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# PRESERVATION OF ERRORS FOR APPEAL

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## I. Preservation at Trial

### A. fundamental principles: the "contemporaneous objection rule"

The first step in appellate practice—and in many ways the most important step—occurs at the trial court level. That step is preserving reversible errors for appeal by making appropriate motions and other requests for judicial action, arguments, and contemporaneous objections at the trial and other proceedings in that court. Arguing an error that was waived—that was not preserved—is simply wasted effort on appeal.

Applicable statutes and Rules of Court are discussed below; but it is important to keep in mind the purposes of such rules, because they will (or at least they should) drive an appellate court's analyses in cases that are not clearly governed by the letter of any statute or rule.

> The main purpose of requiring timely and specific objections to testimony is to allow the circuit court an opportunity to address the issues presented, thereby avoiding unnecessary appeals and reversals of the circuit court's judgment . . . . A specific, contemporaneous objection also affords the opposing party an opportunity to address an issue at a time when the course of the trial may be altered to avoid the problem presented.[1]

Other courts have identified the purposes of contemporaneous objection rules similarly, as allowing trial courts and agencies the opportunity to rule intelligently and avoid unnecessary appeals, reversals, and mistrials; giving opposing parties the opportunity to avoid or overcome the grounds of objections; preventing manipulation of the courts for delay; and adhering to the formal rule that appellate courts cannot review lower tribunals' failures to do what they were not asked to do.[2]

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1 Graham v. Cook, 278 Va. 233, 247-48, 682 S.E.2d 535, 543 (2009).

2 *See*, *e.g.*, In re Bildisco, 682 F.2d 72, 82 (3d Cir. 1982), *aff'd*, 465 U.S. 513 (1983); Neu v. Grant, 548 F.2d 281, 287 (10th Cir. 1977); Shelton v. Commonwealth, 274 Va. 121, 126, 645 S.E.2d 914, 916 (2007); Williams v. Gloucester (County of) Sheriff's Department, 266 Va. 409, 411, 587 S.E.2d 546, 548 (2003); Reed v. Baum-

The contemporaneous objection rule focuses on events in the trial courts, but it is nevertheless a rule of *appellate* procedure. It does not preclude, for example, a trial court's decision to sustain a belated objection and retroactively exclude evidence that was admitted without objection at an earlier point in the trial. *See Zook v. Commonwealth*:

> The purpose and rationale for the contemporaneous objection rule are inapplicable to this situation. The rule is one of appellate procedure that is designed to ensure that the presentation of evidence proceeds in an orderly fashion and that parties do not delay objecting to evidence until the consequences can be fully weighed. Although the Commonwealth should have objected contemporaneously to the introduction of the evidence, the contemporaneous objection rule does not preclude the trial court, in the exercise of its sound discretion, from entertaining a late objection and excluding inadmissible evidence after it has been introduced. Here, the Commonwealth's late objection did not prevent the trial court from intelligently considering the issue or from taking corrective action in response to the objection.
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> The position appellant takes would unduly limit the ability of trial courts to control the flow of evidence and exclude inadmissible evidence.
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> > Trial judges are required to rule on issues as they develop at trial. If the development of the case requires reversal of an earlier ruling, it is the trial judge's duty to order that reversal. . . . "A trial court is empowered to change a legal determination as long as it retains jurisdiction over the proceedings before it."[3]

### B. THE VIRGINIA STATUTE AND RULES

Rule 5:25 of the Supreme Court of Virginia provides that in appeals to the Supreme Court, "No ruling of the trial court, disciplinary board, or commission before which the case was initially heard will be considered as a basis for reversal unless the objection was stated with reasonable certainty at the time of the ruling . . . . " Rule 5A:18, applicable in the Court of Appeals, is essentially identical. Each of those Rules is the basis for many pages of annotations in Michie's Virginia Code, which report numerous decisions that must have been acutely embarrassing for the appellants' counsel.

The steps required to assure preservation are not always as well recognized as the requirement itself, but fortunately the General Assembly has clarified those requirements by enacting Virginia Code section 8.01-384(A), which the Su-

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gardner, 217 Va. 769, 773, 232 S.E.2d 778, 780 (1977); Brown v. Commonwealth, 8 Va. App. 126, 131, 380 S.E.2d 8, 10 (1989).

[3] 31 Va. App. 560, 568-69, 525 S.E.2d 32, 36 (2000) (citation omitted).

preme Court has recognized as leavening some of the rigors of Rule 5:25.[4] Section 8.01-384(A) provides:

> Formal exceptions to rulings or orders of the court shall be unnecessary; but for all purposes for which an exception has heretofore been necessary, *it shall be sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objections to the action of the court and his grounds therefor*; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection shall not thereafter prejudice him on motion for a new trial or on appeal. *No party, after having made an objection or motion known to the court, shall be required to make such objection or motion again in order to preserve his right to appeal, challenge, or move for reconsideration of, a ruling, order, or action of the court*. No party shall be deemed to have agreed to, or acquiesced in, any written order of a trial court so as to forfeit his right to contest such order on appeal except by express written agreement in his endorsement of the order. *Arguments made at trial via written pleading, memorandum, recital of objections in a final order, oral argument reduced to transcript, or agreed written statements of facts shall, unless expressly withdrawn or waived, be deemed preserved therein for assertion on appeal*. [Emphases added.][5]

And as the Court explained in *Helms*, "[o]nce a litigant informs the circuit court of his or her legal argument, '[i]n order for a waiver to occur within the meaning of Code § 8.01-384(A), the record must affirmatively show that the party who has asserted an objection has abandoned the objection or has demonstrated by his conduct the intent to abandon that objection.'"[6]

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[4] *See* Helms v. Manspile, 277 Va. 1, 6-7, 671 S.E.2d 127, 129-30 (2009). In *Helms* the Supreme Court acknowledged explicitly that in cases of apparent conflict it must apply § 8.01-384(A) and not Rule 5:25. 277 Va. at 7, 671 S.E.2d at 130 ("Code § 8.01-384(A) . . . is controlling over Rule 5:25, and we must apply the statutory provision"). *But cf*. Brandon v. Cox, 284 Va. 251, 254, 736 S.E.2d 695, 696 (2012) ("Our rules of court apply [§ 8.01-384(A)] such that '[n]o ruling of the trial court . . . will be considered as a basis for reversal unless an objection was stated with reasonable certainty at the time of the ruling.' Rule 5:25.").

[5] Everything after the first sentence was added by 1992 Va. Acts ch. 564. According to Professor Hamilton Bryson, the amendment was enacted to "clarify" the law in response to *Lee v. Lee*, 12 Va. App. 512, 404 S.E.2d 736 (1991), which held that "neither the Code nor Rule 5A:18 is complied with merely by objecting generally to an order. Since the rule provides that '[a] mere statement that the judgment or award is contrary to the law and the evidence is not sufficient,' it follows that a statement that an order is 'seen and objected to' must also be insufficient." *Id*. at 515, 404 S.E.2d at 738. *See* BRYSON ON VIRGINIA CIVIL PROCEDURE § 12.02 n.14 (4th ed. 2005).

[6] 277 Va. at 6, 671 S.E.2d at 129 (quoting Shelton v. Commonwealth, 274 Va. at 127-28, 645 S.E.2d at 917).

### C. THE FEDERAL RULES

The basic rule in the federal courts is essentially the same as in Virginia. Federal Rule of Civil Procedure 46 provides, in full, "A formal exception to a ruling or order is unnecessary. When the ruling or order is requested or made, a party need only state the action that it wants the court to take or objects to, along with the grounds for the request or objection. Failing to object does not prejudice a party who had no opportunity to do so when the ruling or order was made."[7]

In the federal courts, at least, the settled rule is that "[o]nce a federal *claim* is properly presented, a party can make *any argument* in support of that claim; parties are not limited to the precise arguments they made below."[8] Whether the state appellate courts follow the identical rule is far from clear, but it seems fair to say that expansion of previous arguments generally will be tolerated, within reasonable limits.[9] Citations of additional authorities in support of an argument made below, for example, almost certainly will not be objectionable. Articulation of an entirely new theory in support of a request for relief made in the trial court, on the other hand, is likely to be ruled out of bounds.[10]

### D. BASIC RULES OF PRESERVATION

#### 1. Protect the Record

Preserve arguments and objections *on the record!* As far as reviewing courts are concerned, arguments and rulings made in bench conferences or in chambers (or elsewhere, for that matter), if they are not recorded by the reporter, simply never happened.[11] Or as stated by a California court, "When practicing appellate law, there are at least three immutable rules: first, take great care to prepare a complete record; second, if it is not in the record, it did not happen; and third, when in doubt, refer back to rules one and two."[12]

File all legal memoranda with the Clerk (and not just with the Judge), and respectfully but firmly insist that the court reporter be present and record all proceedings.[13] In a pinch, state for the record the issues that were taken up, the

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[7] *See also* FED. R. CIV. P. 51 ("Instructions to the Jury; Objections; Preserving a Claim of Error"); FED. R. EVID. 103(a) ("Preserving a Claim of Error").

[8] Yee v. Escondido, 503 U.S. 519, 534 (1992) (emphases added); Lebron v. National R.R. Passenger Corp., 513 U.S. 374, 379 (1995) (quoting *Yee*). *See also*, *e.g.*, United States v. Saafir, 754 F.3d 262, 266 (4th Cir. 2014) (citing Citizens United v. Federal Election Comm'n, 558 U.S. 310, 330-31 (2010)).

[9] *See*, *e.g.*, Harbour v. SunTrust Bank, 278 Va. 514, 518-19, 685 S.E.2d 838, 840 (2009).

[10] *See*, *e.g.*, Juniper v. Commonwealth, 271 Va. 362, 385, 626 S.E.2d 383, 399 (2006).

[11] *See*, *e.g.*, Galumbeck v. Lopez, 283 Va. 500, 509, 722 S.E.2d 551, 555-56 (2012) ("his actual objection and the grounds therefor were made off the record. As such, this argument is waived"); Lloyd v. Kime, 275 Va. 98, 107 n.*, 654 S.E.2d 563, 568 n.* (2008) ("Lloyd maintains that he objected at a hearing on October 30, 2006; however, a transcript of that hearing was not filed in the circuit court clerk's office and, consequently, is not a part of the record. The transcript is unavailable for our consideration").

[12] Protect Our Water v. County of Merced, 1 Cal. Rptr. 3d 726, 110 Cal. App. 4th 362, 364 (2003).

[13] *See* VA. CODE § 8.01-420.3 ("The court shall not direct the court reporter to cease recording any portion of the proceeding without the consent of all parties or of their counsel of record"). VA. CODE § 19.2-165, applicable only in felony cases, includes an identical provision.

positions that you articulated, and the rulings that were made, after you return to the courtroom from a chambers conference or at an opportune moment when the jury is absent after a bench conference. Trial judges are well aware that they cannot be reversed for rulings that do not appear on the record, and some judges at times may even try to take advantage of counsel by suggesting jovially that "we don't need the court reporter for this" or something similar.

### 2. Proffers

If the trial court excludes an exhibit, refuses to allow a witness to testify, or refuses to allow a witness to testify regarding particular matters, counsel must proffer what the excluded evidence would have been or any error is waived.[14] The Supreme Court of Virginia has stated repeatedly that it

> "will not consider testimony excluded by the trial court 'without a proper showing of what that testimony might have been.' *O'Dell v. Commonwealth*, 234 Va. 672, 697, 364 S.E.2d 491, 505 (1988). 'When testimony is rejected before it is delivered, an appellate court has no basis for adjudication unless the record reflects a proper proffer.' *Whittaker v. Commonwealth*, 217 Va. 966, 968, 234 S.E.2d 79, 81 (1977)."[15]

And prudence dictates that proffers be thorough and detailed, to forestall any conclusion on appeal that they did not provide "a proper showing of what that testimony might have been."[16]

A proffer must be made in the presence of opposing counsel.[17] Dictating a proffer to the court reporter, after court has adjourned and opposing counsel has gone home, will not suffice. "Under our jurisprudence, only 'a unilateral avowal of counsel, if unchallenged, or a mutual stipulation of the testimony expected constitutes a proper proffer,'"[18] and an unchallenged unilateral avowal is ineffective if there is no opportunity for a challenge.

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14 *E.g.*, Commonwealth Transp. Comm'r v. Target Corp., 274 Va. 341, 348, 650 S.E.2d 92, 96 (2007); Holles v. Sunrise Terrace, Inc., 257 Va. 131, 135, 509 S.E.2d 494, 497 (1999).

15 *Target Corp.*, 274 Va. at 348, 650 S.E.2d at 96 (quoting Rose v. Jaques, 268 Va. 137, 154, 597 S.E.2d 64, 74 (2004)).

16 *See generally Target Corp.*, 274 Va. at 348, 650 S.E.2d at 96 ("The Transportation Commissioner's failure to make a proffer of all the documents without the redactions has deprived this Court of the ability to determine the admissibility of those documents and, if admissible, whether the circuit court's exclusion of that evidence prejudiced the Transportation Commissioner . . . . A circuit court's judgment is presumptively correct, and the appellant bears the burden of presenting a sufficient record to permit a determination whether the circuit court committed an alleged error") (citation omitted).

17 Galumbeck v. Lopez, 283 Va. at 508, 722 S.E.2d at 555.

18 *Id*., 722 S.E.2d at 555 (quoting Whittaker v. Commonwealth, 217 Va. 966, 969, 234 S.E.2d 79, 81 (1977)).

A slightly different rule applies to excluded exhibits and refused instructions.[19] The Rule appears to place the duty on the judge to mark and initial instructions and exhibits, but alert trial lawyers will always pay attention to assure that the duty is carried out.

3. Present Arguments and State Objections with Specificity

As discussed above, "[t]he main purpose of requiring timely and specific objections to testimony is to allow the circuit court an opportunity to address the issues presented . . . ."[20] It follows necessarily that a trial court cannot be reversed for declining to accept an argument or sustain an objection on a ground that was not stated; "Objection!" alone is not enough (unless, of course, the objection is sustained; then all possible arguments in favor of the objection are available on appeal).[21] And of course an appellate court will not consider a ground for objection that was not stated in the court below (unless the objection is sustained, as stated just above; in that circumstance the "right result for the wrong reason" will usually rescue the fortunate litigant who prevailed in the first instance).[22]

This rule was applied, and precluded consideration of an assignment of error, in *Linnon v. Commonwealth*.[23] The issue was whether the trial court correctly instructed the jury that "the '[o]ffense of taking indecent liberties with a minor does not require proof of a direct nexus of any type between the custodial or supervisory relationship and the defendant's wrongful conduct.'" The Court of Appeals declined to consider Linnon's challenge to that instruction, "determining that it was not preserved under Rule 5A:18 because he failed to state a basis for his objection at trial."[24] (Linnon *objected* to the instruction, but the Court of Appeals held that the objection was not preserved because he failed to *state a basis* for that objection.) The Supreme Court held that that was error: Linnon argued in support of his motion to strike that the Commonwealth was required to demonstrate a nexus between any relationship with the victim at school and the proscribed acts, presenting the same issue that was raised by his objection to the instruction. "The basis of the objection was encompassed by his argument

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19 *See* VA. S. CT. R. 5:10(a)(2), (3) and 5A:7(a)(2), (3) (instructions marked either "given" or "refused" and initialed by the judge, and exhibits offered in evidence, whether admitted or not, and initialed by the trial judge, are part of the record on appeal); FED. R. CIV. P. 51(c), (d).

20 Graham v. Cook, 278 Va. at 247, 682 S.E.2d at 543.

21 *See*, *e.g.*, Arnold v. Wallace, 283 Va. 709, 714, 725 S.E.2d 539, 542 (2012); Juniper v. Commonwealth, 271 Va. 362, 385, 626 S.E.2d 383, 399 (2006); Snyder-Falkinham v. Stockburger, 249 Va. 376, 381, 457 S.E.2d 36, 39 (1995); Church v. Commonwealth, 230 Va. 208, 212-13, 335 S.E.2d 823, 826 (1985). *See also* VA. S. CT. R. 5:25, *supra* (objections must be "stated with reasonable certainty at the time of the ruling").

22 *See*, *e.g.*, Graham v. Cook, 278 Va. 233, 248, 682 S.E.2d 535, 543 (2009) ("Graham did not object at trial to Dr. Man's testimony on the basis that Code § 8.01-397.1 does not permit the admission of such testimony. Therefore, this part of his argument is barred on appeal by Rule 5:25"); Perry v. Commonwealth, 280 Va. 572, 578-80, 701 S.E.2d 431, 435-36 (2010) (lengthy discussion of the "right result for the wrong reason doctrine").

23 287 Va. 92, 752 S.E.2d 822 (2014).

24 *Id*. at 103, 752 S.E.2d at 828.

on the motions to strike, which the circuit court had recently considered and rejected"; and that, said the Court, was "sufficient to satisfy the Rules."[25]

The Court then took away what it had given. Linnon argued on appeal "that the instruction was misleading because the word 'nexus' encompasses the temporal association suggested by the word 'maintain[ ]' as used in Code § 18.2-370.1(A)." That was not *the same argument* that he made in the trial court. That argument therefore was not preserved for appeal, and the Court of Appeals' error was harmless.[26]

This rule obviously creates a trap for trial attorneys who have valid objections or arguments but fail to think quickly enough to recognize and articulate the best possible grounds for those positions in the often fast-moving and always highly pressured environment of a trial court. The best solution probably is to plan for the trial with sufficient foresight to anticipate every possible issue—particularly every evidentiary issue—that might be presented; and even that obviously is no simple, surefire answer. Perhaps, however, we can take some consolation in the fact that most evidentiary rulings are discretionary and therefore that they do not often represent fruitful grounds of appeal.

An older line of cases holds that "[t]here is no necessity to apply the [stated with reasonable certainty] rule where the character of the objection is perfectly patent."[27] A more recent decision which might be cited in support of the "perfectly patent" rule is *Washington v. Commonwealth*, where the Court stated—albeit in dictum—that "[u]nless the character of the objection is patent, mere utterance of the word 'objection,' without assigning grounds, is worthless. It is unfair to opposing counsel, who is expected to respond to it, and to the trial court, which must rule on it."[28]

### 4. Join in Arguments and Objections Asserted by Others

In *Linnon v. Commonwealth*, the Supreme Court held—on a question of first impression, surprisingly enough—"that one party may not rely on the objection of another party to preserve an argument for appeal without expressly joining in the objection."[29]

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[25] *Id*., 752 S.E.2d at 829.

[26] *Id*. at 104, 752 S.E.2d at 829.

[27] Solomon v. Atlantic Coast Line R. Co., 187 Va. 240, 243, 46 S.E.2d 369, 370 (1948). *See*, *e.g.*, Evans v. Commonwealth, 161 Va. 992, 1012, 170 S.E. 756, 763 (1933) ("If the court were asked to tell the jury that the defendant was presumed to be innocent and that this presumption went with him throughout the trial, and if that instruction were rejected and an exception taken, it would not be necessary to assign any reason. The necessary reason would be immediately apparent"). *See also* Levine v. Levine, 144 Va. 330, 337, 132 S.E. 320, 322 (1926) ("it was not intended that a strict compliance with the letter of the rule should be necessary to enable a litigant to ask the consideration by this court of an objection or exception which was plainly and manifestly made in the trial court, and the grounds of which appear from the ruling thereon by the trial court").

[28] 228 Va. 535, 549 n.4, 323 S.E.2d 577, 587 n.4 (1984).

[29] 287 Va. at 102, 752 S.E.2d at 828.

The advice stated in the heading of this section must not be followed blindly or uncritically. There are occasions when joining in an argument presented by a party who generally shares common interests with those of your client may undercut, contradict, or even waive a stronger position of your own.

### E. REQUEST A RULING; AND IF NECESSARY, REQUEST IT AGAIN AND AGAIN

Conventional wisdom has it that arguments are not preserved unless the Court actually rules, but that seems to be an overstatement. In *Brandon v. Cox*,[30] for example, which represents a very strict application of preservation rules (as discussed *infra* at 571–74), the Court noted that the appellant "failed to obtain a ruling on her motion to reconsider" but ultimately *held* that the arguments presented in that motion were waived because "[n]othing in the record indicates that the trial court was made aware that the motion for reconsideration and memorandum in support thereof were filed," and thus "there is no evidence in the record that the trial court had the *opportunity* to rule upon the argument that Brandon presents on appeal."[31] "Because the purpose of Rule 5:25 is to ensure that the trial court has the *opportunity* to rule upon an argument, the record must affirmatively demonstrate that the trial court was *made aware* of the argument."[32] Nevertheless, it obviously is better and safer actually to obtain a ruling, or at least to do everything reasonably possible to induce the court to rule.[33]

### F. PRESERVATION BY ENDORSEMENT

Based on section 8.01-384(A) and *Helms*, it appears clear that a detailed statement of objections in the endorsement of an order (final or otherwise) is *not* necessary to preserve arguments, previously made on the record, for presentation on appeal. But the opposite equally is time: a detailed statement of objections in an endorsement, without more, *will not* preserve arguments that were *not* previously stated on the record. The trial court must, *at minimum*, be given an opportunity to rule on an issue, or it is not preserved for appeal.[34]

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[30] 284 Va. 251, 736 S.E.2d 695 (2012).

[31] *Id.* at 256, 736 S.E.2d at 697 (emphasis added).

[32] *Id.* (emphases added). *See also*, *e.g.*, Lenz v. Commonwealth, 261 Va. 451, 463, 544 S.E.2d 299, 306 (2001) ("the defendant has waived his claim because he was required to request a ruling from the circuit court, and he failed to do so").

[33] *See generally*, *e.g.*, Nelson v. Davis, 262 Va. 230, 235 n.3, 546 S.E.2d 712, 715 n.3 (2001) ("The trial court made no ruling on this issue and the Nelsons did not make this objection to the trial court's April 17, 2000 order. Consequently, the issue is not before us. *See* Rule 5:25"); Taylor v. Commonwealth, 208 Va. 316, 324, 157 S.E.2d 185, 191 (1967) ("There was no ruling by the court on the objection. Counsel for defendant did not insist that the court rule, nor did he request the court to instruct the jury to disregard the remarks of the Commonwealth's attorney. Moreover, counsel did not move for a mistrial. Hence, the objection was not saved for our consideration").

[34] *See*, *e.g.*, Brandon v. Cox, 284 Va. 251, 736 S.E.2d 695; Nusbaum v. Berlin, 273 Va. 385, 402-406, 641 S.E.2d 494, 503-505 (2007), and cases cited (holding, in *Nusbaum*, that by stating specific objections to an action of the court but stating further—instead of asking the circuit court to reconsider and set aside the ruling in question—that "I am not asking [the court] at this time to change [its] ruling. I am simply going to make sure . . .

Section 8.01-384(A) states in part that "[a]rguments made at trial via written pleading, memorandum, *recital of objections in a final order*, oral argument reduced to transcript, or agreed written statements of facts shall, unless expressly withdrawn or waived, be deemed preserved therein for assertion on appeal." (Emphasis added.) Read literally, that would appear to say that the mere recitation of objections in a final order, without more, is enough to preserve arguments for appeal. The Supreme Court has never (to this author's knowledge) given the statute such a literal reading, however, and it seems unlikely that it would do so. Settled law requires giving the trial court an opportunity to rule on an argument, as discussed at length above. If you are left with absolutely no other recourse, therefore, state objections in the final order and argue the statute. But don't allow yourself to be stuck in that box if there is any possible way to avoid it. (*See* the discussion of Preservation by Motions for Reconsideration, *infra* at 571–74.)

In *Cashion v. Smith*,[35] the Supreme Court announced the startling conclusion that a "We ask for this" endorsement of an order—at least in that case—was not a waiver of arguments previously made and rejected by that order. It was merely a request that the trial court enter an order memorializing its ruling.

In *Cashion*, the Circuit Court sustained demurrers and granted pleas in bar, in part, and it overruled the demurrers and denied the pleas in bar in part. Plaintiff's counsel endorsed the Demurrer Order "WE ASK FOR THIS." The court thereafter entered summary judgment for the defendants on a different ground and dismissed the complaint. On appeal, defendants argued that plaintiff's endorsement of the Demurrer Order stated his express written agreement with the rulings it contained. The Court disagreed, holding that the endorsement did not comprise "'clear and unmistakable proof of the intention to waive'" the right to appeal.[36] It observed that "'[i]t is entirely proper for a party to request that a court memorialize in an order a ruling made from the bench, even when that ruling is contrary to the party's interest'"[37]; and it concluded, as to this issue, that the plaintiff's endorsement "therefore reflects only his request that the court enter an order memorializing its ruling, not his agreement to the portion of the Demurrer Order adverse to him. It therefore does not constitute an 'express written agreement' to waive this argument on appeal."[38]

Justice Powell dissented, joined by Justice Goodwyn and in relevant part by Justice McClanahan, arguing that the "We ask for this" endorsement was a waiver. Justice Powell noted that the Court had held in *Lamar Corp. v. City of*

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that I have preserved any right of appeal . . . ," the appellant "never allowed the circuit court to rectify the effect of what he now asserts as error" and therefore waived those arguments on appeal).

35 286 Va. 327, 749 S.E.2d 526 (2013).

36 *Id.* at 334, 749 S.E.2d at 530 (quoting Chawla v. BurgerBusters, Inc., 255 Va. 616, 623, 499 S.E.2d 829, 833 (1998)).

37 *Id.* at 336, 749 S.E.2d at 531 (quoting Levisa Coal Co. v. Consolidation Coal Co., 276 Va. 44, 56 n.4, 662 S.E.2d 44, 50 n.4 (2008)).

38 286 Va. at 336, 749 S.E.2d at 531 (quoting VA. CODE § 8.01-384(A)).

*Richmond*,[39] albeit not "in the context of Code § 8.01-384(A)," that a "We ask for this" endorsement indicates "that a party has 'asked for and consented to an order.'" As she explained, however, section 8.01-384(A) provides in part that "'No party shall be deemed to have agreed to, or acquiesced in, any written order of a trial court so as to forfeit his right to contest such order on appeal *except by express written agreement in his endorsement of the order*.'"[40] "The only logical interpretation of such an endorsement," Justice Powell argued, "is that it is a request for the circuit court to enter the order *as drafted*, and therefore it constitutes an 'express written agreement' with the terms of the order pursuant to Code § 8.01-384(A)."[41] She also observed "that the majority has made it virtually impossible for a party to 'forfeit his right to contest [an] order on appeal' under Code § 8.01-384(A)."

> According to the majority, an express, written statement asking for a specific order and the relief contained therein with no objections noted is insufficient to waive an objection. Thus, under the majority's rubric, for Dr. Cashion to waive his objections, he would be required to endorse the order with the statement: "I am affirmatively waiving my objection to the demurrer on the non-euthanasia statements."[42]

*Cashion* should be regarded only as a lifeboat—useful in the event of a shipwreck but not to be chosen deliberately as a means of transportation. 4-3 decisions can be distinguished on their facts (or even overruled), if only one Justice thinks a different rule should be applied in a particular case. *Cashion* at least arguably turned in part on the fact that the demurrer order contained "elements [both] favorable and unfavorable to [the appellant],"[43] a point that easily could be (and very likely would be) employed as a ground for distinguishing *Cashion* in later cases where that element is not present. It also addressed only an endorsement of an interlocutory order, not a final judgment, providing another possible ground for distinction. In addition, the dissenting opinion's analysis seems more persuasive than that of the majority, which seemingly was willing to brush aside an apparent procedural default in order to reach the merits of the case, and that is not typical Supreme Court of Virginia behavior. The long-term stability of *Cashion*'s endorsement ruling therefore is at least uncertain. In addition, the dissenting Justices may not be willing to follow it in writ panel proceedings. Previously stated but rejected arguments need not be *repeated* in an order for purposes of preservation—"Seen" or "Seen and objected to" is sufficient[44]—but no attorney should tempt fate by explicitly asking for entry of or-

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39 241 Va. 346, 349, 352, 402 S.E.2d 31, 32, 34 (1991).

40 286 Va. at 344-45, 749 S.E.2d at 536 (emphasis added in the dissenting opinion).

41 *Id*. at 345, 749 S.E.2d at 536 (emphasis in original).

42 *Id*. at 347, 749 S.E.2d at 537.

43 *Id*. at 336, 749 S.E.2d at 531.

44 *See* Helms v. Manspile, 277 Va. 1, 671 S.E.2d 127 (2009).

ders that reject her arguments. The better part of valor, in the case of partial victories such as those at issue in *Cashion*, is to endorse with something along the lines of "We ask for this, except that defendants object to . . . ." or "Seen and agreed [or "I ask for this"] as to Count 1; seen and objected to as to Count 2."

### G. PRESERVATION BY MOTIONS FOR RECONSIDERATION

Virginia Supreme Court Rule 4:15 (Motions Practice) provides, in its subsection (d), that a trial court "*shall* hear oral argument on a motion" upon the request of counsel of record for any party or at the court's request, "*[e]xcept* as otherwise provided in this subparagraph." It then states that "[o]ral argument on a motion for reconsideration . . . shall be heard orally *only* at the request of the court." (Emphases added.)

The Court has held that a party may preserve an argument that it did not assert at trial by presenting it in a motion for reconsideration. *Majorana v. Crown Central Petroleum Corp*.[45] (There are limits to that rule, of course. A hearsay objection or a challenge to a juror or a jury instruction, for example, must be asserted at trial or it is waived. Those are not appropriate circumstances for preservation by motion for reconsideration, because such a motion would come too late to allow the trial court "to rectify the effect of the asserted error,"[46] although issues of that nature might possibly support a motion for a new trial.)

The Supreme Court reiterated but narrowed the *Majorana* rule in *Brandon v. Cox*,[47] leaving attorneys scratching their heads in an effort to discern how they may take advantage of *Majorana* under the constraint imposed by Rule 4:15(d).

The Court held in its initial opinion that Brandon, the appellant, waived an argument asserted in a motion for reconsideration by failing either to "file a notice of hearing to definitively place the matter before the trial court" or to obtain a ruling on it.[48] Brandon then filed a petition for rehearing, pointing out that she was barred by Rule 4:15(d) from taking the action that was necessary, according to the opinion, to preserve her argument for appeal.

The Court responded by filing an amended opinion which contained only minor revisions and did not alter the result. The Court removed the suggestion that Brandon could have "file[d] a notice of hearing to definitively place the matter before the trial court" but adhered to its ruling that Brandon "waived her argument by failing to preserve it," "[b]ecause there is no evidence in the record that the trial court had the opportunity to rule upon the argument that Brandon presents on appeal" and therefore "it cannot be said that the case can be heard in this Court upon the same record upon which it was heard in the trial

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[45] 260 Va. 521, 525 n.1, 539 S.E.2d 426, 428 n.1 (2000) ("having briefed the issue in a post-trial motion for reconsideration, Majorana adequately preserved the issue for review in this appeal").

[46] Scialdone v. Commonwealth, 279 Va. 422, 437, 689 S.E.2d 716, 724 (2010).

[47] 284 Va. 251, 736 S.E.2d 695 (2012).

[48] Brandon v. Cox, Record No. 111396, slip op. at 6-7 (June 7, 2012) (copy on file with the author).

court."[49] Aside from removing its "notice of hearing" requirement, the Court responded to the Rule 4:15(d) argument by adding this, in a footnote:

> Although Rule 4:15(d) provides for a hearing only at the request of the court, it is incumbent upon the party seeking an appeal to provide us with a record that shows, beyond a mere filing in the clerk's office, that the court had an opportunity to rule.[50]

The Court also observed, in the same footnote, that in *Majorana* it "held that an argument is adequately preserved where the appellant *obtained a ruling on*, i.e. denial of, her post-trial motion for reconsideration."[51] But it ignored the fact, noted in Brandon's Petition for Rehearing, that *Majorana* was decided before the adoption of Rule 4:15 and that there was no similar provision in the prior Rules.

Justice Mims dissented, reading *Majorana* as holding more broadly that a written post-trial motion for reconsideration is sufficient to preserve an argument for appeal (consistent with the Court's stated rationale in that case, which did not rely on the fact that the trial court had ruled on the motion for reconsideration) and advancing the common sense notion that "parties who file such motions do so with every intention that the court review the issues they raise."[52]

> The filing of such a motion is evidence that the movant "requested a ruling" on it. This is especially true regarding motions for reconsideration because Rule 4:15(d) prohibits a party from requesting a hearing; rather, no hearing may be had except at the court's request. The Rule therefore places a special obligation upon the court to review such motions without prompting by the parties, since it is otherwise unable to determine whether a hearing is necessary.
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> Thus, taken together, *Majorana* and Rule 4:15(d) create a conundrum: if a motion for reconsideration is sufficient to preserve an argument for appeal under *Majorana*, yet a party may not request a hearing on such a motion under Rule 4:15(d), how does the appellant establish for the record that the trial court had an opportunity to rule intelligently on the motion? I would resolve the question by holding that, at least with respect to motions for reconsideration, mere filing is sufficient.[53]

Justice Mims also commented that "a separate letter to the clerk of court presumably would be no more effective in bringing the motion to the court's atten-

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[49] 284 Va. at 256, 736 S.E.2d at 697.

[50] *Id*. at 256 n.2, 736 S.E.2d at 697 n.2.

[51] *Id.* (emphasis added).

[52] *Id*. at 257, 736 S.E.2d at 698.

[53] *Id.* at 257-58, 736 S.E.2d at 698 (footnote omitted).

tion than the filing of the motion itself," while "a letter or phone call to the chambers secretary or law clerk may be more effective in bringing the motion to the court's attention, but the record would be unlikely to reveal any trace of the effort."[54]

What, then, is the solution to the conundrum described in the dissenting opinion? Three points appear obvious, but the frontiers are uncharted. First, if a trial court *actually rules* on a motion for reconsideration, arguments presented in that motion are preserved. Second, it at least *appears* obvious, in light of the removal of any reference to a notice of hearing in the Court's amended opinion—seemingly a concession to the plain language of Rule 4:15(d)—that parties seeking rehearing are not yet required to flout the provisions of that Rule outright by noticing hearings on motions for reconsideration. And third, "a mere filing in the clerk's office" is not sufficient to show "that the court had an opportunity to rule."

Beyond those points, the solution (if it exists) lies in the realms of ingenuity and common sense. Counsel's first priority in such a case should be to induce the trial court to rule on the motion for reconsideration—and to do so within 21 days after entry of a final order, of course.[55] One tactic may be to tender alternative forms of orders granting or denying the motion, ideally with endorsements of all counsel but absent opposing counsel's endorsement if necessary. Those sketch orders may be mailed or delivered directly to the trial judge with a cover letter calling attention to the motion and respectfully requesting a timely ruling. The letter and enclosures also should be copied to the clerk with a request to place them in the file, in the hope that a reviewing court will conclude that the trial court "had the opportunity to rule upon the argument"[56] and therefore that it was preserved, even if the judge ignores it.

If opposing counsel decline to endorse proposed orders (or drag their feet), then a moving party might justifiably invoke the portion of Rule 1:13 that provides for service of "reasonable notice of the time and place of presenting such drafts [of orders and decrees] . . . upon all counsel of record who have not endorsed them," thus *in effect* scheduling a hearing on the motion for reconsideration despite the prohibition in Rule 4:15(d).

*At minimum*, a party who files a motion for reconsideration should ask the clerk, in a cover letter filing the motion, to present the motion to the judge as soon as possible and note the Rule 1:1 deadline for action on the motion. Sketch orders also should be provided, as noted above. That alone may not satisfy the Court's requirement of a showing "beyond a mere filing in the clerk's office, that the court had an opportunity to rule," however, so it would be wise also to note in the cover letter that a courtesy copy of the letter and its enclosures are being delivered directly to the judge as well.

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54 *Id*., 736 S.E.2d at 698.

55 *See* VA. S. CT. R. 1:1.

56 *Brandon*, 284 Va. at 256, 736 S.E.2d at 697.

There is no assurance at this point that all or any of the above tactics will suffice, in view of the hard line taken by the 6-Justice majority in *Brandon*, but those are at least some of the tactics on the available menu. To reiterate, finally, the real goal in these circumstances is to induce the trial judge to rule, one way or another, on the motion for reconsideration.

### H. WAIVERS

Arguments and objections, once asserted, can be waived. Waivers by endorsement are discussed above. Other, more dangerous waiver traps are discussed here.

#### 1. Express Waivers

Intentionally or not, often as a result of judicial cajoling, counsel may expressly abandon and thus waive arguments that otherwise are properly preserved. In *Graham v. Cook*, for example, Graham objected at trial to a radiologist's testimony regarding his "habit of checking for hardware when reviewing a CT scan of a patient's joint.. . . on the ground that the testimony stated an opinion not contemporaneously documented in [the radiologist's] report."[57] But "[a]fter the circuit court suggested that the parties should 'be[ ] honest' with the jury and let the jury decide the import of Dr. Man's testimony regarding his habit or routine, Graham responded, 'I don't have a problem with that.' By this affirmative statement, Graham informed the circuit court and Dr. Cook that Graham no longer opposed the admission of the testimony at issue." The objection therefore was waived.[58]

#### 2. Waiver by Failure to Reiterate a Previous Argument or Objection

Trial courts' postponements of questions for later consideration present yet another trap for inattentive attorneys. An argument or objection is waived by failing to *re*-assert it, after a ruling has been requested but the court has taken the issue under advisement.[59] This frequently occurs in the context of motions for a change of venue (as in *Riner* and *Green*) or a motion in limine.[60] If the moving party fails to reiterate the argument at an appropriate time—*e.g.*, before a jury is sworn, if the issue is venue, or when evidence is offered, if the issue is admissibility—it is waived.[61]

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[57] 278 Va. 233, 247, 682 S.E.2d 535, 542 (2009).

[58] *Id*. at 248, 682 S.E.2d at 543.

[59] *E.g.*, Riner v. Commonwealth, 268 Va. 296, 309-10, 601 S.E.2d 555, 562-63 (2004); Green v. Commonwealth, 266 Va. 81, 93-95, 580 S.E.2d 834, 841-42 (2003).

[60] *E.g.*, Doan v. Commonwealth, 15 Va. App. 87, 94, 422 S.E.2d 398, 402 (1992).

[61] *E.g.*, *id*., 422 S.E.2d at 402 ("Although the court heard arguments on Doan's motion *in limine* to exclude certain portions of the plea agreement, we find that the court did not make a definitive ruling regarding the admissibility of the evidence. Absent a ruling of the trial court *in limine*, Doan was obligated to object to the evidence at trial. Consequently, we find that Doan's pretrial challenge to the admissibility of the evidence is insufficient to permit our review"). *Compare* Edwards v. Commonwealth, 20 Va. App. 470, 472 n.1, 457 S.E.2d 797, 798 n.1 (1995) ("We are not barred by Rule 5A:18 from considering the issues raised by the defendant on

An objection was waived at trial due to a change of circumstances—the plaintiff's decision to nonsuit a punitive damages claim—in *Riverside Hospital, Inc. v. Johnson*.[62] Defendant hospital moved in limine to exclude evidence that other patients at the hospital had suffered similar injuries. The court agreed with the plaintiff's argument that the evidence was relevant to establishing notice, for purposes of his punitive damages claim, and therefore denied the motion in limine. The plaintiff then nonsuited the punitive damages claim at the close of the evidence. On appeal, the Supreme Court held that a challenge to the evidence as irrelevant to the negligence claim was waived because it was not asserted after the nonsuit. The motion in limine was sufficient to preserve the objection as it related to the "notice claim," but the defendant should have reasserted its relevance objection or requested a cautionary instruction after the nonsuit.

The *Spitzli v. Minson* line of cases points to a variation on the same theme. In *Spitzli*,[63] the defendant moved to strike the evidence at the conclusion of the plaintiff's case and again at the close of all the evidence, and he later moved to set aside the verdict, but he did not object to instructions which submitted the issue of negligence and proximate cause to the jury. *Held*, "his failure to preserve his objections at the instruction stage constituted a waiver of any contention that the trial court erred in not ruling as a matter of law" on those issues.[64]

*Spitzli* at least *appears* to have been overruled by *King v. Commonwealth*,[65] which held that reliance on *Spitzli* and a related case was "misplaced" in light of the 1992 amendment of Code section 8.01-384(A) (discussed *supra* at 563 & nn.4, 5). As stated in *King*, "[t]he undeniable purpose of Code § 8.01-384(A) is to relieve counsel of the burden of making repeated further objections to each subsequent action of the trial court that applies or implements a prior ruling to which an objection has already been noted."[66]

The safest course nevertheless is to object to the giving of any instruction that embodies a legal theory that arguably should not be allowed to go to the jury, to eliminate the risk of suffering an unexpected revival of the *Spitzli* rule. Having done so, trial counsel should be able to request correction of any errors in instructions offered by opposing counsel, after an objection to giving any instruction on the issue is overruled. "[W]hen the record is clear that the party is not waiving its objection to the prior ruling, but merely proffering or agreeing to an

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appeal because the defendant's objections were sufficiently preserved by his motion in limine, objections at trial, and the trial court's assurance that defense counsel 'would not have to continue to make the same objection on each and every one of the witnesses' because he had 'made one general objection which will follow him through the trial so long as he wishes that to be the case'").

62 272 Va. 518, 525-27, 636 S.E.2d 416, 419-21 (2006).

63 231 Va. 12, 341 S.E.2d 170 (1986).

64 *Id.* at 18, 341 S.E.2d at 173. *See also*, *e.g.*, Holles v. Sunrise Terrace, Inc., 257 Va. 131, 137-38, 509 S.E.2d 494, 498 (1999).

65 264 Va. 576, 580-82, 570 S.E.2d 863, 865-66 (2002).

66 *Id*. at 581, 570 S.E.2d at 866. (The *Holles* case, cited above, postdates the 1992 amendment but precedes *King*.)

instruction consistent with the trial court's prior ruling, the previous objection will not be waived."[67]

### 3. Waiver by Failure to Move to Strike at the Close of the Evidence

A motion to strike the plaintiff's evidence, at the close of the plaintiff's case, is waived if the defendant presents evidence of her own. A challenge to the sufficiency of the evidence is preserved only by moving again to strike at the conclusion of all of the evidence.[68] When a defendant presents evidence, after the denial of a motion to strike at the conclusion of the plaintiff's case-in-chief, "the defendant cannot rely on a previously made motion to strike, because any challenge to the sufficiency of the evidence, which includes evidence presented by the defense, will necessarily raise a new and distinct issue from the issue presented by the denied motion to strike."[69] "Thus, the defendant must inform the circuit court of the grounds upon which he or she relies in making a new motion to strike so that the circuit court has the opportunity to consider the asserted grounds for the defendant's belief that the plaintiff's evidence is insufficient in light of all the evidence presented, including defense and rebuttal evidence . . . . [A] renewed motion is in reality a new motion because it addresses a different quantum of evidence."[70] On a motion to strike at the conclusion of all of the evidence, the trial and appellate courts consider the sufficiency of the evidence based on the record as a whole and not merely the evidence presented by the party who opposes the motion.[71]

Omission of a motion to strike at the conclusion of the evidence is not necessarily the end of the story, however. A challenge to the sufficiency of the evidence can be preserved by a motion to set aside a verdict.[72]

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[67] WJLA-TV v. Levin, 264 Va. 140, 159, 564 S.E.2d 383, 394 (2002); Hale v. Maersk Line Ltd., 284 Va. 358, 371-72, 732 S.E.2d 8, 16 (2012) (quoting *WJLA*).

[68] *E.g.*, Norfolk S. Ry. Co. v. Rogers, 270 Va. 468, 481, 621 S.E.2d 59, 66 (2005) ("Because Norfolk Southern introduced evidence on its behalf after the circuit court denied its motion to strike Rogers' evidence, it has waived the right to rely on the first motion"); City of Suffolk v. Hewitt, 226 Va. 20, 22, 307 S.E.2d 444, 445 (1983) ("After Hewitt's evidence had been presented and the City's motion to strike had been denied, the City introduced evidence, thereby waiving its earlier motion"); Murillo-Rodriguez v. Commonwealth, 279 Va. 64, 82, 688 S.E.2d 199, 209 (2010) (holding that Virginia Code § 8.01-384(A) does not alter the stated rule "for the self-evident reason . . . that a motion to strike the evidence presented after the Commonwealth's case-in-chief is a separate and distinct motion from a motion to strike all the evidence, or a motion to set aside an unfavorable verdict, made after the defendant has elected to introduce evidence on his own behalf").

[69] United Leasing Corp. v. Lehner Family Business Trust, 279 Va. 510, 517, 689 S.E.2d 670, 674 (2010) (citing *Murillo-Rodriguez)*.

[70] *Id*. at 518, 689 S.E.2d at 674 (citing Graham v. Cook, 278 Va. at 248, 682 S.E.2d at 543).

[71] *E.g.*, Estate of Taylor v. Flair Prop. Assocs., 248 Va. 410, 414, 448 S.E.2d 413, 416 (1994).

[72] *See*, *e.g.*, *Murillo-Rodriguez*, 279 Va. at 73, 688 S.E.2d at 204 (dictum; quoting Spangler v. Commonwealth, 188 Va. 436, 438, 50 S.E.2d 265, 266 (1948)); *id*. at 83-84, 688 S.E.2d at 210; Gabbard v. Knight, 202 Va. 40, 43, 116 S.E.2d 73, 75 (1960), *quoted in* Little v. Cooke, 274 Va. 697, 718, 652 S.E.2d 129, 141 (2007) ("While a motion to strike is an appropriate way of testing the sufficiency of relevant evidence to sustain an adverse verdict, it is not the only way. It has long been the practice in this jurisdiction to test the sufficiency of such evidence by a motion to set aside the verdict").

### 4. Partial Waivers of Challenges to Sufficiency by Failure to Object to Admission of Evidence

A challenge to the *sufficiency* of a party's evidence is waived in part by a failure to object to the *admission* of evidence. Evidence that is admitted without objection may be considered by the jury (or the judge, in a bench trial), whether it was admitted erroneously or not.[73] "The admissibility of evidence and the sufficiency of evidence are distinct issues. It follows that objections to the admissibility of evidence and the sufficiency of evidence are also distinguishable."[74]

> [A]n objection to the admissibility of evidence must be made when the evidence is presented. The objection comes too late if the objecting party remains silent during its presentation and brings the matter to the court's attention by a motion to strike made after the opposing party has rested . . . . In contrast, an objection to the sufficiency of the evidence is properly made by a motion to strike, rather than when the evidence is first offered. Obviously, the objecting party cannot be sure, nor can the court decide, until the offering party has rested, whether the various fragments of evidence have added up to a justiciable whole.[75]

"[A] motion testing sufficiency of the evidence must be weighed by the evidence that has been admitted." And where evidence was admitted without objection, "the question of admissibility of this evidence is not the proper subject of a motion to strike which tests sufficiency."[76]

The *Banks* Court did observe that "[t]here may be circumstances where evidence is admitted conditioned upon further foundational support and the satisfaction of that condition may not be known until the conclusion of the case-in-chief or at the end of presentation of all of the evidence. The proper motion at that time is a motion to exclude the evidence. Assuming that exclusion of the evidence creates deficiencies in the quantum of proof, a motion to strike may then test the sufficiency of the evidence."[77] *Vasquez v. Mabini*[78] provides an example of an objection that was properly preserved by a defendant's motion to strike an expert's testimony "[a]t the first opportunity, after the flaws in the expert testimony had become apparent on cross-examination," and renewed af-

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73 *See*, *e.g.*, Bitar v. Rahman, 272 Va. 130, 140-41, 630 S.E.2d 319, 324-25 (2006) (challenge to expert medical testimony that was not stated with the required "reasonable degree of medical probability" was a challenge to admissibility and could not be considered on a motion to strike the plaintiff's evidence for insufficiency; the expert testimony, having been admitted without objection, was properly considered by the jury).

74 Banks v. Mario Indus. of Va., 274 Va. 438, 455, 650 S.E.2d 687, 696 (2007).

75 *Id.* at 456, 650 S.E.2d at 696-97 (formatting altered; citations and quotation marks omitted).

76 *Id.*, 650 S.E.2d at 697 (footnote omitted).

77 *Id.* at 456 n.2, 650 S.E.2d at 697 n.2.

78 269 Va. 155, 606 S.E.2d 809 (2005).

ter the plaintiff rested. "[T]he party objecting to flawed expert testimony made no objection while the testimony was being given, but moved to strike at its conclusion, after the flaws had become apparent, thus giving the trial court a proper opportunity to correct the error of admitting it."[79]

If a party properly objects to admission of evidence, the objection can be renewed (in effect) by a motion to strike, and the challenges to both admissibility and sufficiency are preserved for appeal. *See Rushing v. Commonwealth*:

> [A]n appellant may properly contend (1) that evidence was entered erroneously and (2) without that error the record would not contain evidence sufficient to support the conviction. An appellate court, in those circumstances, cannot adjudicate the question of sufficiency without first deciding whether the evidence should have been admitted. If the evidence is determined to have been admitted in error, and the error has been properly preserved and is non-constitutional, and if there remains evidence in the record clearly sufficient to support the conviction without the evidence erroneously admitted, then the error is harmless and the judgment may be affirmed. If the appellate court is in doubt as to the extent to which the erroneously admitted evidence may have affected the verdict, the appellant is entitled to a reversal and a remand for a new trial. But if there remains in the record, without the erroneously admitted evidence, insufficient evidence to support the conviction, the appellate court must reverse and enter final judgment for the appellant.[80]

5. Waiver by Introducing Evidence of the "Same Character"

"[W]here an accused unsuccessfully objects to evidence which he considers improper and then on his own behalf introduces evidence of the same character, he thereby waives his objection."[81] The *Saunders* Court applied that "substantive rule of law,"[82] citing four cases from the 1920s, in a seemingly bizarre case in which a criminal defendant first objected to the Commonwealth's evidence of other, unrelated crimes and then introduced his own evidence "that he had been arrested for escaping jail and had been tried and sentenced for unlawful flight to avoid prosecution" and somehow "turned all the evidence of other offenses to his own advantage."[83]

The Court has more recently applied the same rule in a series of civil cases.[84] It also has held, however, that the "same character" rule "is not applicable to

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[79] *Id.* at 162-63, 606 S.E.2d at 813.

[80] 284 Va. 270, 279-80, 726 S.E.2d 333, 338-39 (2012).

[81] Saunders v. Commonwealth, 211 Va. 399, 401, 177 S.E.2d 637, 638 (1970).

[82] *Id.*

[83] *Id.* at 401, 177 S.E.2d at 638.

[84] *See*, *e.g.*, Galumbeck v. Lopez, 283 Va. at 509, 722 S.E.2d at 559; Drinkard-Nuckols v. Andrews, 269 Va. 93, 606 S.E.2d 813 (2004); Combs v. Norfolk & W. Ry. Co., 256 Va. 490, 499, 507 S.E.2d 355, 360 (1998).

matters elicited in the cross-examination of a witness or in the introduction of rebuttal evidence."[85] The Court added in *Pettus* that it "generally ha[s] applied the rule as a waiver of a party's objection to the admission of certain evidence when that party has elicited evidence dealing with the same subject as part of his own case-in-chief."[86] It appears, therefore, that the "rebuttal evidence" exception may be useful primarily if not exclusively in plaintiffs' cases in rebuttal, allowing presentation of evidence of the same character to rebut evidence presented by defendants' cases in chief.[87]

The Supreme Court's decisions in this area do not always appear to follow an entirely straight line. Thus, in *Brooks v. Bankson*,[88] defaulting home buyers were allowed to present evidence, over objection, of the condition of the house's crawl space as revealed by a "walk through" inspection two days before the scheduled closing. On appeal, the buyers argued that the sellers (the plaintiffs) had waived their objection by presenting their own evidence—apparently in their rebuttal case, although the Court did not emphasize that point—of the condition of the crawl space on the day of the trial. The Court rejected the buyers' argument, reasoning that "[t]he rule will not be applied in distortion of its purpose" and that "the Sellers made known to the trial court their objections to the court's interpretation of the contract, and to its evidentiary ruling predicated on that interpretation. In order to meet the Buyers' evidence of the condition of the crawl space introduced pursuant to these rulings, the Sellers were entitled to present evidence of their own on the same subject." The Court at least arguably might have justified its holding as simply an application of the "rebuttal" exception, and indeed it was cited in *Pettus* as if it were nothing more; but the reasoning articulated in *Brooks* seems more flexible and open to interpretation in future cases.

A further question is what is meant by "evidence of the same character." The Supreme Court has provided little elucidation of that concept, seemingly following an *ad hoc*, "we know it when we see it" approach. Some clues may be gathered, however, from a few of its opinions. In *Blue Ridge Service of Va v. Saxon Shoes*,[89] for example, an expert witness (Hiteshew) testified that a fire in a shoe store was caused by "smoking material" discarded in a trash can. The defendant cleaning company objected to admission of that testimony, on the ground that Hiteshew's opinions were "based on an effort to contradict the direct evidence" and were "not based on an appropriate foundation of scientific facts,"[90] and challenged its admission on appeal.

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85 Pettus v. Gottfried, 269 Va. 69, 79, 606 S.E.2d 819, 825 (2005).

86 *Id*., 606 S.E.2d at 825 (citations omitted).

87 *See* the discussion of *Hubbard v. Commonwealth*, *infra* at 580.

88 248 Va. 197, 207, 445 S.E.2d 473, 478 (1994).

89 271 Va. 206, 624 S.E.2d 55 (2006).

90 *Id*. at 211, 624 S.E.2d at 58.

The shoe company argued that the cleaning company had waived its challenge by offering testimony of its own expert as to the cause and origin of the fire. That argument, said the Court, was "completely without merit. Blue Ridge did not contest Hiteshew's status as an expert witness, but rather that his particular opinion testimony was inadmissible as it was not supported by the evidence. The fact that Blue Ridge presented its own expert on fire origin has no relation to its objection to Hiteshew's opinion testimony and no nexus for any argument concerning 'same character' evidence."[91] Judge for yourself whether that states a persuasive distinction.

The Court reached the opposite conclusion in *Hubbard v. Commonwealth*,[92] an appeal of a manslaughter conviction resulting from a traffic accident, where the defendant challenged the admission of "'reconstructed opinion evidence of speed.'" The defendant also introduced expert testimony regarding the speed of her vehicle at the time of the crash, but she argued "that in presenting the testimony of her experts, she was merely attempting to rebut the reconstructed opinion evidence of speed introduced by the Commonwealth"—a distinct point that the Court did not pause to address—and "that '[t]he defense's own judgment on range of speed was based [not on theory but] primarily on real facts.' It certainly is not the law, Hubbard opines, that a defendant waives the right 'to appeal the use of "ivory tower" theories by attempting to show their limitations in the real world.'"[93] The Court disagreed, opining that the defendant's expert testimony was "reconstructed opinion evidence through and through," including testimony based on two fact witnesses' testimony "'about the relationships between [two] vehicles as they moved toward the scene of the accident.'"[94] The key to the *Hubbard* Court's application of the "same character" rule thus appears to be its conclusion that the defendant's expert evidence, like the Commonwealth's, was "reconstructed opinion evidence."

Some guidance also may be gleaned from the Court of Appeals' decision in *Hills v. Commonwealth*,[95] keeping in mind, of course, that it is at best a persuasive authority in civil cases that fall outside that court's appellate jurisdiction. The Commonwealth presented expert testimony based on a DNA analysis. On appeal, it argued—citing *Hubbard*—that the defendant's challenge to admission of that evidence was "procedurally barred" under the "same character" rule because the defendant "utilize[d] DNA test results offered by the Commonwealth to his . . . advantage during the presentation of the defense."[96] The court disagreed with that characterization of the defense expert's testimony and rejected the Commonwealth's argument. The defense expert's testimony, said the court,

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91 *Id.* at 212 n.2, 624 S.E.2d at 58 n.2.

92 243 Va. 1, 9-10, 413 S.E.2d 875, 879 (1992).

93 *Id.* at 9, 413 S.E.2d at 879.

94 *Id.* at 9-10, 413 S.E.2d at 879.

95 33 Va. App. 442, 534 S.E.2d 337 (2000).

96 *Id.* at 450, 534 S.E.2d at 341.

"was limited to a critique of [the Commonwealth's expert's] analysis, and she testified that she did not perform any DNA analysis in this case." It "therefore, conclude[d] that Hills did not introduce evidence 'of the same character' as the DNA evidence offered by the Commonwealth through the testimony of Mary McDonald, but was instead simply challenging the conclusions McDonald reached in her analysis."[97]

### 6. The "Law of the Case" Doctrine

The "law of the case" is a different animal, in that it refers to failure on appeal (as well as in the trial court) to preserve arguments for presentation on remand or in a subsequent appeal. It also is a particularly nasty waiver doctrine, in that it encourages all parties (appellees as well as appellants) to include every potentially prejudicial ruling in an assignment of error or cross-error, contrary to the well-nigh universal advice to limit arguments on appeal to the most critical and harmful issues and to assign the minimum number of errors possible, lest weaker arguments dilute better ones and the sheer volume of arguments leads to judicial skepticism as to the merits of any.[98]

The law of the case doctrine provides, in a nutshell, that any ruling that is not challenged on appeal is binding on both the parties and the trial and appellate courts on remand or on a subsequent appeal. More expansively:

> Pursuant to the "law of the case" doctrine, when a party fails to challenge a decision rendered by a court at one stage of litigation, that party is deemed to have waived her right to challenge that decision during later stages of the "same litigation." . . . The "law of the case" doctrine applies both to issues that were actually decided by the court, and also to issues "necessarily involved in the first appeal, whether actually adjudicated or not."
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> In our decision in *Kondaurov [v. Kerdasha*, 271 Va. 646, 658, 629 S.E.2d 181, 188 (2006)], we explained that our application of the "law of the case" doctrine extends to "future stages of the same litigation." . . . Thus, when two cases involve identical parties and issues, and one case has been resolved finally on appeal, we will not re-examine the merits of issues necessarily involved in the first appeal, because those

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[97] *Id.* at 451, 534 S.E.2d at 342.

[98] *See*, *e.g.*, R. ALDISERT, WINNING ON APPEAL § 8.06 (1992); R. Jackson, *Advocacy before the United States Supreme Court*, 37 CORNELL L.Q. 1, 5 (1951) ("The mind of an appellate judge is habitually receptive to the suggestion that a lower court committed an error. But receptiveness declines as the number of assigned errors increases. Multiplicity hints at lack of confidence in any one . . . . [E]xperience on the bench convinces me that multiplying assignments of error will dilute and weaken a good case and will not save a bad one"); Fifth Third Mortgage Co. v. Chicago Title Insurance Co., 692 F.3d 507, 509 (6th Cir. 2012) ("When a party comes to us with nine grounds for reversing the district court, that usually means there are none" (first sentence of opinion)); Fadness v. Fadness, 52 Va. App. 833, 850-51, 667 S.E.2d 857, 866 (2008) ("The 'throw everything at the wall and hope something sticks' approach utilized in this appeal is as unappreciated as it is ineffective").

> issues have been resolved as part of the "same litigation" and have become the "law of the case."
>
> Under the "law of the case" doctrine, courts assume without deciding that there may be error in the decision of the court below . . . . As a result, a decision that becomes the "law of the case" is adhered to only in the case in which it arose and does not become binding precedent in other cases.[99]

There is no easy answer to the quandary presented by the risk of being bound on remand (and later) by the law of the case, on the one hand, and the risk of assigning too many errors and thereby foregoing the opportunity to persuade the appellate court that there is merit in the appeal, on the other. The lesson appears to be that you must balance those two countervailing considerations as well as you can; but you cannot afford to skip assignment of an error that is substantially likely to derail your case on a remand, even if it is not among the strongest arguments that you otherwise might choose to present on appeal.

### 7. Failing to Assign Cross-Error

A party who has prevailed at trial or on appeal to the Court of Appeals may assign cross-error to adverse interlocutory rulings, in his Brief in Opposition to a Petition for Appeal. An appellee who does not assign cross-error risks being trapped by the law of the case doctrine, discussed just above, in the event of a reversal in the opposing party's appeal. And a prevailing party's failure to assign cross-error to the trial court's or the Court of Appeals' failure to rule in its favor, on an issue presented to that court but not addressed in its decision, is a waiver of that argument on appeal to the Supreme Court.[100]

### 8. The "Voluntary Payment" Doctrine

"Voluntary payment of a judgment deprives the payor of the right of appeal."[101] But a payment made under threat of execution is not voluntary, and the doctrine does not apply.[102]

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[99] Miller-Jenkins v. Miller-Jenkins, 276 Va. 19, 26-27, 661 S.E.2d 822, 826 (2008) (citations omitted).

[100] Horner v. Department of Mental Health, 268 Va. 187, 194, 597 S.E.2d 202, 206 (2004); Wells v. Shoosmith, 245 Va. 386, 388 n.1, 428 S.E.2d 909, 910 n.1 (1993) (cited in *Horner*) (holding that an argument presented below was waived on appeal "because the property owners, who prevailed below, failed to assign cross-error to the chancellor's failure to rule for them on this issue").

[101] Citizens Bank & Trust Co. v. Crewe Factory Sales Corp., 254 Va. 355, 492 S.E.2d 826 (1997) (citing Carlucci v. Duck's Real Estate, Inc., 220 Va. 164, 166, 257 S.E.2d 763, 765 (1979)).

[102] *Carlucci*, 220 Va. at 166, 257 S.E.2d at 765 (payment following the issuance of an execution on the judgment and the filing of a suggestion in garnishment "is not such a voluntary payment as causes a loss of the right of appeal").

This voluntary payment doctrine is not to be confused with the common law voluntary payment doctrine discussed in, *e.g.*, *D.R. Horton, Inc. v. Board of Supervisors for County of Warren*, 285 Va. 467, 737 S.E.2d 886 (2013), which provides that "'[w]here a party pays an illegal demand with a full knowledge of all the facts which render such demand illegal, [i] without an immediate and urgent necessity therefor, or [ii] unless to release his person or property from detention, or [iii] to prevent an immediate seizure of his person or prop-

## I. EXCEPTIONS TO CONTEMPORANEOUS OBJECTION REQUIREMENTS

### 1. Subject Matter Jurisdiction

In Virginia, as in the federal courts, "the lack of subject matter jurisdiction can be raised at any time in the proceedings, even for the first time on appeal by the court *sua sponte* . . . . In contrast, defects in the other jurisdictional elements generally will be considered waived unless raised in the pleadings filed with the trial court and properly preserved on appeal. Rule 5:25."[103]

The Supreme Court construes this exception narrowly. A circuit court has subject matter jurisdiction, for example, where a statute gives it authority to act.[104]

### 2. No Opportunity to Object

A trio of recent cases addresses the "no opportunity to object to a ruling or order at the time it is made" clause of section 8.01-384(A). In *Commonwealth v. Amos*, the Court held that "a litigant who was precluded by the trial court from asserting a contemporaneous objection"—by a ruling that summarily held her in contempt, sentenced her to jail for ten days, and remanded her into custody—was entitled to raise her issues on appeal, "notwithstanding the provisions of Rule 5A:18."[105] *Id*. The Court relied on the plain language of the portion of section 8.01-384(A), which provides that "if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection shall not thereafter prejudice him on motion for a new trial or on appeal"—a provision that the Court paraphrased as "stat[ing] that when the litigant, through no fault of his own, is prevented from making a contemporaneous objection to the court's ruling or order, the failure to object '*shall not thereafter prejudice*' the litigant on appeal."[106] And under that provision, said the Court, no motion for reconsideration at the trial court is required to preserve an argument for appeal.

> When failure to raise a contemporaneous objection or otherwise bring an objection to the court's attention results from a party's actions, the contemporaneous objection exception of Code § 8.01-384(A) does not apply, and the preservation issue will be decided under the provisions of Rule 5A:18 or Rule 5:25, and case law applying those rules. However, when a party is denied the opportunity to raise a contemporaneous objection, the contemporaneous objection exception of Code § 8.01-384(A) applies.[107]

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erty, such payment must be deemed voluntary, and cannot be recovered back.'" *Id*. at 472, 737 S.E.2d at 888 (quoting Barrow v. County of Prince Edward, 121 Va. 1, 2-3, 92 S.E. 910, 910 (1917)).

[103] Morrison v. Bestler, 239 Va. 166, 170, 387 S.E.2d 753, 756 (1990).

[104] *See id*. at 172, 387 S.E.2d at 757. *See also id*. at 173, 387 S.E.2d at 757-58 (holding that failure to comply with "a mandatory procedural requirement . . . . does not divest the court of subject matter jurisdiction").

[105] 287 Va. 301, 303, 754 S.E.2d 304, 305 (2014).

[106] *Id*. at 306, 754 S.E.2d at 307 (emphasis added by the Court).

[107] *Id*. at 308, 754 S.E.2d at 308.

The Court reached the same result in one of two cases decided together in *Maxwell v. Commonwealth*,[108] in favor of a litigant and his attorney who were on an excused absence during jury deliberations when the trial court responded to juror questions.[109] In the second case decided in *Maxwell*, the prosecutor referred in his closing argument to the defense's failure to offer any evidence. The defendant's counsel told the court that he wanted to make a motion outside the presence of the jury, before presenting his closing argument, but acquiesced in the circuit court's response that "'We'll deal with it when the jury goes out to retire.'"[110] The court denied a motion for a mistrial, after the jury retired. The Court of Appeals held that under Rule 5A:18 it could not consider the denial on appeal. The Supreme Court affirmed, holding that the defendant (Rowe) had "failed to articulate a cognizable objection at a time when the court could take appropriate action" because he "failed to state for the court the details of his objection or the time-sensitive nature of his motion" or to "move for a mistrial at a time when the circuit court could have taken action to correct the asserted error."[111]

> Rowe's counsel's colloquy with the court makes it clear that he had the opportunity to make his objection known to the court and articulate more clearly the action he desired the court to take and that the action needed to be taken before the jury retired.
>
> Nothing in the record supports a finding that Rowe had no opportunity to make a contemporaneous objection to the Commonwealth's argument at a time and in a manner that would make it clear to the court the relief that Rowe sought. When Rowe did subsequently make his objection sufficiently clear to the court, pursuant to our case law, it was too late for the court to take the corrective action sought.[112]

Justices Lemons and Mims dissented, arguing that the majority failed to recognize "real-world trial practice."[113]

> It is important to remember that this was a criminal trial before a jury, and the jury was about to retire to decide the fate of the defendant. Defense counsel had to decide whether to argue with the judge

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[108] 287 Va. 258, 754 S.E.2d 516 (2014).

[109] *Amos* and *Maxwell* were criminal cases, on appeal to the Supreme Court from the Court of Appeals; but the Supreme Court's own rule is essentially identical to the Court of Appeals' Rule 5A:18, and therefore those decisions will be precedential in civil cases as well. *See Amos*, 287 Va. at 307 n.2, 754 S.E.2d at 308 n.2 ("Rule 5:25 is the 'counterpart' to Rule 5A:18, and . . . Code § 8.01-384(A), which 'controls' the interpretation of Rule 5:25, 'likewise inform[s the] interpretation of Rule 5A:18'") (citations omitted).

[110] *Id*. at 264, 754 S.E.2d at 518.

[111] *Id*. at 267, 268, 754 S.E.2d at 520, 521.

[112] *Id*. at 269, 754 S.E.2d at 521.

[113] *Id*.

> in front of the jury and demand that his motion be heard before the jury retired, or to abide by the trial court's ruling. By arguing with the judge immediately before the jury was to retire, defense counsel risked prejudicing the jury against him, and by extension, his client. By acknowledging the trial court's authority to hear the motion at a later time, counsel should not have to risk waiving his client's fundamental right to an appeal. Civility and decorum on the part of defense counsel should not be equated to a waiver of the defendant's fundamental right to appeal.[114]

### 3. The "Ends of Justice" and Similar Exceptions

Virginia's Rules 5A:18 and 5:25 include an exception to the general rule of contemporaneous objection: "for good cause shown or to enable [the Court] to attain the ends of justice," the appellate courts may review a decision not objected to below.[115] Appellate courts typically are reluctant to apply such exceptions.[116]

Appellants must ask for application of the "ends of justice" exception of Rules 5A:18 and 5:25. (That can and should be done in the alternative, if preservation is a close question.) The Court of Appeals of Virginia, at least, will not invoke it *sua sponte*. *See*, *e.g.*, *Sutphin v. Commonwealth*:

> While this Court may invoke the "ends of justice" exception to Rule 5A:18 in situations where "the conduct for which he was convicted was not a criminal offense" . . . or where "'the record affirmatively prove[s] that an element of the offense did not occur'" . . . we will not do so *sua sponte* . . . . As Sutphin has not asked this Court to do so,

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114 *Id*. at 270-71, 754 S.E.2d at 522.

115 *See also* FED. R. CIV. P. 51(d)(2) ("A court may consider a plain error in the instructions that has not been preserved as required by Rule 51(d)(1) if the error affects substantial rights"); FED. R. CRIM. P. 52(b) ("A plain error that affects substantial rights may be considered even though it was not brought to the court's attention").

The U.S. Supreme Court has held that regardless of whether a legal question was settled or unsettled at the time of trial, and even in cases of intervening changes in the law, an error is "plain" within the meaning of Rule 52(b) if it is plain at the time of appellate review. *See* Henderson v. United States, 568 U.S. ___, 133 S. Ct. 1121, 185 L. Ed. 2d 85 (2013); Johnson v. United States, 520 U. S. 461, 468 (1997).

116 *See*, *e.g.*, Hix v. Commonwealth, 270 Va. 335, 348-49, 619 S.E.2d 80, 88 (2005); Spitzli v. Minson, 231 Va. 12, 19-20, 341 S.E.2d 170, 174 (1986); *compare* Thomas v. Commonwealth, 56 Va. App. 1, 690 S.E.2d 298 (2010) (invoking the ends of justice exception to reverse a conviction and dismiss an indictment for felony escape from custody because "the record affirmatively demonstrates that an element of the offense for which Thomas was convicted did not occur—*i.e.* that Thomas was in custody on a felony charge"); Brown v. Commonwealth, 8 Va. App. 126, 131-34, 380 S.E.2d 8, 10-12 (1989) (vacating and remanding for resentencing, where "a miscarriage of justice occurred when the trial court sentenced the appellant for a crime other than that for which he had been convicted"); United States v. Ramirez-Castillo, 748 F.3d 205, 208, 217 (4th Cir. 2014) (exercising discretion to vacate and remand a sentence of imprisonment based on "a jury trial in which the jury made two specific factual findings but never returned a guilty verdict," because "failure to [exercise our discretion to notice the plain error] would seriously affect the fairness, integrity, or public reputation of the judiciary").

> we will not apply the ends of justice exception to Rule 5A:18 and therefore we must affirm.[117]

The Fourth Circuit has articulated a variety of standards (which probably represent little if any substantive difference) governing its decision whether to consider a new argument on appeal in a civil case. It has stated most recently that it will do so "only if the newly raised argument establishes 'fundamental error' or a denial of fundamental justice."[118]

The Fourth Circuit has recently emphasized that the "fundamental error" standard that it applies in civil cases "is 'more limited' than the 'plain error' standard that we apply in criminal cases."[119] And it added this:

> Two things might explain the higher standard that applies in civil cases. First, "Federal Rule of Criminal Procedure 52(b) affords federal appellate courts the discretion to correct certain forfeited errors in the criminal context," but in the civil context (excepting jury instructions), "such discretion is judicially created." . . . As a judicial construction, it should be narrowly construed . . . . Second, plain-error review arose in the criminal context to protect the defendant's "substantial liberty interests," but "[s]uch interests normally are not at stake in civil litigation." . . .[120]

### J. PRESERVATION IN ADMINISTRATIVE AGENCY PROCEEDINGS

Appeals from agency decisions are subject to similar rules as in civil cases.[121] The U.S. Supreme Court expanded on these concepts in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*:

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[117] 61 Va. App. 315, 323, 734 S.E.2d 725, 729 (2012) (citations omitted). *But cf*. Brandon v. Cox, 284 Va. at 258 & n.3, 736 S.E.2d at 698-99 & n.3 (Mims, J., dissenting) ("this case is amenable to the Rule's ends of justice exception. While I agree with the Court's assessment that the exception should be applied sparingly, the unlawful withholding of even $995, the amount in controversy here, is a grave injustice to a person who qualifies for Section 8 housing assistance, as Torri Brandon did"; citing cases in which the Court applied the ends of justice exception *sua sponte*).

[118] In Re: Under Seal, 749 F.3d 276, 285 (4th Cir. 2014) (citation omitted). *See also*, *e.g.*, Barger v. Mayor of Baltimore, 616 F.2d 730, 733 (4th Cir.), *cert. denied*, 449 U.S. 834 (1980) ("miscarriage of justice"); Haywood v. Ball, 586 F.2d 996, 1000 (4th Cir. 1978) ("plain error" and "likely miscarriage of justice"). *See also* Singleton v. Wulff, 428 U.S. 106, 120-21 (1976) ("there are circumstances in which a federal appellate court is justified in resolving an issue not passed on below, as where the proper resolution is beyond any doubt . . . or where 'injustice might otherwise result' ") (citations omitted; a footnote to that passage says, "These examples are not intended to be exclusive").

[119] *In Re: Under Seal*, 749 F.3d at 285.

[120] *Id*. at 286 n.13 (citations omitted).

[121] *E.g.*, Cosby v. Commonwealth ex rel. State Corp. Comm'n, 248 Va. 551, 556, 450 S.E.2d 121, 123-24 (1994) (contentions not asserted before the Commission not considered on appeal); Pence Holdings, Inc. v. Auto Ctr. Inc., 19 Va. App. 703, 454 S.E.2d 732, 734 (1995) (under the Virginia Administrative Process Act, an appellant may not raise issues on appeal from an administrative agency to a circuit court (or in an appeal from the circuit court to the Court of Appeals) that it did not submit to the agency for its consideration).

> "[C]omments must be significant enough to step over a threshold requirement of materiality before any lack of agency response or consideration becomes of concern. The comment cannot merely state that a particular mistake was made . . . ; it must show why the mistake was of possible significance in the results . . . ."
>
> Indeed, administrative proceedings should not be a game or a forum to engage in unjustified obstructionism by making cryptic and obscure reference to matters that "ought to be" considered and then, after failing to do more to bring the matter to the agency's attention, seeking to have that agency determination vacated on the ground that the agency failed to consider matters "forcefully presented."[122]

## II. Preservation in Assignments of Error

Preservation at the trial court or agency level is the first but not the only essential step in preserving arguments for appeal. In Virginia, at least, an argument that has been properly preserved in the lower court (or courts) must again be preserved by an adequate assignment of error on appeal, or it is forfeited. And while preparation of appropriate assignments of error might appear from a distance to be a simple, even ministerial task, that appearance is far from accurate.

> Few areas of the Supreme Court's jurisprudence have befuddled practitioners more than assignments of error. These are one of the few mandatory, jurisdictional, get-it-wrong-and-you-die requirements in the appellate rulebook. Lawyers who craft sloppy assignments are begging for dismissals and the now-automatic reports from the court to the State Bar. And given the less-than-uniform rulings that we've seen in the past few years on how much specificity is required, sometimes even careful lawyers get caught, too.[123]

### A. FUNDAMENTAL PRINCIPLES

Virginia Supreme Court Rule 5:17(c) states that a petition for appeal "must contain the following:

> (1) Assignments of Error. Under a heading entitled "Assignments of Error," the petition shall list, clearly and concisely and without extraneous argument, the specific errors in the rulings below upon which the party intends to rely . . . .
>
> (i) Effect of Failure to Assign Error. Only assignments of error assigned in the petition for appeal will be noticed by this Court. If the petition for appeal does not contain assignments of error, the petition shall be dismissed.

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122 435 U.S. 519, 553-54 (1978) (citations omitted; alterations added in *Vermont Yankee*).

123 http://www.virginia-appeals.com (Analysis of June 5, 2014, Supreme Court Opinions).

> . . . .
> (iii) Insufficient Assignments of Error. An assignment of error that does not address the findings or rulings in the trial court or other tribunal from which an appeal is taken, or which merely states that the judgment or award is contrary to the law and the evidence, is not sufficient. An assignment of error in an appeal from the Court of Appeals to the Supreme Court which recites that "the trial court erred" and specifies the errors in the trial court, will be sufficient so long as the Court of Appeals ruled upon the specific merits of the alleged trial court error and the error assigned in this Court is identical to that assigned in the Court of Appeals. If the assignments of error are insufficient, the petition for appeal shall be dismissed.

The Court has described the purposes of the Rule as follows:

> [A]ssignments of error serve several distinct and important functions. Their chief function is to identify those errors made by a circuit court with reasonable certainty so that this Court and opposing counsel can consider the points on which an appellant seeks a reversal of a judgment . . . .
>
> In addition, assignments of error also enable an appellee to prepare an effective brief in opposition to the granting of an appeal, to determine which portions of the trial record should be included in the parties' joint appendix, and to determine whether any cross-error should be assigned . . . . Therefore, in presenting an assignment of error to this Court, appellant's counsel must "lay his finger on the error" in the trial record.[124]

### B. THE "FINGER ON THE ERROR" RULE

The most fundamental and traditional rule governing assignments of error in Virginia is that

> it is the duty of an appellant's counsel "to 'lay his finger on the error' in his [assignment of error]," *Carroll v. Commonwealth*, 280 Va. 641, 649, 701 S.E.2d 414, 418 (2010) (quoting *First Nat'l Bank of Richmond v. William R. Trigg Co.*, 106 Va. 327, 342, 56 S.E. 158, 163 (1907)), and not to invite an appellate court "to delve into the record and winnow the chaff from the wheat." *Loughran v. Kincheloe*, 160 Va. 292, 298, 168 S.E. 362, 364 (1933).[125]

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[124] Friedline v. Commonwealth, 265 Va. 273, 278, 576 S.E.2d 491, 494 (2003) (citations omitted). *See also*, *e.g.*, Yeatts v. Murray, 249 Va. 285, 290, 455 S.E.2d 18, 21 (1995) (purposes of assignments of error include limiting discussion to the points on which appellant intends to ask a reversal of the judgment and allowing the appellee "to assure himself of the correctness of the record while it is in the clerk's office").

[125] Findlay v. Commonwealth, 287 Va. 111, 115-16, 752 S.E.2d 868, 871 (2014).

The Court has often cited what is now Rule 5:17(c)(iii) ("An assignment of error . . . which merely states that the judgment or award is contrary to the law and the evidence, is not sufficient") or its Court of Appeals counterpart (Rule 5A:12 (c)(1)(ii)) in support of the finger on the error rule; but its origins can be traced back at least as far as 1894,[126] long before adoption of any predecessor to Rule 5:17(c)(iii).

The Court has not always been of one mind on the meaning and application of the rule, however, and its divisions were on display as recently as the *Findlay* decision cited above. Findlay assigned as error "'the trial court's denial of his Motion to Suppress all of the seized videos that came from the defendant's computer, and his computer hard drive, and all derivatives thereof.'"[127] The Court of Appeals dismissed his appeal on the ground that the assignment of error was insufficient under Rule 5A:12(c), in a per curiam order that "held that the assignment of error 'fail[ed] to list any specific error in the rulings below. Instead, it is no more than a base assertion that the award is contrary to law, and Rule 5A:12(c)(1)(ii) makes clear that this is not sufficient to constitute a proper assignment of error.'" A three-judge review panel agreed.[128]

The Supreme Court reversed. It held that the assignment "identif[ied] with specificity the error committed by the trial court" and therefore was sufficient under Rule 5A:12(c)(1).[129] The assignment did not merely allege that Findlay's convictions were contrary to the law or state generally that the evidence was insufficient. It "point[ed] to a specific preliminary ruling of the trial court—the trial court's denial of his motion to suppress—that he believes to be in error."[130] In other words, he "la[id] his finger on the error."[131]

The Court specifically rejected an argument that Findlay was required to "state within his assignment of error precisely *why* it was error for the trial court to deny the motion to suppress."[132] Rule 5A:12(c)(1), said the Court, does not "deman[d] the inclusion of a 'because' clause or its equivalent in each assignment of error."[133] Such a requirement "would create an unnecessary procedural trap that may bar appellate review of meritorious claims. Where, as here, the assignment of error identifies a particular preliminary ruling of the trial court, as

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126 *See* Robinett v. Robinett's Heirs, 1 Va. Dec. 834, 19 S.E. 845, 846 (1894), *rev'd on reh'g*, 92 Va. 124, 22 S.E. 856 (1895), marking what appears to be the first occasion on which the Court used "finger on the error" language in reference to assignments of error on appeal. It was previously used in reference to exceptions to the report of a special commissioner to a circuit court. *E.g.*, Cralle v. Cralle, 84 Va. 198, 201, 6 S.E. 12, 14 (1887).

127 287 Va. at 113, 752 S.E.2d at 870.

128 *Id.* at 114, 752 S.E.2d at 870.

129 *Id*. at 115, 752 S.E.2d at 871.

130 *Id*. at 116, 752 S.E.2d at 871.

131 *Id*. at 115, 752 S.E.2d at 871 (citations and quotation marks omitted).

132 *Id*. (emphasis in original).

133 *Id*. at 116, 752 S.E.2d at 871.

opposed to broadly criticizing the trial court's judgment as being contrary to the law, it is sufficiently detailed to warrant consideration on the merits."[134]

Justices Powell and McClanahan dissented, arguing that the Rules require appellants to identify "the specific errors *in* the rulings below" and not merely to list the specific *rulings* below.[135] "Admittedly," they argued, "Findlay's assignment of error does identify a ruling of the trial court he believes was in error. However, his assignment of error fails to identify with any specificity what, if anything, *in* the ruling is erroneous, as required by Rule 5A:12(c)(1)."[136]

The same 5-2 division was again on display in *Commonwealth v. Herring*.[137] Herring's sole assignment of error, in the Court of Appeals, stated that "The trial court erred by failing to grant the defendant[']s motion to strike the Commonwealth's evidence as being insufficient as a matter of law to sustain his convictions for attempted murder, abduction[,] and the use of a firearm in the commission of a felony."[138] The Commonwealth argued that the assignment was insufficient because it "merely states that the judgment is contrary to the law and the evidence," in violation of Rule 5A:12(c)(1)(ii). The Court disagreed, "find[ing] the holding in *Findlay* . . . to be dispositive of this issue."[139] The assignment, it said, pointed to the specific ruling alleged to be in error, *i.e.*, the denial of Herring's motion to strike, and it "connect[ed] that alleged error to [Herring's] claim that the Commonwealth failed to prove the elements of specific convictions."[140]

Justice Powell dissented, again joined by Justice McClanahan, agreeing with the Commonwealth's argument that the assignment was "tantamount to one which merely states that the 'award is contrary to the law and the evidence'"; that it was "nebulous"; and that it attacked "the sufficiency of each charge brought against him, inviting, indeed requiring, this Court to examine the entire record for sufficient facts supporting every element of each offense." She concluded that the Court had "effectively eviscerate[d] Rules 5A:12(c)(1)(ii) and 5:17(c)(1)(iii)" and that "it is now difficult to envision an assignment of error that would be deemed insufficient under the majority's reasoning."[141]

*Findlay* and *Herring* represent the law as it stands today, but caution nevertheless is a good watchword in this area (as in others). The Court has wandered back and forth in its demand for specificity in assignments of error, and indeed it has been only a few years since most Supreme Court frequent flyers were advising their colleagues *always* to include a "because clause" in assignment of er-

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134 *Id*., 752 S.E.2d at 872.

135 287 Va. at 118, 752 S.E.2d at 873.

136 *Id*. at 119, 752 S.E.2d at 873.

137 288 Va. 59, 758 S.E.2d 225 (2014).

138 *Id.* at 67, 758 S.E.2d at 229 (alterations in opinion).

139 *Id.* at 68, 758 S.E.2d at 230.

140 *Id.* at 69, 758 S.E.2d at 230.

141 *Id.* at 81, 83, 758 S.E.2d at 237, 238.

ror.[142] *Findlay* and *Herring* also are 5-2 decisions on the point at issue; and while the Justices in the majority probably can be relied on to adhere to the analysis and conclusion adopted in those decisions, it may not be safe to make the same assumption with respect to the two dissenters, particularly in the context of writ panel decisions.[143] In addition, one of the five Justices in the *Findlay-Herring* majority, Chief Justice Kinser, has announced her intention to retire "this year," and both her replacement's identity and his or her views are unknown. In short, while *Findlay* teaches that a "'because' clause" is not necessary in an assignment of error, nevertheless inclusion of such a clause (or its equivalent, stating at least generally *why* the ruling below was erroneous) surely can do no harm. The benefits to peace of mind alone may well be worth the investment of a few extra lines of paper and ink.

### C. THE CHANGE OF LAW PROBLEM

On the other hand, however, an appeal occasionally is lost because an assignment is *too* specific and—more specifically—because counsel failed to anticipate an impending change in the law. In *John Crane, Inc. v. Bristow*,[144] an asbestos-mesothelioma case, the defendant appealed a $9 million judgment for the widow of a shipyard worker. Its Petition for Appeal, filed June 8, 2012, stated the following assignment of error:

> The trial court committed reversible error in permitting the implied warranty claim to be tried under a "substantial contributing factor" theory of causation, instead of Virginia's well-established "but for" standard for causation.

On January 10, 2013, the Supreme Court announced its decision in *Ford Motor Co. v. Boomer*,[145] stating the following causation rule:

> The exposure must have been "a" sufficient cause: if more than one party caused a sufficient exposure, each is responsible. Other sufficient causes, whether innocent or arising from negligence, do not provide a defense. Excluding other exposures from the pool of multiple sufficient causes will require competent medical testimony indicating whether the timing of exposure could possibly have caused the cancer.

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[142] *See*, *e.g.*, http://www.virginia-appeals.com/essay.aspx?id=110 (posted June 18, 2008). That essay makes the point, among others, that a petition for appeal was dismissed by an unpublished order, in June 2008, for an insufficient assignment of error—"The trial court erred in granting [the appellee's] motion for summary judgment."—that was essentially identical to the assignment of error in *Shutler v. Augusta Heath Care*, 272 Va. 87, 630 S.E.2d 313 (2006), a 5-2 decision in which the appellant prevailed and none of the Justices questioned the sufficiency of the assignment of error.

[143] Justices McClanahan and Powell rarely if ever serve on the same writ panel, but writ panel lineups are likely to change after Chief Justice Kinser's impending retirement and replacement.

[144] Record No. 120947 (unpublished).

[145] 285 Va. 141, 736 S.E.2d 724 (2013).

> Defendants with sufficient exposures that occur after the cancer has already developed cannot be held liable.
>
> . . . .
>
> Here, *for the first time*, we are called upon to rule explicitly as to the causation standard appropriate for mesothelioma. We find that in concurring causation cases, the "sufficient"-to-have-caused standard as elaborated above is the proper way to define the cause-in-fact element of proximate cause . . . .[146]

On January 30, 2013, the Court directed the parties in *Bristow* to file supplemental letter briefs addressing the effect of the *Boomer* decision. The Court granted the petition for appeal in *Bristow* on April 16, 2013, and heard oral arguments in September 2013. On October 25, 2013, however, the Court dismissed the appeal as "improvidently awarded" and as insufficient under Rule 5:17(c)(1) (which governs assignments of error).

The dismissal order recited the defendant John Crane's argument that the circuit court erred by instructing the jury to use the "'substantial contributing factor' standard . . . and that the case should be remanded for a new trial under the 'sufficient to cause' standard." The Court agreed "that 'sufficient to cause' is the proper standard for causation, as articulated in *Boomer*," but it held that the defendant's assignment of error "explicitly forecloses the relief it is seeking on appeal." Emphasizing the words "instead of" in the assignment of error, quoted above, the Court reasoned that the assignment

> presents the Court with a limited choice between two erroneous standards: the "substantial contributing factor" standard *or* the "but for" standard. In other words, the Court cannot reverse the circuit court's judgment and remand for a new trial under the "sufficient to cause" standard without expanding the assignment of error beyond its plain language.[147]

Justice McClanahan dissented, joined by Justice Goodwyn, arguing that there was no material distinction between the assignments of error in *Bristow* and *Boomer*. She quoted one of several assignments of error in *Boomer*, which stated that the circuit court erred "in instructing the jury on 'substantial contributing factor' causation, thus modifying Virginia's traditional 'but for' causation standard." The Court responded to the dissent in a footnote, stating that the assignments of error in *Boomer* "did not include constraining language similar to the 'instead of' phrase used by John Crane." The assignments of error in that case "indicated that the jury had been improperly instructed as to causation, but did not specifically identify which causation standard the circuit court should have used . . . ." In other words, according to the Court, the assignments of

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146 *Id.* at 158, 736 S.E.2d at 732 (emphasis added).

147 Order, entered Oct. 25, 2013 (copy on file with the author).

error in *Boomer* were adequate because they "laid a finger on the error" by stating that what the circuit court did was wrong, *without* articulating what the circuit court *should have done*. The problems with the assignment of error in *Bristow* were (1) that it was too specific—it did state what the circuit court should have done (that it should have followed "Virginia's well-established 'but for' standard for causation") and (2) that the defendant's counsel failed to anticipate what the Court would do, several months later, in *Boomer*, *a case of first impression*.

John Crane filed a petition for rehearing (copy on file with the author) and a motion for leave to amend its assignment of error. Both were denied.

### D. THE ALTERNATIVE GROUNDS FOR DECISION TRAP

If a trial court rests its decision on multiple grounds, each of which is sufficient to sustain the judgment, a petition for appeal must assign error to *all* of those grounds or it is doomed to fail. Ignoring one of the alternative grounds is a waiver of any challenge to that ground, and it becomes the law of the case. That rule was on display recently in *Ferguson v. Stokes*.[148] The Court relied primarily on *Manchester Oaks Homeowners Ass'n v. Batt*, which held it "well-settled that a party who challenges the ruling of a lower court must on appeal assign error to each articulated basis for that ruling . . . . Otherwise, an appellant could avoid the adverse effect of a separate and independent basis for the judgment by ignoring it and leaving it unchallenged."[149] The *Ferguson* Court did examine the unappealed ruling to determine whether it was a legally sufficient basis for the decision below. It did not, of course, "'examine the underlying merits of the alternative holding—for that is the very thing being waived by the appellant as a result of his failure to [assign error to it] on appeal.'" It considered only whether "'the alternative holding is indeed one that (when properly applied to the facts of a given case) would legally constitute a free-standing basis in support of the [lower] court's decision.'"[150]

### E. INACCURATE DESCRIPTION OF THE RULING BELOW

In *Heinrich Schepers GMBH & CO., KG v. Whitaker*,[151] the appellant assigned as error that "[t]he trial court abused its discretion in denying Heinrich's Motion to Strike the Jury Demand after remand, since Whitaker had previously agreed to waive his jury right in exchange for Heinrich's agreement to forego its defense on the issue of liability."[152] The problem with that assignment, according to the Court, was that "[t]he circuit court did not rule, contrary to Heinrich's

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148 287 Va. 446, 452, 756 S.E.2d 455, 458 (2014).

149 284 Va. 409, 421-22, 732 S.E.2d 690, 698 (2012) (citation and quotation marks omitted).

150 *Ferguson*, 287 Va. at 452-53, 756 S.E.2d at 458 (quoting *Manchester Oaks*, 284 Va. at 422, 732 S.E.2d at 698).

151 280 Va. 507, 702 S.E.2d 573 (2010).

152 *Id*. at 514, 702 S.E.2d at 576.

assignment of error, that the right to a jury trial, once waived, could only be reinstated upon the circuit court's exercise of discretion nor did it find that Whitaker had previously agreed to waive his right to a jury trial in exchange for Heinrich's agreement to forego its defense on the issue of liability." Because the assignment of error did not "reflect the circuit court's ruling," the assignment was "barred by Rule 5:17(c) that requires an appellant to assign error to the specific ruling of the circuit court" and therefore "lack[ed] legal efficacy."[153]

Interestingly enough, the Court nevertheless went on to address and uphold "the circuit court's actual legal ruling upon remand, which [was] unchallenged," which was that the plaintiff's jury trial waiver was limited to the first trial.[154] The lesson of the *Heinrich* decision (and the cases that it cited) nevertheless is clear: be exceedingly careful to identify accurately "the specific ruling of the circuit court" that is challenged in every assignment of error.

### F. MODIFIED ASSIGNMENTS OF ERROR

Although it is not stated explicitly in the Rules, it is widely believed that the Supreme Court may grant an appellant (or cross-appellant) leave to amend an assignment of error.[155] The fact that it has the power to allow amendments does not mean that it is likely to do so, however. The Court that dismissed the petition for appeal *and* denied a motion for leave to amend an assignment of error in *John Crane v. Bristow* is not likely to make liberal use of that power in future cases, or at least not when an amendment would make any substantive change to an assignment. Leave to amend to correct typographical errors may be granted more liberally; but of course the safer route is to cite-check and proofread petitions for appeal meticulously so as to avoid any need to amend at all.

Reluctance to allow amendments of assignments of error flows naturally from the purposes that the Court has articulated for Virginia's long-standing requirements of binding assignments of error. In *Yeatts v. Murray*, the Court stated that the purpose of assignments of error

> is to point out the errors with reasonable certainty in order to direct this court and opposing counsel to the points on which appellant intends to ask a reversal of the judgment, and to limit discussion to these points. Without such assignments, appellee would be unable to

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153 *Id*., 702 S.E.2d at 576-77 (citations omitted).

154 *Id*., 702 S.E.2d at 577; *see id*. at 515-16, 702 S.E.2d at 577.

155 The Court of Appeals addressed a closely related issue at length in *Whitt v. Commonwealth*, 61 Va. App. 637, 646-59, 739 S.E.2d 254, 258-65 (2013) (*en banc*), a 7-4 decision, and held that it has the power to grant motions for leave to amend timely filed petitions for appeal after the filing deadline. It commented, in part, that "litigants may not reword assignments of error when doing so would enlarge the scope of the issue initially presented or allow a litigant to smuggle in additional issues" (citing Hamilton Development Co. v. Broad Rock Club, 248 Va. 40, 445 S.E.2d 140 (1994)) but that "[a] court on appeal . . . ordinarily should, upon a motion, permit a litigant to correct formal defects and remedy errors of oversight in the assignment of error, particularly when the requested amendment renders the revised assignment of error more precise and is consistent with arguments advanced at trial." *Id*. at 659, 739 S.E.2d at 265.

> prepare an effective brief in opposition to the granting of an appeal, to determine the material portions of the record to designate for printing, to assure himself of the correctness of the record while it is in the clerk's office, or to file, in civil cases, assignments of cross-error.[156]

Allowing substantive amendments to granted assignments of error obviously would frustrate at least some of those stated purposes.

Absent leave to amend, counsel should *never* revise an assignment of error after a petition for appeal is filed. To do so is to risk either dismissal of the appeal or an order striking the assignments that were revised without permission.[157] In *Landrum* the appellees moved to strike four of the five assignments of error in the appellant's Opening Brief, and the appellant responded by moving for leave to file a corrected Opening Brief. "Finding that the appellant made substantive changes to Assignments of Error 2 through 5, compared to the assignments of error contained in the petition for appeal," the Court granted the motion to strike and denied the appellant's motion to file a corrected Opening Brief.[158]

Some earlier decisions have rebuked appellants who modified assignments of error in their briefs but proceeded to decide the cases based on the original assignments of error on which the appeals were granted.[159] Whether *Landrum* exemplifies a sea change in the Court's approach to "impermissible"[160] changes in the wording of assignments of error is unclear; but why take that chance?

### G. ASSIGNMENTS OF ERROR IN APPEALS FROM THE COURT OF APPEALS TO THE SUPREME COURT

Rule 5:17(c)(1)(ii) provides that "[w]hen appeal is taken from a judgment of the Court of Appeals, only assignments of error relating to assignments of error presented in, and to actions taken by, the Court of Appeals may be included in the petition for appeal to this Court"; and Rule 5:17(c)(1)(iii) provides in part that an assignment of error "that does not address the findings or rulings in the trial court or *other tribunal from which an appeal is taken* . . . is not sufficient" and that if the assignments of error are insufficient, the petition for appeal *shall*

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156 249 Va. 285, 290, 455 S.E.2d 18, 21 (1995) (quoting Harlow v. Commonwealth, 195 Va. 269, 271-72, 77 S.E.2d 851, 853 (1953)),

157 *See*, *e.g.*, Landrum v. Chippenham and Johnston-Willis Med. Ctr., Record No. 101102 (Nov. 10, 2010) (copy on file with the author).

158 That was neither the beginning nor the end of the problems that apparently were attributable to the blunders of the appellant's out-of-state attorney in that case. *See* Landrum v. Chippenham & Johnston-Willis Hospitals, Inc., 282 Va. 346, 717 S.E.2d 134 (2011).

159 *E.g.*, White v. Commonwealth, 267 Va. 96, 103, 591 S.E.2d 662, 666 (2004) ("The improper modification of an assignment of error . . . will not prevent the appellant from arguing and having his appeal considered on the issue actually asserted in the trial court and for which an appeal was granted, provided that he has adequately briefed that issue"); Hamilton Development Co. v. Broad Rock Club, 248 Va. 40, 43-45, 445 S.E.2d 140, 142-43 (1994).

160 White v. Commonwealth, 267 Va. at 103, 591 S.E.2d at 666.

be dismissed. (Emphases added.) In *Davis v. Commonwealth*,[161] the Court dismissed an appeal for failure to observe those Rules. In the Supreme Court, Davis "assign[ed] as error the trial court's acceptance of his guilty plea," as he had done in the Court of Appeals, "but [did] not assign error to the Court of Appeals' holding that his guilty plea waived non-jurisdictional defects."[162] "Accordingly," because Davis' sole assignment of error in his appeal to the Supreme Court did not address any finding or ruling of the Court of Appeals, the Supreme Court dismissed the appeal.[163]

The Court has since reversed or at least modified the *Davis* holding, by amending Rule 5:17(c)(1)(iii) to add the following:

> An assignment of error in an appeal from the Court of Appeals to the Supreme Court which recites that "the trial court erred" and specifies the errors in the trial court, will be sufficient so long as the Court of Appeals ruled upon the specific merits of the alleged trial court error and the error assigned in this Court is identical to that assigned in the Court of Appeals.

That amendment may not have saved Davis' appeal, even if it had been in place at that time, because he did not assign error to what appears to have been an adequate and independent ground for the Court of Appeals' decision. But at least it removes a significant trap for the unwary, occasional appellant practitioner—who may be representing an indigent criminal defendant by court appointment—and that seems a clear improvement in the Rules.

### H. THE SPECIAL RULE FOR APPEALS OF JUDGMENTS THAT ARE VOID AB INITIO

In *Amin v. County of Henrico*,[164] a 6-1 majority of the Supreme Court held, reversing the Court of Appeals, that an argument that a judgment is void ab initio may be considered on appeal even if that deficiency is not the subject of an assignment of error. The Court held "that an order that is void ab initio 'may be impeached directly or collaterally by all persons, anywhere, at any time, or in any manner.'"[165] "[A]n order which is void ab initio is a 'nullity,' and is without effect from the moment it comes into existence."[166]

The Court also addressed the question whether the Court of Appeals ever acquired appellate jurisdiction, a necessary prerequisite to its consideration of the claim that the judgment was void ab initio. "If Amin's petition for appeal had been untimely, had failed to include any assignments of error, or if the only

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[161] 282 Va. 339, 717 S.E.2d 796 (2011).

[162] *Id*.

[163] *Id*. at 340, 717 S.E.2d at 797.

[164] 286 Va. 231, 749 S.E.2d 169 (2013).

[165] *Id*. at 235, 749 S.E.2d at 171 (quoting Singh v. Mooney, 261 Va. 48, 52, 541 S.E.2d 549, 551 (2001)).

[166] 286 Va. at 235-36, 749 S.E.2d at 171 (quoting Kelley v. Stamos, 285 Va. 68, 75, 737 S.E.2d 218, 221 (2013)).

assignment of error had been insufficient to comply with Rule 5A:12, the Court of Appeals would have lacked active jurisdiction and would have been required to dismiss the petition for appeal."[167] In that case, however, the petition for appeal included one proper assignment of error, all necessary parties were present, and the appeal was timely filed and granted. "Consequently, the Court of Appeals had acquired active jurisdiction over Amin's appeal," and "it was required to review the merits of Amin's argument that the conviction order he was appealing was void ab initio."[168]

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[167] 286 Va. at 236, 749 S.E.2d at 171.

[168] *Id*., 749 S.E.2d at 171.