In The
Supreme Court of Virginia

Record No. 230691

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

Appellants,

v.

VIRGINIA DEPARTMENT OF WILDLIFE RESOURCES,

Appellee.

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

OPENING BRIEF OF APPELLANTS

DAMIEN M. SCHIFF*
Cal. Bar No. 235101
Pacific Legal Foundation
555 Capitol Mall, Suite 1290
Sacramento, California 95814
Telephone: (916) 419-7111
DSchiff@pacificlegal.org
**Pro Hac Vice*

DANIEL WOISLAW
Va. Bar No. 91180
Pacific Legal Foundation
3100 Clarendon Blvd., Suite 1000
Arlington, Virginia 22201
Telephone: (202) 888-6881
DWoislaw@pacificlegal.org

Counsel for Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTRODUCTION 1

STATEMENT OF THE CASE 2

ASSIGNMENTS OF ERROR 11

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 11

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 12

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 13

ARGUMENT 14

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 14

Standard of Review 14

Discussion 14

A. The Court of Appeals could not in any event have relied on judicial statements from the oral argument 15

1. Oral statements from the bench cannot alter a circuit court's final written order 16

2. A written motion for demurrer limits the grounds on which a circuit court may rule 20

B. Concerns about waiver, or approbation and reprobation, are not a sufficient basis for requiring a transcript or statement of facts in this appeal 21

II. Assignment of Error 2: The Court of Appeals erred by failing to properly construe the unambiguous written order of the Circuit Court 27

Standard of Review 27

Discussion 28

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 33

Standard of Review 33

Discussion 34

IV. If the Department thought the order should include an additional ground, it had a remedy 35

CONCLUSION 37

CERTIFICATE 39

TABLE OF AUTHORITIES

Cases

Anderson v. Commonwealth,
13 Va. App. 506 (1992) 23

Austin v. Consolidation Coal Co.,
256 Va. 78 (1998) 19

Ayres v. Harleysville Mut. Cas. Co.,
172 Va. 383 (1939) 30

Baldwin v. Baldwin,
No. 0310-19-4, 2019 WL 6704409 (Va. Ct. App. Dec. 10, 2019) 33

Baumann v. Capozio,
269 Va. 356 (2005) 21

Bay v. Commonwealth,
60 Va. App. 520 (2012) 25

Berean Law Grp., P.C. v. Cox,
259 Va. 622 (2000) 30

Brown v. Lukhard,
229 Va. 316 (1985) 30–31

Browning v. Browning,
68 Va. App. 19 (2017) 23

Cedar Point Nursery v. Hassid,
594 U.S. 139 (2021) 3, 28

Chippenham Manor, Inc. v. Dervishian,
214 Va. 448 (1974) 21

City of Richmond v. Randall,
215 Va. 506 (1975) 25

Cohan v. Thurston,
223 Va. 523 (1982) 31

Dixon v. Dixon,
71 Va. App. 709 (2020) 23

Ellis v. Sussex Dep't of Soc. Servs.,
No. 0397-21-2, 2022 WL 1215509 (Va. Ct. App. Apr. 26, 2022) 23

Fairfax Cnty. Sch. Bd. v. Martin-Elberhi,
55 Va. App. 543 (2010) 32

Flippo v. F & L Land Co.,
241 Va. 15 (1991) 20–21

Fun v. VMI,
245 Va. 249 (1993) 20

Haugen v. Shenandoah Valley Dep't of Soc. Servs.,
274 Va. 27 (2007) 24

Jenkins v. Winchester Dep't of Soc. Servs.,
12 Va. App. 1178 (1991) 25

Lawlor v. Commonwealth,
285 Va. 187 (2013) 33, 35

Lawrence v. Nelson,
200 Va. 597 (1959) 23

Matthews v. Matthews,
277 Va. 522 (2009) 26

McMillion v. Dryvit Sys., Inc.,
262 Va. 463 (2001) 18

Miller & Rhoads Bldg., L.L.C. v. City of Richmond,
292 Va. 537 (2016) 29

Nationwide Mut. Fire Ins. Co. v. Erie Ins. Exch.,
297 Va. 455 (2019) 14, 27

Old Dominion Iron & Steel Corp. v. Virginia Elec. & Power Co.,
215 Va. 658 (1975) 25

Rose v. Commonwealth,
265 Va. 430 (2003) 18

Shiembob v. Shiembob,
55 Va. App. 234 (2009) 23–24

Smith v. Commonwealth,
281 Va. 464 (2011) 22–23, 27

Smyth v. Midgett,
199 Va. 727 (1958) 22, 25

Stamper v. Commonwealth,
220 Va. 260 (1979) 17–18, 35–36

Temple v. Mary Washington Hosp., Inc.,
288 Va. 134 (2014) 14–16, 32, 35

Town of Front Royal v. Front Royal & Warren Cnty. Indus. Park Corp.,
248 Va. 581 (1994) 19

Turner v. Commonwealth,
2 Va. App. 96 (1986) 23, 25

Waterfront Marine Constr., Inc. v. N. End 49ers Sandbridge Bulkhead Grps. A, B & C,
251 Va. 417 (1996) 16–17, 35

Whitt v. Commonwealth,
61 Va. App. 637 (2013) 33–35

Woodfin v. Commonwealth,
236 Va. 89 (1988) 24

Statutes

Va. Code Ann. § 8.01-273 (West 2017) 14, 20

Va. Code Ann. § 18.2-136 (West 2011) 1, 5, 7, 28

Va. Code § 8.01-428(B) (West 2016) 36–37

INTRODUCTION

Appellants[1] are landowners from across the Commonwealth whose properties have been overrun by hunters and their hounds as a result of Virginia's "Right to Retrieve Law," Va. Code Ann. § 18.2-136 (West 2011). This law, enforcement of which is the responsibility of Appellee Virginia Department of Wildlife Resources,[2] authorizes (1) "fox hunters and coon hunters" to continue hunts onto "prohibited lands," and (2) "hunters of all other game" to "go upon prohibited lands to retrieve their dogs." *Id.* Thus, the law's moniker of "Right to Retrieve" is in part a misnomer, since it authorizes more than the mere retrieval of animals, but also hunts on private land for foxes and raccoons that would otherwise be prohibited at common law.

Because Landowners and the Department agree that if the law is a decriminalization, it does not effect a *per se* taking without compensation within the meaning of the Fifth Amendment of the U.S. Constitution or Article I, § 11 of the Virginia Constitution, the central question on the merits underlying Landowners' appeal on the present procedural issue is

---

[1] Hereinafter "Landowners."

[2] Hereinafter "the Department."

as follows: Does the law *authorize* or instead merely *decriminalize* entry on private properties?

In granting the Department's demurrer, the Henrico Circuit Court interpreted the Right to Retrieve Law as a decriminalization rather than a taking within the meaning of the U.S. and Virginia Constitutions. Landowners appealed, but the Court of Appeals deemed the transcript of oral arguments "indispensable" and affirmed the judgment below without reaching the merits of the central statutory interpretation question.

Because the Court of Appeals erred in refusing to reach the merits of Landowners' appeal, this Court should reverse and remand with instructions that the Court of Appeals reach the merits of Landowners' assignment of error below.

STATEMENT OF THE CASE

Landowners filed a petition for inverse condemnation.

Landowners filed a petition in the Henrico Circuit Court on April 12, 2022 against the Department, seeking just compensation under the Fifth Amendment's Just Compensation Clause and Article I, § 11 of the Virginia Constitution, claiming that the Right to Retrieve Law takes

their right to exclude hunters for a public use within the meaning of *Cedar Point Nursery v. Hassid*, 594 U.S. 139 (2021) (laws authorizing groups to take access to private properties effect takings). J.A. 1–25. The petition claimed relief in the form of (1) a declaratory judgment that the Right to Retrieve Law effects an uncompensated taking for public use under the Virginia and U.S. constitutions, and (2) the impaneling of a jury to determine the just compensation owed to Landowners.[3] J.A. 22–25.

Because this case never proceeded past the demurrer stage, 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, Landowners set out the following:

1. They own properties in the Commonwealth of Virginia;
2. The Department is responsible for enforcement of the hunting laws of the Commonwealth, including the Right to Retrieve Law;
3. Hunters and their dogs have repeatedly entered Landowners' posted properties without permission under color of the Right to Retrieve Law;

[3] Landowners also requested reasonable attorneys' fees and costs. J.A. 25.

4. Landowners asked the Director of the Department to initiate proceedings for the payment of just compensation;
5. The Director refused; and
6. Landowners are entitled to just compensation as a matter of law under the U.S. and Virginia Constitutions because their right to exclude has been taken for the public use of hunters who chase game with their dogs.

J.A. 1–25.

The Department demurred.

The Department demurred on May 16, 2022, J.A. 32–44, asserting the following arguments: (1) the Right to Retrieve Law just decriminalizes rather than affirmatively authorizes hunters' entries on private land, and (2) the Department is not responsible for the intrusions on Landowners' properties. J.A. 37, 40–42. (Landowners will refer to this second argument as "causation" for ease of reading). The motion was fully briefed, including Landowners' Response in Opposition dated June 17, 2022, and the Department's Reply dated July 8, 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 argument on the demurrer on August 19, 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 reality that nothing of note transpired during that hearing is evidenced by the Circuit Court's final order, which recorded only that the court received "the arguments made at the hearing and in the briefs submitted." J.A. 134. This language would become the tenuous foothold for the Court of Appeals' affirmance of the trial court's judgment, which affirmance Landowners challenge before this Court.

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

On August 25, 2022, the Circuit Court entered a written order sustaining the Department's demurrer on the decriminalization ground alone.[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;

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

> 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.

J.A. 134.

Landowners filed a timely appeal to the Virginia Court of Appeals, assigning error to the Circuit Court's interpretation of the Right to Retrieve Law on the ground on which it found, pursuant to its written order, that Landowners "failed to state a claim." J.A. 134.

Landowners filed their opening brief[5] in the Court of Appeals on December 28, 2022.[6] In its responsive brief, the Department argued[7] that the order's statement concluding that Landowners "failed to state a claim" constituted a second, independent ground for the court's ruling, in addition to the decriminalization ground specifically set out in the order. J.A. 234. Since Landowners did not assign error to this inferred

---

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

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

[7] In relevant part.

additional ground for the Circuit Court's ruling, the Department argued, the appeal was procedurally barred. J.A. 246.

Landowners replied on March 3, 2023, arguing[8] that the best reading of the Circuit Court's order was that it unambiguously determined that Landowners had "fail[ed] to state a claim" *because* "Va. Code § 18.2-136 only creates an exception to criminal trespass" and thus the Circuit Court sustained the Department's demurrer on this ground alone. J.A. 293–94. In Landowners' view, logic dictated that the order's general conclusion that Landowners failed to state a claim flowed directly from the specific reasoning that the law was a decriminalization.

In the unlikely event that the Court of Appeals agreed with the Department, Landowners asked that, were it to find the order ambiguous and resolve that ambiguity in favor of the Department's interpretation, the court should grant Landowners leave to amend their assignment of error to include this second, unspecified ground. J.A. 293–94.

[8] In relevant part.

The Court of Appeals affirmed the Circuit Court order without reaching the merits of Landowners' appeal.

On July 11, 2023, the Court of Appeals entered a memorandum opinion affirming the Circuit Court's order 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).

J.A. 313–14.

The Court of Appeals acknowledged the parties' dispute as to whether the Circuit Court ruled on one or both arguments in the Department's demurrer. J.A. 313–17. However, instead of interpreting the order as resting on *one* or *both* grounds (decriminalization or causation), the Court of Appeals decided that it *would not decide* without a transcript. *Id.* In support of this, the Court of Appeals quoted the following language from the Circuit Court order: "The Court has

‘*considered the arguments made at the hearing* and in the briefs submitted.’” J.A. 315–16 (emphasis by Court of Appeals). The Court of Appeals further 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. J.A. 317.

Landowners petitioned for rehearing.

Landowners filed a timely petition for rehearing before the Court of Appeals. 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. J.A. 326–35. Therefore, argued Landowners, the Court of Appeals should not have demanded a transcript of oral arguments because a transcript could not have been relied upon for the arguments below or to supplement the written Circuit Court order. *Id.* Such collateral attacks on written orders are strongly disfavored in Virginia. *See infra* Part I–A.

Likewise, argued Landowners, a statement of facts would have been superfluous to the pleadings, since a demurrer merely tests the *legal* sufficiency of facts *alleged* in a petition or complaint, with well-pled facts being taken as true at that stage. J.A. 323–24, 331–35.

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

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

This Court granted Landowners' petition for appeal.

This Court granted Landowners' Unopposed Motion for an Extension of Time to file their petition for appeal until September 25, 2023. Order, *Medeiros v. VDWR*, Va. Ct. App. No. 1463-22-2 (Va. Aug. 28, 2023). Their timely petition for appeal followed.

After hearing oral argument before a writ panel on February 13, 2024, this Court granted Landowners' petition for appeal on February 23, 2024.

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. J.A. 316. 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. J.A. 316–17. 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. J.A. 317. 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. Since this assignment of error arises from the Court of Appeals' *sua sponte* ruling on the

indispensability of a transcript without briefing by the parties on the question, Landowners raised this argument for the first time in their petition for rehearing. J.A. 323–25.

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 alternatively on an additional, unspecified ground as well. J.A. 316. 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. The order unambiguously ruled on only one specific ground—the one to which Landowners assigned error. Moreover, any ambiguity in the order should have been resolved by careful reading and the application of canons of construction, such as *expressio unius est exclusio alterius*, and after such application it would have been clear to the court that the order ruled only on one ground. Finally, even 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. J.A. 293–96, 329–31.

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 should grant Landowners leave to amend their assignment of error to reflect this new interpretation of the Circuit Court order. The Court of Appeals ignored this request, despite deeming 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. J.A. 293–96, 325, 335–37.

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 Mut. Fire Ins. Co. v. Erie Ins. Exch.*, 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. J.A. 316–17. In the Commonwealth, "trial courts speak only through their written orders," *Temple v. Mary Washington Hosp., Inc.*, 288 Va. 134, 141 (2014), and are permitted to consider only those arguments first raised in a demurrant's written motion. Va. Code Ann. § 8.01-273 (West 2017). Thus, the pleadings and written order formed a complete and sufficient record for review. This is particularly so

where, as here, neither party argued that the order failed to "reflect accurately what transpired." *Temple*, 288 Va. at 141. Given that a complete and sufficient record was before the Court of Appeals, it should not have sidestepped the question presented by Landowners' assignment of error.

A. The Court of Appeals could not in any event have relied on judicial statements from the oral argument.

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." J.A. 316. 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 Circuit Court judge subjectively intended a second, unspecified ground for sustaining the Department's demurrer, the Court of Appeals would not have been permitted to use the transcript to supplement the written order to add that ground.

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 Constr., Inc. v. N. End 49ers Sandbridge Bulkhead Grps. A, B & C*, 251 Va. 417 (1996), this Court considered 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 from the bench 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." Br. 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 conclude that the lower court *did not* decide the question of arbitrability. *Id.*

Here, the Court of Appeals desired a transcript to do the very thing this Court foreclosed in *Waterfront Marine*—namely, add a specific finding not reflected by the written final order.

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 extended. *Id.* In concluding 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 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, different from, or omitted 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 that the 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 even if it existed. Under this Court's binding precedents, therefore, the transcript could not have been "indispensable," as the Court of Appeals reasoned.

The remedy for a party who believes that the trial court erred by omission is to move for the court to amend its order. *See infra* Part IV. The Department sought no such remedy, nor did the Court of Appeals remand for clarification, instead declining to interpret the order after speculating that the Circuit Court *might* have ruled on an unexpressed additional ground, despite not articulating that additional ground. J.A. 316.

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

The Court of Appeals' concern that the Henrico Circuit Court could have based its ruling on any number of arguments raised by the parties at the demurrer hearing was unjustified. 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 Ann. § 8.01-273 (West 2017) (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. The Court of Appeals needn't have speculated on the infinite permutations of arguments and defenses potentially raised and waived below because Virginia rules and laws of procedure strictly limited them, and the record on appeal was the case's complete universe in this respect.

B. Concerns about waiver, or approbation and reprobation, are not a sufficient basis for requiring a transcript or statement of facts in this appeal.

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 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 plain language of Rule 5A:8 "demonstrates that there is no requirement that a transcript be filed in every appeal." *Smith v. Commonwealth*, 281 Va. 464, 468 (2011). Indeed, "cases may often be decided without the filing of a transcript." *Id.* This Court has observed that it "will consider any question of law properly raised as to matters appearing on the face of the record." *Smyth v. Midgett*, 199 Va. 727, 729 (1958). Landowners presented the court below with just such an appeal, assigning error to the Henrico Circuit Court for its interpretation of the Right to Retrieve Law, the sole ground it provided in its written order for sustaining the Department's demurrer. J.A. 134, 137–39. In such a case, a sufficient "record consists of the pleadings, exhibits filed therewith and the orders of the lower court." *Smyth*, 199 Va. at 729. Again, just such a record was provided to the Court of Appeals below.

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 required only when the facts they provide are "indispensable." *Smith*, 281 Va. at 468–69. This is most common with evidentiary 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.

---

[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).

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), though this Court has even ruled a transcript *not* to be indispensable in one such case. *See Haugen v. Shenandoah Valley Dep't of Soc. Servs.*, 274 Va. 27, 32 (2007).

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" to determine whether the demurrer should have been sustained as a matter of law under a *de novo* standard of review.

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.*, *Haugen* 274 Va. at (record sufficient without transcript for court to rule that trial court abused discretion in

denying a motion for continuance); *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); *City of Richmond v. Randall*, 215 Va. 506, 507–08 (1975) (record sufficient without transcript for assignment of error concerning issuance of land-use permit); *Smyth*, 199 Va. at 729 (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 Soc. Servs.*, 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, [a 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. J.A. 317. 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 by either the Court of Appeals or the Department.

Moreover, if the Department wished to press such an argument, then it was *the Department's burden* to ensure that a transcript of the oral argument hearing was taken. If such a transcript existed, Rule 5A:7 would have designated it as a part of the record on appeal. Even if the Department had made the argument, it would have waived it as a result

of not making a record in the lower court. Landowners should not be punished for not preserving the record of a speculative argument that the Department never raised or relied upon.

Finally, since 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 where a hearing has occurred, a result in conflict with this Court's conclusion that a transcript is not always necessary and that appeals may "often" be decided without one. *See Smith*, 281 Va. at 468.

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 concerning the interpretation (or lack thereof) of a written instrument (the Henrico Circuit Court's written order), this Court will apply a *de novo* standard of review. *See Nationwide Mut. 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." J.A. 315. The Court of Appeals failed to acknowledge the causal relationship between these two statements, as well as the ordinary inference that flows from the general, dispositive conclusion following its more specific legal reasoning. This reading is the best one for another reason: Finding that the Right to Retrieve Law *decriminalizes* trespassing rather than *authorizing* it was a legally sufficient basis for sustaining the Department's demurrer.

Because physical invasions of property under a statute must be authorized by law to constitute uncompensated takings, *Cedar Point Nursery*, 594 U.S. at 152–53, a law that merely decriminalizes trespassing by private parties, preserving to Landowners their civil

remedies, is not a taking in the constitutional sense.[10] 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.'" J.A. 315–16. 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.

But the Court of Appeals' error is not merely that it misinterpreted the Circuit Court's order. Rather, it erred by failing to interpret it at all.

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 included one specific ground—

[10] There might be some set of factual circumstances under which the enforcement or nonenforcement of criminal laws may result in takings for public use, but Landowners did not plead such a case below and the parties agree that if the Right to Retrieve Law is a decriminalization rather than an authorization, then it does not effect a taking of Landowners' private properties for public use.

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 causation defense—by not listing it in the order. If the inclusion of a court's specific reasoning, followed by a conclusion that necessarily proceeds 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 or qualify 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. Cas. Co.*, 172 Va. 383, 393 (1939)). None of this could be said of the Circuit Court's order below. Even if it could, 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 a transcript, if it had been created, might have cleared up the ambiguity. J.A. 316. 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 the Circuit Court "considered the arguments made at the hearing and in the briefs submitted." J.A. 315–16 (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 Circuit 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 the Circuit Court's order was truly ambiguous, the correct course for the Court of Appeals was first to attempt a resolution of the ambiguity by applying canons of construction, and should the ambiguity persist, then to remand for the Circuit Court to clarify its ruling, 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 (assuming this to be its implicit finding) and had proceeded to interpret it as sustaining the Department's demurrer on both grounds asserted in the Department's written motion, the Court of Appeals 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 the demurrer incorporated the Department's second ground therefor, despite the Circuit Court's order not specifically identifying it. J.A. 293–96.

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. *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. J.A. 293–96, 325–26. Its failure to do so was an abuse of discretion that merits 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 and citation omitted).

IV. If the Department thought the order should include an additional ground, it had a remedy.

As this Court has said, circuit court orders are to be interpreted based on the findings they expressly include, rather than the findings they do not. In *Temple*, this Court ruled that a circuit court order not expressly incorporating the findings from an earlier nonsuited action did not incorporate them, despite statements from the bench indicating that the circuit court would do so. 288 Va. at 140–41. In *Waterfront Marine*, the Court came to the same conclusion with respect to whether an oral statement by a circuit court judge should be incorporated to supplement a written order. 251 Va. at 427 n.2. Likewise, in *Stamper*, this Court favored the plain language of a written order over a party's transcript-based argument on appeal. 220 Va. at 280. Indeed, it noted in *Stamper*

that the parties had 21 days to move for the circuit court to amend its order if they believed that the order did not accurately reflect what transpired. *Id.* at 280–81. The Department had the same opportunity here.

Because the Henrico Circuit Court did not rule that Landowners' petition failed on the causation ground argued by the Department but instead limited its ruling to the decriminalization ground expressed by its written order, the Department was bound to this order on appeal. Its argument below that Landowners' assignment of error was procedurally insufficient must therefore fail. If the Department wished to argue the causation ground on appeal—and by extension that Landowners failed to assign error to it—then it had two options.

First, it could have moved the Circuit Court to amend its order to incorporate the causation ground under Rule 1:1(a) for the 21 days after it was entered, during which the court retained jurisdiction. It made no attempt to do so.

Second, even after Landowners' appeal was taken, the Department could have moved under Va. Code § 8.01-428(B) if it believed that the

Henrico Circuit Court's omission of the causation ground was an error of oversight. This section provides as follows:

> Clerical mistakes in all judgments or other parts of the record *and errors therein arising from oversight or from an inadvertent omission* may be corrected by the court at any time on its own initiative or upon the motion of any party and after such notice, as the court may order. During the pendency of an appeal, such mistakes may be corrected before the appeal is docketed in the appellate court, and thereafter *while the appeal is pending such mistakes may be corrected with leave of the appellate court*.

Va. Code Ann. § 8.01-428(B) (West 2016) (emphasis added). Again, the Department chose not to pursue this remedy. If it wanted a circuit court order that ruled in its favor on *two* grounds rather than *one*, it should have sought amendment. Its failure to do so should not be charged against Landowners' account.

CONCLUSION

For the foregoing reasons, this Court should vacate the Court of Appeals' order affirming the Circuit Court's order and remand with instructions that it rule on Landowners' assignment of error below on the merits. In the alternative, if this Court finds the Circuit Court order ambiguous, and resolves that ambiguity in favor of the Department's interpretation, Landowners request that this Court vacate the Court of

Appeals' order nonetheless, but remand with instructions that Landowners may amend their assignment of error to encompass the causation ground. In the second alternative, if this Court finds that the Circuit Court order is irremediably ambiguous, Landowners ask that the Court nonetheless vacate the Court of Appeals' order and remand to the Henrico Circuit Court for it to clarify its order.

DATED: April 3, 2024.

Respectfully submitted,

/s/ Daniel Woislaw

DAMIEN M. SCHIFF*
Cal. Bar No. 235101
Pacific Legal Foundation
555 Capitol Mall, Suite 1290
Sacramento, California 95814
Telephone: (916) 419-7111
DSchiff@pacificlegal.org
**Pro Hac Vice*

DANIEL WOISLAW
Va. Bar No. 91180
Pacific Legal Foundation
3100 Clarendon Blvd., Suite 1000
Arlington, Virginia 22201
Telephone: (202) 888-6881
DWoislaw@pacificlegal.org

Counsel for Appellants

CERTIFICATE

Pursuant to Rule 5:26(g) of the Supreme Court of Virginia, I hereby certify the following:

1. The Appellants are James Medeiros, Mauricio Tovar, Blue Wing LLC, and Robert Pierce.

2. Counsel for the Appellants are:

Daniel Woislaw (VSB No. 91180)
Pacific Legal Foundation
3100 Clarendon Blvd., Suite 1000
Arlington, Virginia 22201
Telephone: (202) 888-6881
Facsimile: (916) 419-7747
DWoislaw@pacificlegal.org

Damien M. Schiff (*Pro Hac Vice*)
Cal. Bar No. 235101
Pacific Legal Foundation
555 Capitol Mall, Suite 1290
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
DSchiff@pacificlegal.org

3. The Appellee is Virginia Department of Wildlife Resources.

4. Counsel for Appellee are:

Erika L. Maley, Principal Deputy Solicitor (VSB # 97533)
Graham K. Bryant, Deputy Solicitor General (VSB # 90592)
M. Jordan Minot, Assistant Solicitor General (VSB # 95321)
Kelci A.M. Block, Assistant Attorney General (VSB # 86036)
Office of the Attorney General
202 North Ninth Street
Richmond, Virginia 23219
Telephone: (804) 786-7704
Facsimile: (804) 371-0200
SolicitorGeneral@oag.state.va.us
GBryant@oag.state.va.us
MMinot@oag.state.va.us

5. Pursuant to Rule 5:26(b), this Opening Brief contains 7,533 words.

6. The foregoing Opening Brief has been filed with the Clerk of the Supreme Court of Virginia via VACES, and a copy has been served via email, as agreed by the parties, upon counsel for Appellee this 3rd day of April, 2024.

/s/ Daniel Woislaw
DANIEL WOISLAW