

In The
Supreme Court of Virginia

Record No. _____

JAMES MEDEIROS, MAURICIO TOVAR,
BLUE WING LLC, and ROBERT PIERCE,

Petitioners – Appellants,

v.

VIRGINIA DEPARTMENT OF WILDLIFE RESOURCES,

Respondent – Appellee.

Court of Appeals of Virginia
Record No. 1463-22-2

PETITION FOR APPEAL

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NATURE OF THE CASE

Appellants¹ are a group of landowners from across the Commonwealth whose properties have been overrun by hunters and hunting dogs as a result of Virginia’s “Right to Retrieve Law,” Va. Code § 18.2-136. This law, enforcement of which is the responsibility of the Virginia Department of Wildlife Resources,² grants physical access to “fox hunters and coon hunters” to “follow their dogs on prohibited lands” and “hunters of all other game” to “go upon prohibited lands to retrieve their dogs.” *Id.*

Landowners filed a petition for inverse condemnation.

Landowners sought compensation for the loss of their right of exclusive possession of their properties against hunters, the frequent trespasses, and attendant damages caused by this law through their filing of a petition for inverse condemnation in the Henrico Circuit Court on 12 April 2022, which asserted claims for the following relief: (1) a declaratory judgment that the Right to Retrieve Law effects an uncompensated taking for public use within the meaning of the U.S. and

¹ Hereinafter “Landowners.”

² Hereinafter “the Department.”

Virginia Constitutions, and (2) the impaneling of a jury to set the measure of just compensation owed to Landowners.³ R. 22–25.

The Department demurred.

The Department swiftly moved to dismiss through a demurrer filed on 16 May 2022, R. 40–55, which asserted the following arguments: (1) the Right to Retrieve Law is a decriminalization rather than a grant of affirmative access to hunters, and (2) the Department is not responsible for the intrusions on Landowners’ properties. R. 45, 47–51. The motion was fully briefed, including Landowners’ Response in Opposition dated 17 June 2022 and the Department’s Reply dated 8 July 2022. The parties did not stipulate to the inclusion of any evidence beyond the pleadings, nor was any offered through supplemental filings, testimony, or any evidentiary proceeding. The Henrico Circuit Court heard oral arguments on the demurrer on 19 August 2022. There being no testimony to be taken, nor evidence to be introduced, neither party requested a court reporter and no transcript was created. The Circuit Court’s final order reflected this by recording only that the court received “the arguments made at the hearing and in the briefs submitted.” R. 146.

³ Landowners also requested reasonable attorneys’ fees and costs. R. 25.

The Henrico Circuit Court sustained the Department’s demurrer, interpreting the Right to Retrieve Law as a decriminalization.

On 25 August 2022, the Circuit Court entered a written order sustaining the Department’s demurrer on the decriminalization ground.⁴

That order reads, in its entirety, as follows:

On August 19, 2022, the Department of Wildlife Resources (“DWR”) and the named plaintiffs appeared by counsel and were heard on DWR’s Demurrer. The Court has considered the arguments made at the hearing and in the briefs submitted. As it appears proper to do so, the Court finds that

WHEREFORE Va. Code § 18.2-136 only creates an exception to criminal trespass and does not modify common law trespass and;

WHEREFORE plaintiffs have failed to state a claim upon which relief can be granted;

It is ORDERED that DWR’s Demurrer shall be sustained and the Petition shall be dismissed with prejudice.

The clerk is directed to send a certified copy of this order to all counsel of record.

R. 146.

Landowners timely noticed and perfected their appeal to the Virginia Court of Appeals, assigning error to the Circuit Court’s

⁴ The Court of Appeals did not interpret the Circuit Court order thusly—or at all.

interpretation of the Right to Retrieve Law as a mere decriminalization—the ground on which it found, pursuant to its written order, that Landowners “failed to state a claim.” R. 146.

Landowners filed their opening brief⁵ in the Court of Appeals on 28 December 2022.⁶ In the Department’s Appellee Brief, filed 17 February 2023, it argued⁷ that the Circuit Court order’s language identifying that Landowners “failed to state a claim upon which relief can be granted” constituted a second, independent ground for the court’s ruling in addition to the decriminalization interpretation of the Right to Retrieve Law. Br. of Appellee 13–19. Since Landowners did not assign error to this ground, the Department argued, the appeal was procedurally barred. *Id.* at 13.

Landowners replied on 3 March 2023, arguing⁸ that the best reading of the Circuit Court’s unambiguous order was that it found that Landowners “failed to state a claim” *because* “Va. Code § 18.2-136 only

⁵ Landowners first filed their opening brief on 21 December 2022, but re-filed on 28 December 2022 to fix an electronic formatting error.

⁶ The Virginia Property Rights Alliance filed a brief amicus curiae in support of Landowners on 5 January 2022.

⁷ In relevant part.

⁸ In relevant part.

creates an exception to criminal trespass” and thus the Circuit Court sustained the Department’s demurrer on this ground alone. Reply Br. of Appellants 2–3. However, Landowners asked that, in the event that the Court of Appeals were to adopt the Department’s interpretation of the order below, the court would allow Landowners leave to amend their assignment of error to include this second ground. *Id.* at 3.

The Court of Appeals affirmed the circuit court order without reaching the merits of Landowners’ appeal.

On 11 July 2023, the Court of Appeals entered a memorandum opinion affirming the Circuit Court’s order below without reaching the merits of Landowners’ appeal:

The trial court sustained the demurrer after considering arguments raised in the briefs and at the hearing on the demurrer. The record does not include a transcript or a written statement of facts of the demurrer hearing. Without a record of the arguments on which the trial court relied in reaching its decision, we cannot engage in a meaningful review of its ruling. Accordingly, the landowners’ arguments are waived and the trial court’s judgment is affirmed. After examining the briefs and record in this case, the panel unanimously holds that oral argument is unnecessary because “the appeal is wholly without merit.” Code § 17.1-403(ii)(a); Rule 5A:27(a).

Medeiros v. VDWR, No. 1463-22-2, slip op. at *1–2 (Va. App. July 11, 2023) (unpublished).

The Court of Appeals acknowledged the parties' dispute as to whether the Circuit Court ruled on one or both of the arguments in the Department's demurrer. *Id.* at *4. However, instead of interpreting the order as being based on either one or both grounds, the Court of Appeals decided that it *could not decide* without a transcript. *Id.* In support of this, it quoted the following language from the Circuit Court order: The Court has "*considered the arguments made at the hearing* and in the briefs submitted." *Id.* at *3–4. (emphasis added by Court of Appeals). The Court of Appeals reasoned that, because it could not determine what arguments were preserved, waived, or raised at the oral argument hearing without a transcript or statement of facts, it could not reach the merits of Landowners' appeal and thus had to affirm the Circuit Court order. *Id.* at *5.

Landowners petitioned for rehearing.

Landowners timely petitioned the Court of Appeals for a rehearing. In their petition, they presented binding statutory and judicial authorities establishing that (1) a circuit court speaks only through its written orders, (2) only arguments raised in a written demurrer can be considered by a circuit court, and (3) no facts or evidence beyond the

pleadings was presented to the circuit court. Appellants' Pet. for Reh'g 4–13. Therefore, argued Landowners, the Court of Appeals should not have demanded a transcript of oral arguments that could not have been relied upon in either determining which arguments were made below or what the written circuit court order said. *Id.* at 4–15. Likewise, argued Landowners, a statement of facts would have been superfluous to the pleadings. *Id.* at 1–2, 9–13.

The Court of Appeals denied Landowners' petition for rehearing without opinion.

The Court of Appeals denied Landowners' petition for rehearing without opinion on 15 August 2023. Order, *Medeiros v. VDWR*, No. 1463-22-2 (Va. Ct. App. Aug. 15, 2023). Landowners timely noticed their appeal to this Court. Notice of Appeal, *Medeiros v. VDWR*, No. 1463-22-2 (Va. Ct. App. Aug. 21, 2023).

This Court granted Landowners' unopposed motion for an extension of time to file this petition for appeal until 25 September 2023. Order, *Medeiros v. VDWR*, Va. Ct. App. No. 1463-22-2 (Va. Aug. 28, 2023). This timely petition for appeal follows.

STATEMENT OF FACTS

Since (1) the Department filed a demurrer prior to the inception of discovery, (2) the parties did not stipulate to the admission and consideration of any additional evidence, and (3) no evidentiary hearing was held, the only facts before the Henrico Circuit Court, the Court of Appeals, and this Court, are those contained in Landowners' inverse condemnation petition. In that petition, the Landowners set out that they own properties in the Commonwealth of Virginia, that the Department is responsible for the enforcement of the Right to Retrieve Law, that hunters and their dogs have repeatedly entered their properties without Landowners' permission under the authority of the Right to Retrieve Law, that Landowners asked the Director of the Department to initiate proceedings for the payment of compensation, that the Director refused, and that Landowners are entitled to compensation as a matter of law under the U.S. Constitution's Fifth and Fourteenth Amendments and Article I, § 11, of the Virginia Constitution because their right to exclude hunters and their dogs from their private properties, which is a fundamental attribute of property ownership, has been taken for the public use of hunters who chase game with their dogs. R. 1–25.

ASSIGNMENTS OF ERROR

- 1. The Court of Appeals erred by ruling that a transcript or a written statement of facts from the non-evidentiary oral argument hearing on the Department's demurrer was indispensable to a determination of Landowners' appeal of the Circuit Court's written order sustaining the demurrer.**

The Court of Appeals ruled that a transcript or written statement of facts from the oral argument hearing on the Department's demurrer was indispensable to a determination of Landowners' assignment of error below, because otherwise the lower court's ruling was supposedly unintelligible. Slip op. at *4. This ruling was essential to its disposition of the case in affirming the Circuit Court's order and refusing to reach the merits of Landowners' appeal. *Id.* at *4–5. The Court of Appeals also based this ruling on its inability to know whether Landowners committed waiver or approbation and reprobation by repudiating a position they took during oral argument. *Id.* at *5. The ruling was error because trial courts speak only through their written orders, which are presumed to accurately reflect what transpired. The written order in this case was unambiguous and the transcript of oral arguments would have been superfluous rather than indispensable with respect to any argument of waiver or approbation and reprobation.

2. The Court of Appeals erred by failing to resolve or attempt a resolution of the perceived ambiguity in the Circuit Court order Landowners appealed from.

The Court of Appeals affirmed the Circuit Court's order after ruling that it could not determine, without a transcript, whether the trial order sustained the Department's demurrer on the single ground to which Landowners assigned error or on an additional, unspecified ground as well. Slip op. at *4. This was error. Courts are required to attempt to resolve the ambiguity of a written instrument by construing its language and applying canons of construction where applicable before resorting to extrinsic evidence. First, the order unambiguously ruled on only one ground—the one to which Landowners assigned error. Second, any ambiguity in the order should have been resolved by careful reading and the application of canons of construction, such as *expressio unius*, and after such application it would have been clear to the court that the order ruled only on one ground. Third, if the order was irremediably ambiguous, the transcript of oral arguments would have been of no assistance to the Court of Appeals and the court therefore should have remanded for the Circuit Court to clarify its ruling rather than affirm an irremediably ambiguous order. Landowners preserved these arguments

to the extent necessary below. Reply Br. of Appellants 2–5; Appellants’ Pet. for Reh’g 7–9; Appellants’ Assignment of Error 2–3.

3. The Court of Appeals erred by failing to grant Landowners’ alternative request for leave to amend their assignments of error in light of the ambiguity that the court found in the Circuit Court’s order.

After the Department’s response to Landowners’ opening brief asserted that the Circuit Court had sustained the demurrer on both grounds asserted by the Department below, Landowners requested in their reply that, if the Court of Appeals agreed with the Department’s interpretation, it grant Landowners leave to amend their assignments of error to reflect this new interpretation of the Circuit Court order. The Court of Appeals ignored this request, despite finding the order ambiguous. Denial of a request to amend the errors an appellant has assigned to a circuit court order that the Court of Appeals has found ambiguous is error. Landowners preserved these arguments to the extent necessary below. Reply Br. of Appellants 3–5; Appellants’ Pet. for Reh’g 3, 13–15.

SUMMARY OF ARGUMENT

Landowners sought relief from a Virginia statute that they claim takes their properties without just compensation for a public use as a

matter of law. The Henrico Circuit Court sustained the Department's demurrer on the pleadings as a matter of law. Yet, the Court of Appeals refused to reach the merits of Landowners' appeal from the trial court's written order on the grounds that it could neither interpret the order nor know whether arguments were preserved or waived without a transcript of proceedings or fact-statement in lieu. Landowners are not alone in having their case dismissed recently on these grounds. In fact, the Court of Appeals has done this to exponentially more appellants in the last two years than it has in the preceding 35. *See infra* Part IV. Landowners now ask this Court to take up their appeal to allow them to press their own claims and correct the Court of Appeals' errant practice, exemplified by Landowners' case, of holding appellate issues waived in cases where a transcript or fact-statement is not even relevant, much less indispensable.

Landowners' right to proceed to the merits of their appeal renders the Courts of Appeals' errors quite clear. First, the Court of Appeals erred in ruling that a transcript or fact-statement was indispensable since (1) circuit courts speak only through their written orders, (2) the Circuit Court order here was based entirely on the pleadings, (3) parties are

bound by the arguments they advance in their written demurrer filings, and (4) courts will not hear evidence beyond the pleadings unless stipulated to by the parties. *See infra* Part I. Second, the Court of Appeals erred in failing to interpret the trial order since (1) it was unambiguous, and (2) the court should have resolved any ambiguity with textual construction before demanding extrinsic evidence. *See infra* Part II. Third, the Court of Appeals erred in refusing to allow Landowners to amend the errors they assigned to a circuit court order that the court had found to be ambiguous. *See infra* Part III. Finally, this Court should grant Landowners' petition because this is an issue of great importance as the Court of Appeals' increased jurisdiction over civil appeals has coincided with a disproportionate increase in the number of cases it is dismissing on the erroneous grounds relied on in Landowners' case.

ARGUMENT

- I. **Assignment of Error 1: The Court of Appeals erred in ruling that an oral argument transcript or statement of facts was indispensable to Landowners' appeal.**

Standard of Review

Because Landowners assign error to the Court of Appeals' conclusions of law concerning the indispensability of a transcript or

statement of facts, this Court will apply a *de novo* standard of review. See *Nationwide Mutual Fire Ins. Co. v. Erie Ins. Exchange*, 297 Va. 455, 457 (2019) (“we review all conclusions of law *de novo*”) (quotations and citation omitted).

Discussion

The Court of Appeals erred when it ruled that an argument transcript was indispensable to Landowners’ appeal from a written order sustaining a demurrer. Slip op. at *4–5. In the Commonwealth, “trial courts speak only through their written orders,” *Temple v. Mary Washington Hosp., Inc.*, 288 Va. 134, 141 (2014), and are only permitted to consider arguments first raised in a demurrant’s written motion. Va. Code § 8.01-273. Thus, the pleadings and written order formed a complete and sufficient record for review. This is particularly so, as here, where neither party argued that the order did not “reflect accurately what transpired.” *Temple*, 288 Va. at 141.

A. The Court of Appeals could not have relied on judicial statements from the oral argument if it had wanted to.

The Court of Appeals’ first error lies in its insistence that it was incapable of determining without an oral-argument transcript “whether [the Circuit Court’s] second ruling [that Landowners failed to state a

claim] flows from the first [that the Right to Retrieve Law only decriminalizes trespassing], or whether the two rulings constitute independent bases for the trial court’s decision.” Slip op. at *4. First, the best reading of the order is that Landowners failed to state a claim *because* the Right to Retrieve Law merely decriminalizes trespass. Second, even if the Court of Appeals correctly concluded that the order contained a second, unspecified ground for sustaining the Department’s demurrer, it would not have been permitted to use the transcript to supplement the written order to define that ground. Instead, it should have looked to the pleadings, which set out the two grounds on which the Department moved for a demurrer.

1. Oral statements from the bench cannot alter a circuit court’s final written order.

The Court of Appeals would have erred had it credited arguments made by counsel or statements from the bench during an oral argument hearing to supplement, alter, qualify, or replace the written language selected by the Henrico Circuit Court in its written order. As “[t]his Court

has stated on numerous occasions ... trial courts speak only through their written orders.” *Temple*, 288 Va. at 141 (collecting cases).

In *Waterfront Marine Construction, Inc. v. N. End 49ers Sandbridge Bulkhead Groups A, B & C*, 251 Va. 417 (1996), this Court was called on to consider whether a circuit court had ruled in a contract matter that certain disputes were arbitrable. To answer this question, one party attempted to rely on oral statements made from the bench during a hearing for the proposition that the court “decide[d] the issue of arbitrability” of the contract dispute, *id.* at 427 & n.2, where the judge stated that “the primary finding that the court shall find” is that “the parties have agreed to arbitrate anything that relates to the contract.” Brief of Appellee, 1995 WL 17223546, at *6 (Va. Dec. 22, 1995) (quoting transcript). The final written order, however, *did not address* whether the dispute was arbitrable. *Waterfront Marine*, 251 Va. at 427 & n.2. Repeating, as it often has, that “a court speaks through its orders” and that those orders are presumed to “accurately reflect what transpired,” *id.* at 427 n.2, this Court set aside the oral statements of the trial judge and relied only on the written order to determine that the lower court erred by failing to decide the question of arbitrability. *Id.*

In *Stamper v. Commonwealth*, 220 Va. 260 (1979), this Court likewise favored a written trial court order over a transcript-based argument that a criminal defendant was not provided an opportunity for allocution. While “the transcript fail[ed] to show that the right of allocution was extended ... by the trial court,” *id.* at 280, this Court highlighted language from the trial court’s final order, which noted that the opportunity for allocution was indeed extended. *Id.* In reaching the conclusion that the order should control over the transcript, this Court relied on the presumption that a written order “as the final pronouncement on the subject, rather than a transcript that may be flawed by omissions, accurately reflects what transpired.” *Id.* at 280–81. “In the absence of objection,” reasoned this Court, “we deem the order of the trial court to contain an accurate statement of what transpired.” *Id.* at 280. If counsel in *Stamper* had wished to challenge the accuracy of the court’s order, they “had 21 days after its entry ... to have it corrected.” *Id.*

Here, neither party asserted that the Circuit Court’s order contained an inaccuracy or failed to reflect a waived argument or new evidence. Thus, the Court of Appeals erred by speculating, on behalf of the parties, that additional evidence, arguments, or information from the

demurrer hearing should be considered to supplement or alter the Circuit Court's final written order. "It is not the role of the appellate courts to look beyond the express language and effect of a trial court's orders to glean some unexpressed intention." *Rose v. Commonwealth*, 265 Va. 430, 435 n.2 (2003). Indeed, "[t]he maxim that 'trial courts speak only through their orders and that such orders are presumed to reflect accurately what transpired' is the well-established law of this Commonwealth." *Id.* (citation omitted). This Court has consistently relied on the express language of trial court orders, even when transcripts reveal that judges "agreed" to dispositions contrary to or different from what is ultimately recorded in the final order. *See McMillion v. Dryvit Sys., Inc.*, 262 Va. 463, 469 (2001) (judge agreed from bench to filing of amended motion only to certain defenses, but order contained no qualification as to defenses and this Court held order controlled); *Austin v. Consolidation Coal Co.*, 256 Va. 78, 81 (1998) (correcting federal court on certified question that trial court judges' statements from the bench do not inform final written orders or facts found); *Town of Front Royal v. Front Royal & Warren Cnty. Indus. Park Corp.*, 248 Va. 581, 581 (1994) (refusing to consider

transcript-based arguments from opposing parties as to the meaning of a trial court's written final order).

Thus, the Court of Appeals would not have been allowed to rely on the oral argument transcript to decide what the lower court decided even if it had existed and been provided.

2. A written motion for demurrer limits the grounds on which a circuit court may rule.

A demurrer does not call on a circuit court to “evaluate and decide the merits of a claim” but “only tests the sufficiency of factual allegations” set out in the pleadings “to determine whether the motion for judgment states a cause of action.” *Fun v. VMI*, 245 Va. 249, 252 (1993). Because of the limited task this entails, a court may only rely on “substantive allegations of the pleading attacked [together with] accompanying exhibit[s] mentioned in the pleading.” *Flippo v. F & L Land Co.*, 241 Va. 15, 17 (1991). This is not only a requirement of precedent, but of the Virginia Code, which mandates as follows:

All demurrers shall be in writing and shall state specifically the grounds on which the demurrant concludes that the pleading is insufficient at law. ***No grounds other than those stated specifically in the demurrer shall be considered by the court.***

Va. Code § 8.01-273 (emphasis added). Further, a demurrant “admit[s]

as true all allegations of material facts which were well pleaded,” with the court drawing all reasonable inferences in favor of the pleading. *Chippenham Manor, Inc. v. Dervishian*, 214 Va. 448, 450 (1974). While a court “may consider documents not mentioned in the challenged pleading,” this is limited to circumstances under which “the parties so stipulate.” *Flippo*, 241 Va. at 15, 17. Neither party asserted any such stipulation. Thus, the only documents relevant to the Court of Appeals’ review were the pleadings, exhibits attached thereto, and the Henrico Circuit Court’s written order sustaining the demurrer. All were provided.

B. Concerns about waiver, or approbation and reprobation, are not a sufficient basis for requiring a transcript or statement of facts in all appeals from demurrers.

The Court of Appeals based its ruling that a transcript was required in part on its inability to discern whether either party had engaged in approbation and reprobation or otherwise waived any argument in the Circuit Court. But this argument was not raised by either party in this litigation. *Cf. Baumann v. Capozio*, 269 Va. 356, 360 (2005) (party relying on waiver has the burden to prove it). Further, if the concern over parties taking inconsistent positions at different stages of litigation were a sufficient ground for demanding an oral-argument transcript, then the

absence of a transcript would be a bar to every appeal in which a hearing occurred below. As a matter of law, however, transcripts or statements of fact are not required in all cases.

The absence of a transcript or statement of facts does not raise a bar to appeal. *Browning v. Browning*, 68 Va. App. 19, 30 (2017). Transcripts are only required when the facts they provide are “indispensable.” *Smith v. Commonwealth*, 281 Va. 464, 468–69 (2011). This is most common with factual hearings and trials where oral objections and evidentiary issues must be preserved for appeal, *e.g.* *Lawrence v. Nelson*, 200 Va. 597, 598–99 (1959) (appeal dismissed for failure to make sufficient record of evidence offered at jury trial); *Dixon v. Dixon*, 71 Va. App. 709, 716 (2020) (partial transcript of evidentiary hearing insufficient record for court to rule on “breach of matrimonial duty” question); *Turner v. Commonwealth*, 2 Va. App. 96, 99–100 (1986) (missing transcript included testimony relied on by trial court judge); *Anderson v. Commonwealth*, 13 Va. App. 506, 509 (1992) (statement of facts indispensable to determining whether offense committed in

presence of officer),⁹ or when the basis for an appellant’s assignment of error appears only in the missing transcript, *e.g. Shiembob v. Shiembob*, 55 Va. App. 234, 246 (2009) (“[T]he only basis for [appellant’s] argument [concerning attorneys’ fees] is contained in the transcript of the December 12, 2008 hearing that was not timely filed.”). It is especially important in cases where the standard of review is an abuse of discretion. *See Woodfin v. Commonwealth*, 236 Va. 89, 97 (1988) (appeal dismissed for failure to make sufficient record to prove lower court abused discretion in refusing to grant motion to withdraw counsel).

Here, where the only facts relevant to the Department’s demurrer, and the Circuit Court’s ruling on that motion, are contained in the pleadings, a transcript of oral arguments was anything but “indispensable” for the Court of Appeals to determine whether the demurrer should have been sustained as a matter of law under a *de novo* standard of review. Appellants’ Opening Br. 4–5.

Contrary to the Court of Appeals’ opinion, “cases may often be

⁹ *See also Ellis v. Sussex Dep’t of Soc. Servs.*, No. 0397-21-2, 2022 WL 1215509, at *4 (Va. Ct. App. Apr. 26, 2022) (trial transcript necessary for court of appeals to rule on sufficiency of evidence concerning termination of parental rights) (unpublished).

decided without the filing of a transcript.” *Smith*, 281 Va. at 468–69. Virginia’s appellate courts have a long tradition of ruling on the merits of appeals that lack transcripts or statements of fact when the pleadings are sufficient to present, preserve, and limit the issues on appeal, as they do here. *See, e.g., Old Dominion Iron & Steel Corp. v. Virginia Elec. & Power Co.*, 215 Va. 658, 659–60 (1975) (pleadings sufficient for review of order sustaining demurrer and motion for summary judgment); *Smyth v. Midgett*, 199 Va. 727, 729 (1958) (pleadings and attached exhibits “sufficient for the Court to pass on the questions of law raised”); *Bay v. Commonwealth*, 60 Va. App. 520, 529–30 (2012) (transcript from trial not indispensable where appellant moved for change of venue under theory all veniremen were biased *per se*); *Jenkins v. Winchester Dep’t of Social Services*, 12 Va. App. 1178, 1184–86 (1991) (ruling on merits of appeal concerning hearsay objection without the trial transcript). Thus, “[i]f the record on appeal is sufficient in the absence of the transcript to determine the merits of the appellant’s allegations, [this Court is] free to proceed to hear the case.” *Turner*, 2 Va. App. at 99. Here, the only relevant arguments and facts are contained in the pleadings that were already provided to the Court of Appeals.

As noted above, the Court of Appeals’ ruling also concluded that a transcript was necessary because otherwise the Court would not know whether Landowners “repudiate[d] a position that they may have taken in the trial court,” citing the requirement that arguments on appeal must have been raised properly in the trial court and the general prohibition on a party’s taking inconsistent litigation positions. Slip op. at *5. But the parties’ trial-court briefing, which is in the appellate record, provides an adequate basis for it to determine whether such arguments were first properly ventilated in the trial court. As for the concern about possible shifts in argument, “a litigant who takes inconsistent positions must also invite error and take advantage of the situation created by the inconsistency in order to approbate and reprobate.” *Matthews v. Matthews*, 277 Va. 522, 528 (2009). There is no allegation of this. Moreover, Landowners could not have gained anything from the Circuit Court, which sustained the Department’s demurrer and afforded them no relief. Moreover, given that it is possible for a party in *any* hearing to take inconsistent positions, the Court of Appeals’ ruling effectively imposes a mandatory requirement for transcripts in all appeals in which there has been any hearing, a result in conflict with this Court’s

conclusion that a transcript is not always necessary. *See Smith*, 281 Va. at 468 (“[T]here is no requirement [under 5A:8] that a transcript be filed in every appeal.”).

II. Assignment of Error 2: The Court of Appeals erred by failing to properly construe the unambiguous written order of the Circuit Court.

Standard of Review

Because Landowners assign error to the Court of Appeals’ conclusion of law as to the ambiguity and interpretation of a written instrument, this Court will apply a *de novo* standard of review. *See Nationwide Mutual Fire Ins. Co.*, 297 Va. at 457 (“we review all conclusions of law *de novo*”) (quotations and citation omitted).

Discussion

The Circuit Court’s unambiguous order is best read to sustain the Department’s demurrer only on the single, specific ground listed in that order.

As the Court of Appeals identified, the Circuit Court’s order set out first that “§ 18.2-136 only creates an exception to criminal trespass” and, “[s]econd,” that “plaintiffs have failed to state a claim upon which relief can be granted.” Slip op. at *3. But the Court of Appeals did not

acknowledge the causal relationship between these two statements, nor the ordinary inference that flows from their being consecutively ordered, with the general legal conclusion following the specific ruling on the statutory interpretation question. Because physical invasions of property under a statute must be authorized by the challenged law to constitute uncompensated takings, *Cedar Point Nursery v. Hassid*, 141 S.Ct. 2063, 2074 (2021), a law that merely decriminalizes trespassing, preserving Landowners’ civil remedies, by private parties is not a taking. Thus, the Henrico Circuit Court’s interpretation of the Right to Retrieve Law as “only creat[ing] an exception to criminal trespass” was a sufficient ground for its conclusion that “[Landowners] ... ‘failed to state a claim upon which relief can be granted.’” Slip op. at *3–4. Had the court sustained the Department’s demurrer on *another* specific ground, logic and common usage dictate that it would have specified that ground—as it did with its decriminalization holding.

One tool courts often rely on to interpret written language is the canon *expressio unius est exclusio alterius*, which directs that the inclusion of a specific item, term, or concept, excludes others not so listed. See *Miller & Rhoads Bldg., L.L.C. v. City of Richmond*, 292 Va. 537, 544–

45 (2016). Because the Circuit Court adopted one specific ground—decriminalization—for ruling that Landowners failed to assert a claim on which relief could be granted, the only fair inference is that it excluded the Department’s other specific ground—the “it wasn’t me” defense—by not listing it in the order. If the inclusion of a court’s specific reasoning, followed by a conclusion that flows from that reasoning, followed next by the court’s disposition, creates ambiguity, then *every well-drafted circuit court order is ambiguous*. But this Court has prescribed much more rigorous standards for deeming a writing ambiguous before reaching for extrinsic evidence to supplement, qualify, or elucidate its meaning. For language to be ambiguous, it must be “difficult to comprehend, ... of doubtful import, or lack[] clearness and definiteness.” *Brown v. Lukhard*, 229 Va. 316, 321 (1985) (citing *Ayres v. Harleysville Mut. Casualty Co.*, 172 Va. 383, 393 (1939)). None of this could be said of the Circuit Court’s order below. Even if it could, however, this Court has instructed that canons of construction, like *expressio unius*, should be applied to determine the meaning of seemingly ambiguous language before finally resorting to available extrinsic evidence. *See, e.g., Berean Law Grp., P.C. v. Cox*, 259 Va. 622, 627–28 (2000) (finding two circuit court orders, when

read together, unambiguous, without resort to extrinsic evidence); *Lukhard*, 229 Va. at 321 (rejecting extrinsic evidence, i.e., legislative history, in interpreting statute); *Cohan v. Thurston*, 223 Va. 523, 524–25 (1982) (rejecting parol evidence in interpreting plat: “Generally, extrinsic evidence is not admissible to vary the terms of a written instrument.”).

Instead of resolving what it found to be a possible ambiguity by applying interpretive canons to the written order, the Court of Appeals speculated that the transcript of oral argument proceedings might have cleared up the ambiguity, if only it existed. Slip op. at *4. But as a matter of law, the transcript would have provided no clarification since Virginia statutes and case law establish that (1) parol evidence from hearing transcripts cannot be relied on to supplement the language of a trial court order, and (2) arguments beyond the pleadings could not have been considered by the trial court in any event. *See supra* Part I-A.

The Court of Appeals supported its demand for the oral argument transcript by implying that the Circuit Court’s order incorporated arguments from the hearing, noting that it “considered the arguments made at the hearing and in the briefs submitted.” Slip op. at *3–4 (emphasis removed). If such general language has ever been read by any

other appellate court before now to incorporate specific arguments or statements from an oral argument transcript into a final trial-court order, counsel has not found it. Rather, this language is best read to inform the record that oral arguments were heard; had the court desired to incorporate any findings, evidence, or argument into its ruling, it would have done so with express language, as it did with the statement that the Right to Retrieve Law is a decriminalization.

Moreover, if general statements indicating that oral arguments were held *did* effectively incorporate the statements made by the parties or judge below, it would open every final circuit court order to reinterpretation and collateral attack based on the transcript of proceedings, unraveling this Court's firm rule that "trial courts speak only through their written orders." *Temple*, 288 Va. at 141. If, however, the Circuit Court order is truly ambiguous, the correct course for the Court of Appeals was to remand for the Circuit Court to clarify its ruling rather than affirm the ostensibly ambiguous order, as the Court of Appeals has done in like circumstances. *See Fairfax Cnty. Sch. Bd. v. Martin-Elberhi*, 55 Va. App. 543, 548 (2010) (remanding for "unclear" ruling on a dispositive point by Workers' Compensation Commission);

Baldwin v. Baldwin, No. 0310-19-4, 2019 WL 6704409, at *7 (Va. Ct. App. Dec. 10, 2019) (unpublished) (“Because we cannot resolve the ambiguity contained in this record between the circuit court’s various rulings, its consideration of the settlement agreement, and its actions in admitting evidence, we remand this case to the circuit court[.]”).

III. Assignment of Error 3: If the Circuit Court’s order should be interpreted as the Department argued, the Court of Appeals erred by not granting Landowners leave to amend their assignments of error.

Standard of Review

Because an appellate court’s ruling on whether to grant leave to amend an assignment of error is discretionary, this Court will apply an abuse-of-discretion standard of review. *See Lawlor v. Commonwealth*, 285 Va. 187, 212–14 (2013) (abuse of discretion standard applies to discretionary rulings and defining the measure of “deference to a primary decisionmaker’s judgment” that governs); *Whitt v. Commonwealth*, 61 Va. App. 637, 648, 659 (2013) (recognizing “fact that an appellate court possesses discretion to allow a litigant to amend a defective assignment of error”).

Discussion

Even if the Court of Appeals had been correct to find the Circuit Court's order ambiguous and had proceeded to interpret it as sustaining the Department's demurrer on both grounds asserted in its written motion, it should have granted Landowners' request for leave to amend their assignments of error. In the interests of justice, an appellant should not be held to the errors it assigned to an ambiguous order before the ambiguity is resolved by the court on appeal. Landowners requested such treatment in their reply after the Department raised the argument that the order sustaining their denial incorporated the second ground, despite the Circuit Court's order not specifically identifying it. Reply Br. of Appellants 3–5.

As set out above, the absence of a transcript or statement of facts is not fatal to an appeal. If, in the eyes of the Court of Appeals, the trial order adopted both grounds for the demurrer argued in the Department's written motion, then Landowners' exclusion of that second ground, which was not listed specifically in the order, was a mere "error of oversight," for which an appeals court will allow amendment "to correct a formal defect" of this nature. *Whitt*, 61 Va. App. at 648. Landowners asked the

Court of Appeals to exercise that discretion to grant rehearing and leave to amend the Assignment of Error in this matter. Reply Br. of Appellants 2–5; Appellants’ Pet. for Reh’g 7–9. Its failure to do so was an abuse of discretion that merits this Court’s review and correction. *See Lawlor*, 285 Va. at 213 (considering improper factors, failing to assign significance to an important factor, or “commit[ting] a clear error of judgment” each constitute an abuse of discretion) (quotation marks & citation omitted).

IV. The Court of Appeals has established a practice of affirming trial court orders without reaching the merits with alarming frequency since its jurisdiction was expanded.

In the last two years, the number of cases in which the Virginia Court of Appeals has ruled an appellate issue to be waived for lack of a transcript or statement of facts increased 476%. *See* Attachment 1. During the 35 years spanning from 1986 through 2021, it disposed of only 13 such cases. *Id.* Since 2022, it has disposed of 75. *Id.* This is not a result of an increase in the cases it has decided. In fact, in 2022 the court disposed of 111 *fewer* cases than it averaged during the five-year period from 2015 through 2019.¹⁰

¹⁰ 2022 Court of Appeals of Virginia Statistical Report, Court Performance & Statistical Services Division, Supreme Court of Virginia

These numbers indicate that Landowners are very likely not the only parties injured by the Court of Appeals' increasing insistence on transcripts and statements of fact. Because the Court of Appeals' docket comprised nearly entirely criminal and family-law cases prior to 2022, its insistence on transcripts or fact-statements is understandable: family and criminal matters tend to be more fact-bound than other fields of law, with frequent evidentiary hearings. Appeals from hearings involving custody, bail, evidentiary suppression, and mistrial rulings inevitably require close inspection of transcripts and evidence in most cases. Landowners' appeal from a demurrer on their petition claiming that a Virginia statute effects a taking of their properties under the Virginia and U.S. Constitutions as a matter of law is no such case.

The Court of Appeals will begin hearing many more cases like this one which neither contemplate nor require an examination of extrinsic evidence or transcripts for appellate review. If the Court of Appeals is allowed to continue refusing to reach the merits of such cases, many

(2023), https://www.vacourts.gov/courtadmin/aoc/djs/programs/cpss/csi/stats/cav/cav_caseload_rpt_2022.pdf; Court of Appeals of Virginia Statistical Review 2019, Judicial Planning Department, Supreme Court of Virginia (2020, https://www.vacourts.gov/courtadmin/aoc/djs/programs/cpss/csi/stats/cav/cav_caseload_rpt_2019.pdf).

meritorious claims will fail and the clarity and predictability of Virginia law will suffer.

CONCLUSION

For the foregoing reasons, this Court should grant Landowners' petition for appeal to correct the Court of Appeals' errors. Landowners respectfully request that this Court remand for further proceedings on the merits of their appeal in the Virginia Court of Appeals following rulings that (1) a transcript or statement of facts is not indispensable to Landowners' appeal, and (2) the Circuit Court's unambiguous order sustained the Department's demurrer only on the decriminalization ground. If this Court finds that the Circuit Court order was ambiguous and that it sustained the Department's demurrer on both grounds, then Landowners request that this Court remand to the Court of Appeals with instructions that Landowners may amend their assignments of error below. If this Court finds that the Circuit Court order is irremediably ambiguous, Landowners request that this Court remand to the Henrico Circuit Court, either directly or through the Court of Appeals, with

instructions that the Circuit Court clarify its ruling so that Landowners may proceed with their appeal on the merits in the Court of Appeals.

DATED: September 25, 2023.

Respectfully submitted,

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**Attachment 1
Compendium of Relevant Court of Appeals' Decisions**

CASE	DATE	Type of Case	Circuit Court procedure	Transcript/ SOF created in trial court	Transcript/ SOF in record	Decided based on 5A:8 defect	Judgment	Details
<i>Perfect Landscapes, LLC v. Mansour</i> , 0248-23-4, 2023 WL 5353029 (Va. App. Aug. 22, 2023)	8/22/2023	Contract	Hearing (dismissed with prejudice)	Yes, presumably	No	Yes	Issue waived	
<i>Zimmerman v. Cmmw.</i> , 0507-22-4, 2023 WL 5206902 (Va. App. Aug. 15, 2023)	8/15/2023	Criminal Law	Trial (last day of the trial)	Yes	No	Yes	Issue waived	Appellant claimed transcript was filed, and that there was a clerical error. But, the appellant did not file a formal motion to fix the error.
<i>Bowman v. Cmmw.</i> , 1126-22-3, 2023 WL 5020468 (Va. App. Aug. 8, 2023)	8/8/2023	Criminal Law	Trial	Yes	No	Yes	Issue waived	
<i>Brown v. Cmmw.</i> , 0005-23-3, 2023 WL 5020475 (Va. App. Aug. 8, 2023)	8/8/2023	Criminal Law	Trial	Yes	No	Yes	Issue waived	
<i>Johnson v. Cmmw.</i> , 0726-22-3, 2023 WL 5020929 (Va. App. Aug. 8, 2023)	8/8/2023	Criminal Law				No		irrelevant
<i>Lovelace v. Robbinette</i> , 0925-22-3, 2023 WL 5020942 (Va. App. Aug. 8, 2023)	8/8/2023	Landlord-Tenant	Hearing (merits)	No (but could have filed SOF)	No	Yes	Issue waived	
<i>Atkins v. Williams</i> , 0751-22-3, 2023 WL 4872480 (Va. App. Aug. 1, 2023)	8/1/2023	Wills, Trusts, & Estates	Yes	Yes	Yes	Yes		irrelevant

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<i>Breslin v. Ballew</i> , 1884-22-4, 2023 WL 4710911 (Va. App. July 25, 2023)	7/25/2023	Tort (defamation)	Trial		No	Yes	Issue waived	
<i>Organ v. Cmmw.</i> , 1902-22-3, 2023 WL 4711699 (Va. App. July 25, 2023)	7/25/2023	Criminal Law	Trial	Yes	No	Yes	Issue waived	Filed transcripts too late
<i>Rockey v. Medina</i> , 1920-22-3, 2023 WL 4565437 (Va. App. July 18, 2023)	7/18/2023	Tort	Hearing (dismiss for lack of personal jurisdiction)		No	Yes	Issue waived	
<i>Thomas v. Cmmw.</i> , 1530-22-3, 2023 WL 4565442 (Va. App. July 18, 2023)	7/18/2023	Criminal Law	Sentencing hearing		No	Yes	Issue waived	Filed transcripts too late
<i>Williamson v. Williamson</i> , 0805-22-3, 2023 WL 4565883 (Va. App. July 18, 2023)	7/18/2023							5A:8 issue irrelevant
<i>Medeiros v. Virginia Dept. of Wildlife Resources</i> , 1463-22-2, 2023 WL 4425974 (Va. App. July 11, 2023)	7/11/2023		Hearing (demurrer)	No	No	Yes	Issue waived	
<i>Kavanaugh v. Cmmw.</i> , 1410-22-4, 2023 WL 4424797 (Va. App. July 11, 2023)	7/11/2023	Criminal Law	Plea hearing		No	Yes	Issue waived	
<i>Decicco v. Cmmw.</i> , 0049-22-2, 2023 WL 4424798 (Va. App. July 11, 2023)	7/11/2023	Criminal Law	Hearing (to amend sentencing order)		No	Yes	Issue waived	
<i>Kersey v. Cmmw.</i> , 0057-23-2, 2023 WL 4337681 (Va. App. July 5, 2023)	7/5/2023	Criminal Law	Trial		No	Yes	Issue waived	Filed transcripts too late

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<i>Austin v. Williams</i> , 0808-22-4, 2023 WL 4187847 (Va. App. June 27, 2023)	6/27/2023	Tort	Trial		No	Yes	Issue waived	Filed transcripts 1 day too late, even though notice of filing was on time
<i>Ejfyk v. McLean Crest Homeowners Assn., Inc.</i> , 1699-22-4, 2023 WL 4187864 (Va. App. June 27, 2023)	6/27/2023	Civil Proceudre/Pro perty	Hearing (attorney's fees)		No	Yes	Issue waived	
<i>Mundy v. Cmmw.</i> , 1675-22-2, 2023 WL 4187886 (Va. App. June 27, 2023)	6/27/2023	Criminal Law	Hearing (motion to expunge convictions)		No	Yes	Issue waived	
<i>Phillips v. Cmmw.</i> , 1531-22-4, 2023 WL 4065175 (Va. App. June 20, 2023)	6/20/2023	Criminal Law	Trial		No	Yes	Issue waived	Filed transcripts too late
<i>Sisco v. Sisco</i> , 1215-22-4, 2023 WL 3956753 (Va. App. June 13, 2023)	6/13/2023	Family Law	Hearing (motion to strike)		No	Yes	Issue waived	Filed transcripts in time with the Court of Appeals, but not with the lower court, so the transcripts were excluded from the record.

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<i>Laxamana-Pascua v. Pascua</i> , 1327-22-2, 2023 WL 3957317 (Va. App. June 13, 2023)	6/13/2023	Civil Procedure	Hearing		No	Yes	Issue waived	
<i>Est. of Rothe v. Centra Health, Inc.</i> , 1334-22-3, 2023 WL 3827904 (Va. App. June 6, 2023)	6/6/2023	Contract	Trial		No	Yes	Issue waived	
<i>Lampkins v. Cmmw.</i> , 0958-22-2, 2023 WL 3696325 (Va. App. May 30, 2023)	5/30/2023	Criminal Law	Hearing		No	Yes	Issue waived	
<i>Thornock v. Bedford County</i> , 1755-22-3, 2023 WL 3587854 (Va. App. May 23, 2023)	5/23/2023		Hearing (demurrer)	Yes, SOF	Yes	Yes	Issue waived	"Although the Thornocks timely filed a statement of facts in the trial court on November 14, 2022, the statement of facts did not provide notice to the County that it would be presented to the trial judge. Nor was the statement signed by the trial judge, as required by Rule 5A:8(c)."

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<i>Coles v. Cmmw.</i> , 0998-22-3, 2023 WL 3587475 (Va. App. May 23, 2023)	5/23/2023	Civil Forefeiture	Hearint (forfeiture)		No	Yes	Issue waived	
<i>Das v. Wang</i> , 1704-22-4, 2023 WL 3587819 (Va. App. May 23, 2023)	5/23/2023	Tort	Hearing & Trial		No	Yes	Issue waived	Trial transcript was filed 1 day too late and therefore excluded from the record
<i>Haring v. Bank of New York Mellon</i> , 0778-22-4, 2023 WL 3587825 (Va. App. May 23, 2023)	5/23/2023	Eviction					Irrelevant	
<i>Smoke USA, Inc. v. Nour Associates, L.L.C.</i> , 1695-22-4, 2023 WL 3470284 (Va. App. May 16, 2023)	5/16/2023	Tort	Trial		No	Yes	Issue waived	Filed transcripts too late
<i>Veldhuis as Tr. of Nancy C. Veldhuis Revocable Living Tr. v. Abboushi</i> , 886 S.E.2d 766 (Va. App. 2023)	5/9/2023	Property	Trial		No	No		Trial transcript was considered "not indispensable" to resolving the case
<i>Jeffries v. Cmmw.</i> , 0881-22-3, 2023 WL 3310307 (Va. App. May 9, 2023)	5/9/2023	Criminal Law	Trial		No	Yes	Issue waived	Filed transcripts too late
<i>Coyne v. Cmmw.</i> , 0628-22-4, 2023 WL 3310310 (Va. App. May 9, 2023)	5/9/2023	Criminal Law	Trial		No	Yes	Issue waived	Filed transcripts too late

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<i>Lundie v. Cmmw.</i> , 1332-22-2, 2023 WL 3310313 (Va. App. May 9, 2023)	5/9/2023	Criminal Law	Trial		Yes	Yes	Issue waived	Trial Transcripts were timely filed, but was missing information due to a scheduling conflict from the court reporter and lack of courtroom audio.
<i>Sanjines v. Donais</i> , 1551-22-4, 2023 WL 3310420 (Va. App. May 9, 2023)	5/9/2023	Family Law	Hearing		No	Yes	Issue waived	
<i>Colbert v. Spaight</i> , 1458-22-4, 2023 WL 3310667 (Va. App. May 9, 2023)	5/9/2023	Tort	Trial		Yes	Yes	Issue waived	Some portions of the trial transcript were timely filed, but record ultimately was missing containing certain evidence introduced at trial.

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<i>Williams v. Legere</i> , 886 S.E.2d 292 (Va. App. 2023)	5/2/2023	Election Law	Hearing (demurrer)	No	No	No		irrelevant
<i>Everette v. Community Meml. Hosp.</i> , 1510-22-2, 2023 WL 3183161 (Va. App. May 2, 2023)	5/2/2023	Civil Procedure	Hearing		No	Yes	Issue waived	
<i>Lester v. Cmmw.</i> , 1955-22-2, 2023 WL 3183597 (Va. App. May 2, 2023)	5/2/2023	Criminal Law	Trial		No	No		Filed transcripts too late, but transcripts were not indispensable to resolving the case
<i>Flores v. Cmmw.</i> , 0370-22-2, 2023 WL 3061790 (Va. App. Apr. 25, 2023)	4/25/2023	Criminal Law	Trial		No	Yes	Issue waived	Filed transcripts too late. " The decision to review a case on appeal without a relevant transcript is "the rare exception rather than the general rule." Wolfe v. Commonwealth, 6 Va. App. 640, 644 (1988)."

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<i>Stephens v. Cmmw. , 1068-22-4, 2023 WL 2575947 (Va. App. Mar. 21, 2023)</i>	3/21/2023	Criminal Law	Trial		No	Yes	Issue waived	Filed transcripts too late
<i>McReynolds v. Cmmw. , 0623-22-2, 2023 WL 2374723 (Va. App. Mar. 7, 2023), reh'g granted, opinion withdrawn and vacated (June 13, 2023), opinion superseded on reh'g, 0623-22-2, 2023 WL 5020955 (Va. App. Aug. 8, 2023)</i>	3/7/2023	Criminal Law	Trial		No	Yes	Issue waived	
<i>Cannon v. Chesterfield-Colonial Heights Dept. of Soc. Services, 0344-22-2, 2023 WL 2246321 (Va. App. Feb. 28, 2023)</i>	2/28/2023							Filed transcripts too late Not relevant

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<i>Theologis v. Weiler</i> , 883 S.E.2d 241 (Va. App. 2023)	2/14/2023	Tort (defamation)	Hearing (demurrer)	Yes (SOF)	Yes	No		"The circuit court entered a "written statement of facts" rejecting Theologis's proposed statement as "inaccurate" and clarifying that the court had sustained the demurrers on the grounds raised by each defendant. Theologis timely appealed."
<i>Gallop v. Cameron Bay Homeowners Assn.</i> , 0687-22-2, 2023 WL 1111660 (Va. App. Jan. 31, 2023)	1/31/2023	Contract	Challenging circuit court's failure to sign record		No	Yes	Issue waived	
<i>Mattison v. Sec. of Veterans Affairs</i> , 0813-22-1, 2023 WL 1111673 (Va. App. Jan. 31, 2023)	1/31/2023	Civil Procedure	Hearing (motion for summary judgment)		No	Yes	Issue waived	

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<i>Jackson v. Cmmw.</i> , 0984-22-2, 2023 WL 362437 (Va. App. Jan. 24, 2023)	1/24/2023	Criminal Law	Trial		Yes	Yes	Issue waived	Filed transcripts, but transcript contained a missing portion that stated: "NOTE: SHORT BREAK IN THE AUDIO TRANSCRIPT HERE." The court held that the missing portion of the transcript contained information indispensable to resolving the case.
<i>Expectacion v. Cmmw.</i> , 0617-22-1, 2023 WL 362355 (Va. App. Jan. 24, 2023)	1/24/2023	Criminal Law	Trial		No	Yes	Issue waived	Filed transcripts too late
<i>Bates v. Cmmw.</i> , 1384-21-1, 2023 WL 362431 (Va. App. Jan. 24, 2023)	1/24/2023	Criminal Law	Trial		No	Yes	Issue waived	
<i>Haybyrne v. Dumapias</i> , 0569-22-4, 2023 WL 191899 (Va. App. Jan. 17, 2023)	1/17/2023	Contract & Tort	Hearing (demurrer)	Yes	No	Yes	Issue waived	Filed transcripts too late

**Attachment 1
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<i>Burr v. Burr</i> , 0114-22-1, 2023 WL 192086 (Va. App. Jan. 17, 2023)	1/17/2023	Family Law	Hearing		No	Yes	Issue waived	
<i>Wolcott v. Henretty Constr. Group, LLC</i> , 0783-22-2, 2023 WL 138576 (Va. App. Jan. 10, 2023)	1/10/2023				Yes	Yes	Issue waived	"The written statement of facts did not provide notice to HCG that it would be presented to the trial judge. Nor was the statement signed by the trial judge. See Rule 5A:8(c). "Consequently , the statement of facts is not 'a part of the record.' "
<i>Shvets v. Shvets</i> , 0048-22-1, 2022 WL 17980338 (Va. App. Dec. 29, 2022)	12/29/2022	Family Law	Hearing		No	Yes	Issue waived	
<i>Bean v. Cmmw.</i> , 0307-22-1, 2022 WL 17586737 (Va. App. Dec. 13, 2022)	12/13/2022	Criminal Law	Trial		No	Yes	Issue waived	
<i>Potts v. Cmmw.</i> , 1244-21-2, 2022 WL 17586746 (Va. App. Dec. 13, 2022)	12/13/2022	Criminal Law			Yes	No		Irrelevant

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<i>Harrell v. Cmmw.</i> , 0195-22-1, 2022 WL 17096492 (Va. App. Nov. 22, 2022)	11/22/2022	Criminal Law	Hearing (motion to suppress)		No	Yes	Issue waived	Filed transcripts too late
<i>Abdulsamad v. Deak</i> , 0050-22-4, 2022 WL 16933776 (Va. App. Nov. 15, 2022)	11/15/2022	Family Law	Trial		No	Yes	Issue waived	
<i>Morris v. Elias</i> , 0261-22-2, 2022 WL 16823535 (Va. App. Nov. 9, 2022)	11/9/2022	Employment Law	Hearing (demurrer)	No	No	Yes	Issue waived	
<i>Cmmw. v. Oliver</i> , 0911-22-1, 2022 WL 16824223 (Va. App. Nov. 9, 2022)	11/9/2022	Criminal Law	Hearing (motion to suppress)		Yes (see Details)	No		Transcript was filed late but entered into evidence anyways. Case has a dissent which states that the transcript should have been excluded from the record.
<i>Caldwell v. Cmmw.</i> , 0576-22-3, 2022 WL 16556478 (Va. App. Nov. 1, 2022)	11/1/2022	Criminal Law	Hearing (revocation of parole)		No	Yes	Issue waived	
<i>Lumumba v. Cmmw.</i> , 0324-22-3, 2022 WL 6572394 (Va. App. Oct. 11, 2022)	10/11/2022	Criminal Law	Trial (guilty plea)		No	Yes	Issue waived	Transcripts were incomplete.
<i>Schneider v. Brant</i> , 0396-22-4, 2022 WL 4828837 (Va. App. Oct. 4, 2022)	10/4/2022	Contract	Hearing (motion for sanctions)	No	No	Yes	Issue waived	

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<i>Jordan v. Miller</i> , No. 0156-22-4, 2022 WL 4349061 (Va. App. Sept. 20, 2022)	9/20/2022	Legal Ethics	Hearing (motion for sanctions)		Yes, SOF (see Details)	Yes	Issue waived	Court entered order accepting most of movant's statement of facts, but did not accept paragraph stating that the judge in the previous action had a personal relationship with the movant's adversary. Appeal was based on this stricken fact.
<i>Banerjee v. Brisson</i> , No. 0325-22-4, 2022 WL 4073317 (Va. App. Sept. 6, 2022)	9/6/2022	Family Law	Hearing (attorney's fees)		No	Yes	Issue waived	

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<i>Allen v. Cmmw.</i> , No. 1280-21-2, 2022 WL 3363056 (Va. App. Aug. 16, 2022)	8/16/2022	Criminal Law	Trial		No	No		Transcript was not necessary to review appeal, but review was limited to evidence outside of transcripts
<i>Grimstead v. Cmmw.</i> , No. 1106-21-1, 2022 WL 3031122 (Va. App. Aug. 2, 2022)	8/2/2022	Criminal Law	Trial		No	Yes	Issue waived	Filed transcripts too late
<i>Doe v. Virginia Empl. Comm'n</i> , No. 0734-21-4, 2022 WL 2919572 (Va. App. July 26, 2022)	7/26/2022	State Administrative Law	Administrative Hearing		Yes (see Details)	No	Issue waived	Transcript was "not created in compliance with the Rules of the Supreme Court of Virginia" and thus was excluded from the record. Appeal dismissed due to other grounds (claim was not pled in the lower court)

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<i>Sykes v. Cmmw.</i> , No. 1084-21-2, 2022 WL 2811941 (Va. App. July 19, 2022)	7/19/2022	Criminal Law	Trial		Yes (see Details)	Yes	Issue waived	Transcripts were incomplete.
<i>McCracken v. Cmmw.</i> , No. 0001-22- 3, 2022 WL 2674044 (Va. App. July 12, 2022)	7/12/2022	Criminal Law	Trial		No	Yes	Issue waived	
<i>Prochaska v. Cmmw.</i> , No. 0894-21- 3, 2022 WL 2674180 (Va. App. July 12, 2022)	7/12/2022	Criminal Law	Sentencing hearing		No	Yes	Issue waived	
<i>Bugg v. Cmmw.</i> , No. 0859-21-2, 2022 WL 2433007 (Va. App. July 5, 2022)	7/5/2022	Criminal Law	Trial		No	Yes	Issue waived	Filed transcripts too late
<i>Furbee v. Virginia Beach Dept. of Human Services</i> , No. 0125-22-1, 2022 WL 2308126 (Va. App. June 28, 2022)	6/28/2022	Family Law	Hearing		No	Yes	Issue waived	
<i>Johnson v. Cmmw.</i> , No. 0206-21-4, 2022 WL 2308309 (Va. App. June 28, 2022)	6/28/2022	Criminal Law	Trial		Yes	No	Irrelevant	
<i>Hogg v. Cmmw.</i> , No. 0716-21-1, 2022 WL 2124517 (Va. App. June 14, 2022)	6/14/2022	Criminal Law	Trial		No	Yes	Issue waived	Filed transcripts too late
<i>Prentice v. Cook</i> , No. 0836-21-4, 2022 WL 2124584 (Va. App. June 14, 2022)	6/14/2022	Family Law	Hearing (motion to reconsider attorney's fees)		No	Yes	Issue waived	
<i>Allen v. Cmmw.</i> , No. 0746-21-3, 2022 WL 2125021 (Va. App. June 14, 2022)	6/14/2022	Criminal Law	Trial		No	Yes	Issue waived	Filed transcripts too late

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<i>Lyons v. Cmmw.</i> , No. 0965-21-1, 2022 WL 1739175 (Va. App. May 31, 2022)	5/31/2022	Criminal Law	Trial		Yes, SOF	No	Decided on Merits	
<i>Hendricks v. Cmmw.</i> , No. 0939-21- 2, 2022 WL 1739157 (Va. App. May 31, 2022)	5/31/2022	Criminal Law	Trial		No	Yes	Issue waived	Filed transcripts too late
<i>Jones v. Roanoke City Dept. of Soc. Services</i> , No. 0687-21-3, 2022 WL 1739180 (Va. App. May 31, 2022)	5/31/2022	Family Law	Hearing		No	No	Decided on Merits	
<i>Sims v. Cmmw.</i> , No. 0895-21-1, 2022 WL 1631828 (Va. App. May 24, 2022)	5/24/2022	Criminal Law	Trial		No	Yes	Issue waived	
<i>Jacks v. Cmmw.</i> , 872 S.E.2d 233 (Va. App. 2022)	5/17/2022	Criminal Law	No proceeding in lower court		No	No	Reversed	No proceeding took place in the lower court, so no transcript/SOF was ever created. A transcript/SOF was not necessary to review the assignment of error, so petitioner's arguments are not waived

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<i>Harvey v. Cmmw.</i> , No. 1116-21-1, 2022 WL 1547988 (Va. App. May 17, 2022)	5/17/2022	Criminal Law	Trial		Yes	No	Decided on merits	
<i>Ellis v. Sussex Dept. of Soc. Services</i> , No. 0397-21-2, 2022 WL 1215509 (Va. App. Apr. 26, 2022)	4/26/2022	Family Law	Hearing		No	Yes	Issue waived	Filed transcripts too late
<i>Botos v. Botos</i> , No. 1015-21-3, 2022 WL 1144213 (Va. App. Apr. 19, 2022)	4/19/2022	Family Law	Hearing		No (see details)	Yes	Issue waived	The SOF from one side was not timely filed. The SOF from opposing counsel was insufficient and not accepted by the court.
<i>Connor v. Lyons</i> , No. 1177-21-3, 2022 WL 1009851 (Va. App. Apr. 5, 2022)	4/5/2022	Family Law	Hearing		No	Yes	Issue waived	
<i>Radford v. Bedford Cnty. Dept. of Soc. Services</i> , No. 0743-21-3, 2022 WL 598349 (Va. App. Mar. 1, 2022)	3/1/2022	Family Law	Hearing		No	No	Decided on Merits	The record contained sufficient evidence to decide the case on the merits
<i>Shvets v. Shvets</i> , No. 0336-21-1, 2021 WL 5570397 (Va. App. Nov. 30, 2021)	11/30/2021	Family Law	Hearing		No	Yes	Issue waived	

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<i>Williams v. City of Virginia Beach, Dept. of Human Services</i> , No. 0418-21-1, 2021 WL 5456485 (Va. App. Nov. 23, 2021)	11/23/2021	Family Law	Hearing		No	No	Decided on Merits	Transcript was "not indispensable" for review of assignment of error.
<i>Smith v. Harrisonburg Rockingham Soc. Services Dist.</i> , No. 0541-21-3, 2021 WL 5312390 (Va. App. Nov. 16, 2021)	11/16/2021	Family Law	Hearing		No	Yes	Issue waived	
<i>Henley v. Henrico Dept. of Soc. Services</i> , No. 0683-21-2, 2021 WL 4953955 (Va. App. Oct. 26, 2021)	10/26/2021	Family Law	Hearing		No	No	Decided on Merits	Transcript was "not indispensable" for review of assignment of error.
<i>Caison v. Culpeper Cnty. Dept. of Soc. Services</i> , No. 1436-20-4, 2021 WL 4734469 (Va. App. Oct. 12, 2021)	10/12/2021	Family Law	Hearing		No	No	Decided on Merits	Filed transcripts too late. But, record contained enough evidence to decide on merits anyway.

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<i>Jacks v. Cmmw. , 861 S.E.2d 599 (Va. App. 2021), reh'g en banc granted, mandate stayed, 73 Va. App. 499 (Va. App. 2021), and superseded on reh'g en banc, 872 S.E.2d 233 (Va. App. 2022)</i>	8/24/2021	Criminal Law	No proceeding in lower court		No	No	Decided on Merits	Case reheard and 5A:8 point is reaffirmed.
<i>Allison v. Cmmw. , 861 S.E.2d 64 (Va. App. 2021)</i>	8/3/2021	Criminal Law	Trial		Yes, SOF	Yes	Decided on Merits	
<i>Ward v. Newport News Dept. of Human Services, No. 1280-20-1, 2021 WL 2931399 (Va. App. July 13, 2021)</i>	7/13/2021	Family Law	Hearing		No	Yes	Issue waived	
<i>Cmmw. v. Thomas , 855 S.E.2d 879 (Va. App. 2021)</i>	4/6/2021	Criminal Law	Trial		No	Yes	Issue waived	
<i>Shah v. Shah , 829 S.E.2d 586 (Va. App. 2019)</i>	7/16/2019	Family Law	Hearing		No	Yes	Issue waived	
<i>Browning v. Browning , 802 S.E.2d 178 (Va. App. 2017)</i>	7/25/2017	Family Law	Hearing		No	Yes	Issue waived	
<i>Cleary v. Cleary , 757 S.E.2d 588 (Va. App. 2014)</i>	5/13/2014	Family Law	Hearing		Yes	No	Irrelevant	
<i>Bay v. Cmmw. , 729 S.E.2d 768 (Va. App. 2012)</i>	8/7/2012	Criminal Law	Trial		No	No	Decided on Merits	Transcript was "not indispensable" for review of assignment of error.
<i>Smith v. Cmmw. , 722 S.E.2d 310 (Va. App. 2012)</i>	3/6/2012	Criminal Law	Trial		Yes	No	Irrelevant	
<i>Pilati v. Pilati , 717 S.E.2d 807 (Va. App. 2011)</i>	12/6/2011	Family Law	Hearing		Yes	No	irrelevant	

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<i>Reid v. Cmmw.</i> , 698 S.E.2d 269 (Va. App. 2010)	8/31/2010	Criminal Law	Trial		No	Yes	Issue waived	Appellant has burden of filing transcript
<i>Cook v. Cross</i> , No. 0155-09-2, 2010 WL 2265030 (Va. App. June 8, 2010)	6/8/2010	Family Law	Hearing		Yes	No	Irrelevant	
<i>Cmmw. v. Needham</i> , 685 S.E.2d 857 (Va. App. 2009)	12/8/2009	Criminal Law	Trial		No	No	irrelevant	
<i>Shiembob v. Shiembob</i> , 685 S.E.2d 192 (Va. App. 2009)	11/24/2009	Family Law	Hearing		No	Yes	Issue waived	
<i>Grant v. Cmmw.</i> , 682 S.E.2d 84 (Va. App. 2009)	9/1/2009	Criminal Law	Trial		Yes, SOF	No	Irrelevant	
<i>DeLuca v. Katchmeric</i> , No. 3035-08-4, 2009 WL 1658136 (Va. App. June 16, 2009)	6/16/2009	Family Law	Hearing		Yes, SOF	No	Irrelevant	
<i>West v. West</i> , 669 S.E.2d 390 (Va. App. 2008)	12/16/2008	Family Law	Hearing		No	No	Irrelevant	
<i>Virginia Dept. of Corrections v. Compton</i> , 623 S.E.2d 397 (Va. App. 2005)	12/20/2005	Employment Law					Irrelevant	
<i>Lazarchic v. Lazarchic</i> , No. 0458-04-2, 2005 WL 1719054 (Va. App. July 26, 2005)	7/26/2005	Family Law	Hearing		No	Yes	Issue waived	
<i>M.G. v. Albemarle Cnty. Dept. of Soc. Services</i> , 583 S.E.2d 761 (Va. App. 2003)	7/22/2003	Family Law	Hearing		Yes	No	Decided on Merits	
<i>Dickerson v. Cmmw.</i> , 548 S.E.2d 230 (Va. App. 2001)	7/3/2001	Criminal Law	Trial		Yes	No	Irrelevant	

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<i>Smith v. Cmmw.</i> , 531 S.E.2d 11 (Va. App. 2000)	7/11/2000	Criminal Law	Trial		No	Yes	Issue waived	Filed transcript too late
<i>Kyhl v. Kyhl</i> , 526 S.E.2d 292 (Va. App. 2000)	3/21/2000	Family Law	Hearing		Yes	No	Irrelevant	
<i>Harter v. Cmmw.</i> , 525 S.E.2d 606 (Va. App. 2000)	3/14/2000	Criminal Law	Trial		Yes	No	Irrelevant	
<i>Price v. Price</i> , 435 S.E.2d 652 (Va. App. 1993)	9/21/1993	Family Law	Hearing		No	No	Decided on Merits	Record was complete enough to decide case on merits despite lack of transcript
<i>Duggan v. Cmmw. of Va.</i> , No. 1258-91-4, 1993 WL 44562 (Va. App. Feb. 23, 1993)	2/23/1993	Criminal Law	Trial		Yes	No	Irrelevant	
<i>Proctor v. Town of Colonial Beach</i> , 425 S.E.2d 818 (Va. App. 1993)	1/19/1993				Yes	No	Irrelevant	
<i>Clary v. Clary</i> , 425 S.E.2d 821 (Va. App. 1993)	1/19/1993	Family Law	Hearing		Yes	No	Irrelevant	
<i>Anderson v. Cmmw.</i> , 413 S.E.2d 75 (Va. App. 1992)	1/14/1993	Criminal Law	Trial		No	Yes	Issue waived	
<i>Lee v. Lee</i> , 404 S.E.2d 736 (Va. App. 1991)	5/14/1991	Family Law	Hearing		Yes	Yes	Issue waived	Transcript was incomplete
<i>Jordan v. Jordan</i> , 402 S.E.2d 246 (Va. App. 1991)	3/19/1991	Family Law	Hearing		Yes	No	Irrelevant	
<i>Kelly v. Cmmw.</i> , 382 S.E.2d 270 (Va. App. 1989)	7/11/1989	Criminal Law	Suppression Hearing		No	No	Decided on merits	Court proceeded despite lack of transcript

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<i>Turner v. Cmmw.</i> , 341 S.E.2d 400 (Va. App. 1986)	3/18/1986	Criminal Law	Trial		No	Yes	Issue waived	