructions; Motion to set aside the verdict; Motions to strike; Affirmative defenses; Fraudulent invoicing; Recoupment; Doctrine of reasonable assurances; Best and narrowest grounds; Material breach; Rule 5A:20

The CAV declined to adopt the doctrine of reasonable assurances and affirmed a circuit court's refusal to instruct the jury on the same. No error in striking the NRA's affirmative defenses where no evidence supported the defenses. Materiality of UWS's potential first breach was a factual question owed great deference, and the jury's conclusion that it was not material was not plainly wrong.

UWS and the NRA partnered to produce a television program hosted by Makris, "dedicated to hunting various big and small game at numerous locations while utilizing many different types of firearms." The current iteration of the agreement was effective January 1, 2016, through December 31, 2025, and the agreement was executed in 2018. UWS was to deliver 13 episodes a year, and the NRA agreed to pay for advertising and sponsorship of the program, four payments a year to UWS.

In July 2019, the NRA requested information regarding viewership and other data on the episodes. UWS objected, stating it was not required to deliver the information and that asking for the information could be construed as an anticipatory breach. Nevertheless, UWS delivered the metrics, which were not favorable. The NRA failed to make their next payment as obligated.

UWS filed suit claiming 2 counts of breach of contract and 2 counts of anticipatory breach. The NRA counterclaimed that UWS had committed the first breach "by failing to deliver all 13 episodes scheduled to air in 2018." The NRA asserted several affirmative defenses in their answer, including fraudulent invoicing and recoupment.

During the trial the NRA presented evidence that the NRA had a "verbal agreement" to supplement the contractual payments with UWS and submitted 24 "supplemental invoices" into evidence. These additional payments "were to pay for these events that [Makris] would host after" certain large conventions or hunting events. UWS presented evidence from Makris that these additional payments were "a plan . . . for him to host events . . . to facilitate exposure for NRA and networking with attendees."

At the conclusion of the 6-day jury trial the circuit court granted UWS's motions to strike the affirmative defenses of fraudulent invoicing and recoupment. The circuit court granted the motions, finding "that the supplemental payments were made pursuant to a separate oral contract outside of the advertising and sponsorship agreements." UWS proposed Instruction 21 which discussed anticipatory breach

and demand for reasonable assurances. The circuit court denied Instruction 21, stating that giving the instruction would be the circuit court commenting on the evidence. The jury found in UWS's favor for breach of contract, awarding \$550,000. The jury rejected the anticipatory breach claims and the NRA's counterclaims. Both parties appealed, and the CAV consolidated the cases.

On Instruction 21, the CAV found no error in denying the instruction because it was an inaccurate statement of the law. UWS's proposed instruction asserted that Virginia recognized the doctrine of reasonable assurances, which has never been incorporated into Virginia precedent. The CAV declined to extend the law at this juncture and found that Instruction 21 was not a correct statement; therefore, the circuit court did not abuse its discretion in denying it.

The CAV also found no issue in the jury's verdict, finding evidentiary support for the jury's implied conclusion that UWS did not materially breach the contract first. The jury was properly instructed on material breaches and the impact of breaching the contract first. The jury's implicit conclusion that UWS did not commit a material breach prior to the NRA's breach was a factual finding entitled to great deference.

Finally, the CAV found that the circuit court did not err when it struck the NRA's affirmative defenses, finding that "the record clearly reflects that Makris and LaPierre agreed that Makris would conduct networking events for NRA's benefit and that Makris would be separately paid for his work." The CAV found that the affirmative defenses were without evidentiary support and that the circuit court properly granted the motions to strike.

Hardin v. Hopewell DSS, Record No. 1587-23-2: (Malveaux, J., writing for O'Brien and Raphael, JJ.)

Termination of Parental Rights; § 16.1-283; Alternative grounds; Best interests of the child
No error in terminating Hardin's parental rights under § 16.1-283(C)(2) where his long-term incarceration was combined with evidence demonstrating that he failed to remedy his behavioral issues and improve his parental skills. Alternative grounds theory applied, and CAV did not review whether termination was appropriate under § 16.1-283(B).

Hardin is A.H.'s father. A.H. was born substance-exposed in December 2022. Mother, when she was admitted for labor, "tested positive for fentanyl, cocaine, opioids, and amphetamines." A.H. tested positive to amphetamines, benzodiazepines, opiates, fentanyl, and THC. A.H. was admitted to the NICU. Hardin was incarcerated during this time. DSS immediately prepared plans to place A.H. with a relative but three separate plans were reviewed and rejected. DSS visited Hardin while incarcerated and created a plan, asking Hardin to "address his behavioral issues and improve his parenting skills." Hardin provided contact information for his grandmother, who subsequently petitioned for custody of A.H. DSS filed an emergency removal petition.

JDR found that A.H. had been abused and/or neglected. JDR also found that Hardin's grandmother was not an appropriate custodian, as she only wanted custody until Hardin was released from custody. JDR removed A.H. and placed her in foster care with the intent of adoption or permanent placement elsewhere. Subsequently, JDR terminated Hardin's residual parental rights. The circuit court also terminated his rights on appeal de novo, under both § 16.1-283(B) and (C)(2).

The CAV affirmed under § 16.1-283(C)(2). Reiterating that long-term incarceration is not sufficient to terminate, the CAV affirmed that "it is a valid and proper circumstance which, when combined with other evidence . . . can support a court's finding by clear and convincing evidence that the best interests of the child will be served by termination." (quoting *Ferguson v. Stafford Cnty. Dep't of Soc. Servs.*, 14 Va. App. 333, 340 (1992)). The CAV found sufficient evidence for termination of Hardin's rights under (C)(2). As such, the CAV did not review whether there was sufficient evidence under (B).

Roloson v. Carroll County DSS, Record No. 1157-23-3: (Per Curiam opinion: Athey, White, and Frucci, JJ.)

§ 16.1-283; *Termination of parental rights*

No error in termination of parental rights where Roloson failed to assign error to the circuit court's factual basis for termination, arguing only that his brother's petition for custody was sufficient to find that the best interests of the child were not satisfied by termination. CAV rejected appeal without oral argument as "wholly without merit."

The CAV rejected Roloson's appeal without oral argument, finding it was "wholly without merit." Code § 17.1-403(ii)(a); Rule 5A:27(a). Roloson contended that the circuit court erred in terminating his parental rights, but "he fail[ed] to contest the sufficiency of the circuit court's factual basis for terminating his parental rights." Instead, Roloson argued that the best interests of the child were not served by changing DSS's plan to adoption rather than "return home" and that the "uncle's custody petitions" demonstrated the insufficiency of the evidence to terminate Roloson's residual parental rights.

Roloson is the biological father of S.R. and M.R., who were removed from his custody and placed in foster care in November 2020, when Roloson and Mother were arrested for production of child pornography and other sexual abuse charges. Both were subsequently convicted of these charges, and Roloson has been incarcerated since. DSS initially looked to close-relative placement, including the children's paternal Uncle and paternal Great Grandmother. DSS created plans to support and prepare both Uncle and Great Grandmother for placement.

However, DSS was concerned with placement with both individuals because "they each [had] expressed they did not feel [Roloson] perpetrated any abuse against S.R. and that he was not involved with child pornography." S.R. in particular "exhibited a trauma response triggered by simply mentioning her relatives. DSS then filed a

petition to modify the plan, recommending adoption instead of close-relative placement. Both Uncle and Great Grandmother filed petitions for custody.

The circuit court consolidated the petitions in a single ore tenus hearing. DSS introduced evidence from the children's caseworker and a professional counselor who both worked closely with S.R. regarding her trauma. The Counselor opined that "neither S.R. nor M.R. should have any contact with family members." Uncle testified, and Great Grandmother joined in Uncle's petition for custody, deciding not to pursue her own petition. The circuit court rejected Uncle's petitions and granted the DSS petition for termination of parental rights and plan to prepare S.R. and M.R. for adoption.

The CAV found that "the circuit court satisfied its obligation based on the evidence presented by the Department." The evidence supported the conclusion that the Department had attempted to identify "reasonable relative replacements" and that none existed. (citing Sauer v. Franklin Cnty. Dep't of Soc. Servs., 18 Va. App. 769, 771 (1994)). The circuit court's conclusions regarding the lack of alternative placements was not plainly wrong or without evidentiary support. (citing Castillo v. Loudoun Cnty. Dep't of Fam. Servs., 68 Va. App. 547, 568 (2018)). Therefore, the circuit court did not err in terminating Roloson's parental rights.

Commentary: This one is slightly different from most of the termination of parental rights cases because the foundation of Roloson's arguments was not that the evidence was insufficient to support the termination of his own parental rights. Instead, Roloson presented arguments averring that the evidence was insufficient but relying solely upon the denial of Uncle's petition. All in all, this case will have relatively little precedential value because it does not even reference whether there was sufficient factual basis to terminate under any of the four subsections the circuit court referenced: §§ 16.1-283(B); (C)(1); (C)(2); and (E). This is a unique fact pattern that will likely not repeat itself.

Amerson v. Com., Record No. 1070-23-1: (Huff, J., writing for O'Brien and Athey, JJ.)
Sexually violent predator; Conditional release; § 37.2-910

CAV affirmed the circuit court's conclusion that Amerson was a sexually violent predator based on competing expert doctrine. Where experts disagree, and the circuit court chooses one expert as more credible, the CAV reviews only for whether the evidence supports the expert's conclusion.

Amerson was convicted of attempted rape in 1999 in Virginia and child sexual abuse in 2003 in DC. In 2008, the Commonwealth petitioned to declare Amerson a sexually violent predator. The circuit court agreed and granted Amerson conditional release. Amerson violated his conditions three separate times, and eventually, the circuit court revoked Amerson's release and remanded him into custody for inpatient treatment. Amerson was released once more in 2020 before the circuit court revoked his conditional release again.

In 2023, the circuit court conducted its annual review of Amerson's case and received evidence from Dr. Dennis and Dr. Plaud. Dr. Dennis reviewed the 2020 conviction that resulted in Amerson's current inpatient treatment, as well as medical records and progress reports, meeting with Amerson in April 2022 and interviewing Amerson's therapist. Dr. Plaud met with Amerson multiple times in February 2023 but did not consult with Amerson's therapist. Dr. Dennis opined that Amerson was still a sexually violent predator and needed inpatient treatment. Dr. Plaud recommended outpatient treatment and conditional release.

The circuit court found Amerson was still a sexually violent predator and ordered that Amerson remain in inpatient treatment. Amerson appealed only the finding that Amerson was a sexually violent predator.

The CAV found that sufficient evidence was presented for the circuit court to conclude that Amerson was a sexually violent predator. The CAV found that Dr. Dennis's opinion was well-founded and "accurately reflected [Amerson's] current mental state" and "support[ed] Dr. Dennis's conclusion that [Amerson] remained likely to reoffend." The CAV stated that both Dr. Plaud and Dr. Dennis considered the same data and merely assigned different weights to each factor. As such, there was no error in the circuit court's conclusion that Dr. Dennis's opinion was more accurate, as that is a credibility determination that the CAV will not review as long as the finding is supported by credible evidence. (citing Welsh v. Com., 78 Va. App. 287, 302 (2023) (citation omitted)).

Hanover County, et al. v. Moore, Record No. 0715-23-2: (Clements, SJ., writing for Beales and Callins, JJ.)

Worker's Compensation Commission; § 65.2-402; Definition of "heart disease"

The nature of a disease/diagnosis as a "heart disease" is a question of medical fact and thus not reviewable de novo as a legal question. The Commission is not required to give the treating physician's opinion more weight than another physician if the opinion is not related to the individual's diagnosis. Therefore, no error in the finding that a thoracic aortic aneurysm is a "heart disease" based on a non-treating physician's unequivocal opinion.

Moore was a firefighter in Hanover County. In 2007, Moore began treatment with a cardiologist, Dr. Craven, who diagnosed Moore with TAA in 2021. TAA is a thoracic aortic aneurysm which "is an enlargement of the aorta beyond a typical size." The TAA prevented Moore from fulfilling his duties as a firefighter, and Dr. Craven opined that "even with surgery, Dr. Craven doubted that Moore would be able to return to normal physical activity." Dr. Craven excluded Moore's family history as the cause of his TAA but could not otherwise determine the cause of the TAA. When asked whether TAA was "heart disease," Dr. Craven responded, "It depends on what you mean by heart disease," clarifying that TAA was an aortic disease.

§ 65.2-402(B) presumes that a firefighter's heart disease is compensable under certain circumstances, but Hanover argued that because TAA was an aortic disease,

it was not heart disease. But, Hanover conceded that it could not rebut the presumption if the Commission found that the code section applied. Moore presented a written statement from Dr. Tucker who opined that TAA is considered a heart disease because it would be treated by a cardiologist, stating that “any conditions involving the aortic valve would also be considered a ‘heart disease.’” The commission found that TAA was a heart disease and awarded lifetime medical benefits. Hanover appealed, arguing that whether TAA was a heart disease was a legal question.

The CAV reiterated that “whether a particular ailment is a compensable occupational disease is a mixed question of law and fact.” (citing A New Leaf, Inc. v. Webb, 26 Va. App. 460 (1998)). The factual inquiry “involves ‘any facts relevant to the nature and cause of the impairment.’” (quoting A New Leaf v. Webb, 257 Va. 190, 196 (1999) (citation omitted)). The legal question “involves determining whether a condition ‘constitutes an occupational disease.’” (Id.)

The CAV found that because the only point in contention was whether TAA was a heart disease, the question involved the nature of the impairment, which is factual. “[W]hether a specific ailment is heart disease under Code § 65.2-402(B) is a question of medical fact.” (quoting Com. v. Haga, 18 Va. App. 162, 166-67 (1994)). The CAV rejected Hanover’s contention that the Commission should have given greater weight to Dr. Craven’s equivocal testimony rather than Dr. Tucker’s unequivocal and unexplained conclusion merely because Dr. Craven was the treating physician. This question did not require an in-depth understanding of Moore’s medical history and is simply a question of whether or not TAA was a heart disease. Therefore, the Commission’s conclusion was not without evidentiary support.

Dexis Interactive, Inc., v. International Business & Technical Consultants, Inc., Record No 689-23-4: (Decker, CJ., writing for O’Brien and AtLee, JJ.)

Plea in bar; Government contracts; Anticipatory breach; Justiciability of claims; Rule 3:8; Specific performance; Injunctive relief; Best and narrowest grounds

Subcontractor of a federal government contract not entitled to proportional workshare of additional funding to the prime contract added years after the subcontract. Subcontract’s Order of Precedence required that all documents that contradict the subcontract yield to the subcontract. CAV found that subcontract’s plain and unambiguous language did not cover any additional funding.

Dexis and IBTCI are partners in a federal government contract. IBTCI is the prime contractor, with Dexis operating as a subcontractor. The contract was valued at approximately \$70,000,000. Dexis agreed to perform between 38.5% and 41.5% of the work, and IBTCI “was obligated to make a good faith effort to achieve the agreed-upon workshare.” The subcontract had an expected value of approximately \$26,015,344. In 2022, the federal government “notified IBTCI that it intended to increase the value of the prime contract . . . by an additional \$55,000,000.” The parties then disputed what share of the additional value would be allocated to Dexis,

with IBTCI stating that the additional value would be 15%. Dexis objected and stated it was entitled to 40%, the goal workshare of the initial contract.

Dexis sued for anticipatory breach and declaratory judgment on the additional fee. IBTCI filed a plea in bar, arguing that the subcontract contradicted Dexis's claims and therefore there was no justiciable claim presented to the court. The circuit court granted the plea in bar and dismissed Dexis's claims.

The CAV affirmed, finding that the best and narrowest grounds for its decision was that the subcontract did not extend past the initial value of the contract of \$70,000,000. The CAV evaluated the entirety of the subcontract and noted that the "Order of Precedence" provision specifically stated that the subcontract was pre-eminent, and all other documents must yield to the subcontract, should any contradictions arise. Therefore, the plain and unambiguous language of the subcontract did not require IBTCI to provide Dexis with 40% of the additional funding/work.

Paige v. Com., Record No. 0091-23-2: (Clements, SJ., writing for Beales and Callins, JJ.)
Sufficiency; 5th Amendment suppression; 4th Amendment suppression; Best and narrowest grounds; Constitutional harmless error; Inter-panel accord doctrine; Rule 5A:18; Ends of justice exception; Miscarriage of justice; Exclusionary rule

Best and narrowest grounds doctrine required the CAV affirm Paige's conviction of PWID Sch. I/II and the denial of his motions to suppress. Any error in allowing a pre-Miranda statement about marijuana was harmless beyond a reasonable doubt. No error in admitting the physical evidence obtained by a warrantless search because the Exclusionary Rule would not have been implicated because officers did not act contrary to clearly established law.

In August 2020, Officer Talamantes was investigating a motor vehicle crash when another crash occurred nearby. Paige was the driver of a black rental car that had been rear-ended by another vehicle. Talamantes approached the crash and obtained insurance and identification documents from all drivers. Talamantes observed the odor of marijuana coming from Paige's vehicle. Paige "retrieved a Black and Mild cigarillo from the car and closed the car door.

Talamantes asked Paige where there was marijuana in his car. When Paige denied that, Talamantes said "be honest" because Paige would "get in trouble if he lied." Paige stated that the odor must have been the cigarillo and reiterated that he did not own the car. Talamantes prepared to search the vehicle, identifying the odor as sufficient probable cause. The female passenger of Paige's vehicle admitted she had smoked recently but told Talamantes that there was no marijuana in the car. Another officer, Claud, arrived and asked again if there was marijuana, stating that if there was only a little bit, the officers would just confiscate it and not issue any fines. Paige admitted there was "a little bag of weed" and told the officers that the marijuana was in a pouch in the car.

In the pouch, Claud found 9 grams of cocaine, a digital scale, and \$1000 in cash. Claud found the marijuana in a separate compartment of the pouch. Talamantes handcuffed Paige and advised him of his Miranda rights. Claud searched the rest of the vehicle and found \$800 in cash and two firearms, one in the glovebox and another concealed between the center console and front passenger seat. Paige said the pouch was not his and that he found it in the car when he rented it. Paige had placed the marijuana in the side compartment without looking in the main compartment. The female passenger stated that she owned both firearms but denied ownership of the pouch.

Paige moved to suppress his statement about the bag of weed and the physical evidence located. Paige argued that he was subjected to custodial interrogation without being advised of his Miranda rights. Paige also argued that § 18.2-250.1(F) required suppression of the physical evidence because the search was unlawful. The circuit court disagreed, finding that Paige was not in custody at the time of the questioning and that § 18.2-250.1(F) did not apply retroactively. Further, the circuit court found that because possession of marijuana was still subject to a civil penalty rather than a criminal conviction, it was still contraband and covered under the automobile exception to the warrant requirement.

The CAV affirmed Paige's conviction of PWID Schedule I or II. In doing so, the CAV found the incriminating evidence so overwhelming that it did not reach the merits of Paige's Miranda argument, finding that even if there was error, its exclusion would not have resulted in a different jury verdict, finding any error harmless beyond a reasonable doubt. The CAV applied the inter-panel accord doctrine and found that Street v. Com., 75 Va. App. 298, 312 (2022), bound the CAV to find that § 18.2-250.1(F) was not retroactive. The CAV also found that Paige had not properly preserved an argument regarding search incident to arrest under Rule 5A:18.

The CAV did not engage with the question of whether the automobile exception applied in these limited circumstances because the exclusionary rule would not have been implicated. The officers were not acting in contravention to unambiguous precedent or binding law. Therefore, because a "reasonably well trained officer would [not] have known that the search was illegal" the exclusionary rule would not have required suppression of the evidence. (quoting Parady v. Com., 78 Va. App. 18, 38 (2023) (alteration in opinion)).

Mitchell v. Com., Record No. 0066-23-2: (AtLee, J., writing for Beales and Malveaux, JJ.)
Sufficiency; Permanent physical impairment; Identity

Evidence sufficient to prove that Mitchell was the shooter based on unequivocal testimony by the surviving victim, whose testimony was not inherently incredible. Jury's implicit conclusion that gunshot wounds are permanent was not plainly wrong.

In 2021, Lancaster and Tolliver (who were in a romantic relationship) were in a hotel with several friends. Lancaster and Tolliver got locked out of the hotel room

and went to their friends' room. Lancaster left the room and came back 15 minutes later to find Mitchell's bag, which had not been there before Lancaster left. Lancaster accused Tolliver of having sex with Mitchell, and the two had an argument. During the argument, Lancaster emptied Mitchell's bag and stole fentanyl from it, while a 3rd party called Mitchell to inform him of the argument.

Mitchell and Mayo arrived and watched Lancaster and Tolliver continue the argument. Lancaster did not confront Mitchell. Mitchell took his bag and left with Mayo. Later, Lancaster used the fentanyl and went to a store with Tolliver and friends. They saw Mayo at the store, and Lancaster saw that Mayo had a firearm. The group returned to the hotel.

Around 9:00 pm, Lancaster and Tolliver were sitting on a staircase outside the hotel and Lancaster "felt a gun on the top of his head." Mitchell was holding the same gun that Lancaster had seen Mayo with earlier that day. Despite a COVID mask covering the mouth, Lancaster identified the person as Mitchell. Lancaster asked Mitchell what he was doing, and Mitchell did not respond. Mitchell walked to the bottom of the staircase and pointed his gun at Tolliver. Lancaster stepped in front of Tolliver, and Mitchell began firing. Lancaster survived after being shot in the face, chest, and right arm. Tolliver died after being shot twice in the chest.

Police used historical cell-site location information to "map Mitchell's phone" on the day of the shooting. Mitchell made or received 4 calls between 8:39 and 8:53 pm within the sector of the cell tower where the shooting occurred, but at 9:02 pm, the phone "used a different cell tower facing away from the crime scene." Mitchell testified in his own defense, stating that he gave his phone to Mayo. The jury convicted Mitchell of murder and aggravated malicious wounding, as well as using a firearm in the commission of the same felonies.

The CAV declined to address Mitchell's argument that Lancaster's identification was insufficient under Neil v. Biggers, 409 U.S. 188 (1972), because Mitchell failed to raise the objection to the circuit court. Therefore, Rule 5A:18 precluded appellate review of the argument. The CAV did address Mitchell's argument that Lancaster was an incredible witness, but the CAV reiterated that credibility was a factual determination for the jury and Lancaster's testimony was not so contrary to human experience to be inherently incredible. Finally, the CAV affirmed that a rational factfinder could conclude that Lancaster's injuries constituted permanent physical impairment.

Commentary: On the aggravated malicious wounding conviction, Mitchell argued only that Lancaster's gunshot wounds were not "permanent." Mitchell conceded that the wounds constituted "significant physical impairment" but that the impairment was not permanent because surgery to remove the bullets may have ameliorated the impairment. The CAV wasted no time in rejecting this argument, citing "common sense." I think this may be the most respectful "what are you talking about" analysis section possible.