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STEER CLEAR OF HAVING YOUR APPEAL "BLACK-FLAGGED" BY A PROCEDURAL MISSTEP IN THE COURT OF APPEALS OF VIRGINIA OR THE SUPREME COURT OF VIRGINIA

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With the recent expansion of the scope of the jurisdiction of the Court of Appeals of Virginia to ensure a right of appeal in most civil and criminal cases,[1] many litigators well versed in trial work may find themselves traveling down unfamiliar speedways of Virginia's appellate courts.

A prior article in the Journal of Civil Litigation by one of the present authors addressed missteps to avoid at the trial level that could lead to procedural default on appeal.[2] That article analogized how a problem embedded in the building of a stock car can lead to disqualifications or penalties and make winning a race more difficult or impossible.

The current article is an extension of the earlier piece and addresses missteps that can occur and lead to procedural default *during the appeal itself*. To continue the analogy, the authors compare such missteps to violations of NASCAR rules during the race itself.

In NASCAR, drivers can be penalized severely for rules violations that are committed during the race. Just to name a few: a driver cannot speed on pit road, violate the commitment line rules to decide whether to pit or continue on the race track, pass the pace car during a caution, drive through too many pit stalls, have crew members over the wall in the pit area too soon, have loose equipment escaping the pit stall, have too many crew members over the pit area wall, or have a pit stop outside his pit box.[3] Penalties for such violations can require that the

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[1] *See* W. Thomas Chappell, *An Appeal of Right—Navigating the New Court of Appeals of Virginia*, VBA Journal 24 (Fall 2022); Graham K. Bryant, *Appeals of Right in Virginia: Preparing for the New Appellate Landscape*, 33 J. Civ. Litig. 427 (Fall 2021).

[2] W. Thomas Chappell & Alli M. Mentch, *What to Watch for at Trial in Virginia Courts to Avoid Having Your Appeal 'Disqualified' or 'Sent to the Rear,'* 35 J. Civ. Lit. 581 (Winter 2023–24).

[3] *E.g.*, Chris Deeley, *NASCAR confirm massive 17 Cup Series penalties at Richmond*, GP FANS (Aug. 17, 2025), https://www.gpfans.com/us/f1-news/1059158/nascar-confirm-massive-17-cup-series-penalties-richmond/; *Understanding when and how NASCAR Teams Are Penalized*, NASCAR 101 (June 28, 2021), https://nascar101.nascar.com/2021/06/28/understanding-when-and-how-nascar-teams-are-penalized/.

driver drive through pit road during the race and thus lose track position or be sent to the rear of the pack. More severe punishments can be imposed for things such as overly aggressive driving.[4] Incurring a penalty or worse—a disqualification—can ruin the chances of success of even the most talented drivers and teams.

In the same way, talented attorneys with good cases can lose an appeal by making a technical misstep at the appellate level. This article explains some common mistakes during proceedings in the appellate courts themselves that practitioners should avoid when litigating an appeal before the Supreme Court of Virginia or the Court of Appeals of Virginia.

I. Misstep One: Problems with Assignments of Error

Problems with an assignment of error can send an appeal or issues in it "behind the wall" and out of the race early in the process.[5] An appellate practitioner would be wise to start and finish the analysis and briefing processes with assignments of error and spend considerable time on them. If error is not assigned on an issue, the appellate courts will not consider it. Appellate courts frame their analysis of an appeal based on the assignments of error as they are the "core" of the case.[6] Thus, assignments of error should be thorough, precise, and persuasive.

A. WHAT IS AN ASSIGNMENT OF ERROR?

An assignment of error is a pleading in an appellate court wherein the appealing party asserts where the trial court committed reversible error.[7] Not an interrogatory but a declaratory statement, an assignment of error should be "clear[ ] and concise[ ] and without extraneous argument" and identify "the specific errors in the ruling below"—or where the lower court refused to rule—"upon which the party intends to rely."[8] An appellant must "lay his finger on the alleged misjudgment of the court below."[9]

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[4] *E.g.*, Zack Albert, *NASCAR officials drop Austin Dillon from Cup Series Playoffs; Logano fined*, NASCAR (Aug. 14, 2024), https://www.nascar.com/news-media/2024/08/14/cup-series-2024-richmond-penalty-austin-dillon-playoffs-eligibility/ (describing Austin Dillon's disqualification from the NASCAR playoffs based on a finding that he was overly aggressive during the final lap, notwithstanding that he won the Richmond race).

[5] For a thorough analysis of many issues involving assignment of error previously published in The Journal of Civil Litigation, see George A. Somerville, *Preservation of Errors for Appeal*, 26 J. Civ. Lit. 561, 587–97 (Winter 2014–15). For additional insight on assignments of error, see material written by Professor Benjamin J. Madison and Graham K. Bryant in "Appeals to the Court of Appeals of Virginia and the Supreme Court of Virginia," in Appellate Practice—Virginia and Federal Courts 21–23, 67–70 (Hon. Frank K. Friedman & L. Steven Emmert, ed., 2023) and by Judge Frank K. Friedman, in "Preserving Error in the Trial Court and Beyond," in Appellate Practice—Virginia and Federal Courts 447–50 (Hon. Frank K. Friedman & L. Steven Emmert, ed., 2023).

[6] Forest Lakes Cmty Ass'n, Inc. v. United Land Corp. of Am., 293 Va. 113, 122 (2017).

[7] *See* Henderson v. Cook, Tr. for Noojin, 297 Va. 699, 706 (2019) ("An assignment of error is in the nature of a pleading, and in the court of last resort it performs the same office as a declaration or complaint in a court of original jurisdiction.").

[8] Va. Sup. Ct. R. 5:17(c)(1), 5:21(a)(7), 5A:12(c)(1), 5A:20(c).

[9] *Forest Lakes Cmty. Ass'n*, 293 Va. at 122; Findlay v. Commonwealth, 287 Va. 111, 115 (2014).

The Supreme Court of Virginia has explained:

> The purpose of assignments of error is to point out the errors with reasonable certainty to direct the Court and opposing counsel to the points on which the appellant intends to ask a reversal of the judgment, and to limit discussion to these points. Without such assignments, the appellee would be unable to prepare an effective brief in opposition to appeal, to determine the material portions of the record to designate for the appendix, to assure herself of the correctness of the record, or to file assignments of error.[10]

Notably, assignments of error are also required to identify where in the record the appeal was preserved below or, if the trial court refused to rule on an issue, where the issue was presented to the lower court and the trial court had the chance to rule on it.[11] If the assignment of error was not preserved below, then the appealing party must argue for a hearing based on the ends of justice or good cause shown exceptions. The appellate court will not consider these grounds sua sponte.[12]

B. PRELIMINARY DESIGNATION OF ASSIGNMENTS OF ERROR AND CROSS-ERROR IN APPEALS OF RIGHT IN THE COURT OF APPEALS

Most appeals from circuit court are now a matter of right to the Court of Appeals of Virginia.[13] As explained in detail below, appellants are required to submit preliminary nonbinding assignments of error within fifteen days after the Court of Appeals of Virginia receives the record from the circuit court, even if the record is digital and no appendix is required.[14] Counsel for appellee has ten days after this designation to file a preliminary statement of its own assignments of cross-error.[15] That the first thing most appealing practitioners have to do in the appellate court is designate preliminary assignments of error reveals their importance to an appeal.

1. Assignments of Error at the Petition Stage of Discretionary Appeal Cases in the Court of Appeals and in the Supreme Court of Virginia

Some cases in the Court of Appeals of Virginia and nearly all cases in the Supreme Court of Virginia are discretionary, meaning that the court has to accept

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[10] Harlow v. Commonwealth, 195 Va. 269, 271–72 (1953); *see also* Friedline v. Commonwealth, 265 Va. 273, 278 (2003); Yeatts v. Murray, 249 Va. 285, 290 (1995).

[11] Va. Sup. Ct. R. 5:17(c)(1), 5:20(a)(7), 5:20(b)(4), 5:27(c), 5A:12, 5A:20(c).

[12] *Id.* 5:25, 5A:18; *e.g.*, Jones v. Commonwealth, 293 Va. 29, 39 n.5 (2017); Spanos v. Taylor, 76 Va. App. 810, 827–28 (2023).

[13] *See* W. Thomas Chappell, *An Appeal of Right—Navigating the New Court of Appeals of Virginia*, VBA Journal 24 (Fall 2022); Graham K. Bryant, *Appeals of Right in Virginia: Preparing for the New Appellate Landscape*, 33 J. Civ. Litig. 427 (Fall 2021).

[14] Va. Sup. Ct. R. 5A:19(b)(1), 5A:25(a)(1), 5A:25(d).

[15] *Id.* 5A:19(b)(1), 5A:25(a)(1), 5A:25(d).

the case (and certain or all assignments of error thereunder) before it is heard on the merits. In such cases, the appellant is required to identify assignments of error in a petition for appeal and convince the appellate court to accept the issues for a full hearing.[16]

As set forth in greater detail below, having to convince a court to hear assignments of error may require an approach different from that used in assigning error in cases in which all assignments of error designated will be heard on their merits as of right.

2. The "Goldilocks Zone"[17] and the "Because Clause"

Effective assignment of error drafting requires consideration of both specificity and breadth.[18]

In both discretionary review and appeals as of right, assignments of error must be included under a heading labeled "Assignments of Error" and

> must list, clearly and concisely and without extraneous argument, the specific errors in the rulings below—or the issue(s) on which the tribunal or court appealed from failed to rule—upon which the party intends to rely, or the specific existing case law that should be overturned, extended, modified or reversed.[19]

An issue may be deemed waived if an assignment of error fails to adequately specify which error the party is challenging on appeal.[20] The appealing party must "lay his finger on the error" and not expect the appellate court "to delve into the record and winnow the chaff from the wheat."[21]

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[16] *Id*. 5:17(c)(1), 5:17A:(c)(1), 5:18, 5A:12(c)(1), 5A:13(b).

[17] The authors attribute this terminology commonly used among members of the appellate bar to the esteemed L. Steve Emmert, Esq., a longtime leader in the Virginia appellate bar.

[18] Notably, there has been interesting discussion among learned and esteemed members of the appellate bar as to whether the Rules should be changed to better align with federal appellate rules and require no binding assignments of error. *Compare* Jay O'Keeffe, *Should the Court of Appeals Require Binding Assignments of Error?*, De Novo: A Va. App. L. Blog (Aug. 30, 2021), https://www.virginiaappellatelaw.com/2021/08/articles/appellate-practice/should-the-court-of-appeals-require-binding-assignments-of-error/; *and* Jay O'Keeffe, *Binding Assignment of Error*, De Novo: A Va. App. L. Blog (June 26, 2018), https://www.virginiaappellatelaw.com/2018/06/articles/uncategorized/binding-assignments-of-error/ *with* John Koehler, *Do away with Assignments of Error? I Think Not, Mr. O'Keeffe*, L. Off. James Steele, (Aug. 31, 2021), https://www.jamessteelelaw.com/post/do-away-with-assignments-of-error-I-think-not-mr-o-keeffe.

[19] Va. Sup. Ct. R. 5:17(c)(1). 5:21(a)(7), 5A:12(c)(1), 5A:20(c).

[20] *See* Findlay v. Commonwealth, 287 Va. 111, 115 (2014) ("Litigants are required to identify with specificity the error committed by the trial court."); Forest Lakes Cmty. Ass'n, Inc. v. United Land Corp. of Am., 293 Va. 113, 122 (2017) (appealing party must "lay his finger on the alleged misjudgment of the court below"); Westlake Props., Inc. v. Westlake Pointe Prop. Owners Ass'n, Inc., 274 Va. 107, 124 n.5 (2007); First Nat'l Bank of Richmond v. William R. Trigg Co., 106 Va. 327, 342 (1907) (holding that an appellant's assignment of error must "lay his finger on the error").

[21] *Findlay*, 287 Va. at 115–16 (citations and internal quotation marks omitted).

But an assignment of error that is *too* specific runs the danger of being insufficient as well. For example, if an assignment of error states that a ruling of the lower court was incorrect for a particular reason and the appellate court disagrees that the stated basis was the actual one employed, the assignment of error may be disregarded or stricken as insufficient. Moreover, there is a danger of an overly specific assignment of error failing to challenge the full breadth of a lower court's ruling and, as explained in more detail below, missing potential separate and independent bases supporting the trial court's ruling.[22] Further, an overly specific assignment of error could prevent persuasive arguments from being heard if they fall outside the ambit of the narrow terms set forth in the assignment of error.[23] In addition, overly specific assignments of error run the risk of misstating the ruling of the trial court below and being procedurally defaulted on that ground.[24]

Notably, an assignment of error is required only to identify *where* the lower court allegedly went wrong but not to state *why* the lower court went wrong.[25] This means there is no requirement for a "because clause" in an assignment of error.[26] Nevertheless, in the opinion of the authors, good advocacy starts with the assignments of error, such that a succinct, thorough, and specific explanation of why the lower court's ruling was incorrect is effective to explain the argument to the court in appropriate circumstances. However, when in doubt, parties do have the option of including an assignment of error without a "because clause" to stave off waiver concerns.[27]

Specificity can be especially tricky in appeals from the Court of Appeals of Virginia to the Supreme Court. If the Court of Appeals of Virginia affirms the circuit court's ruling on the ground that it was harmless error, waived, or adds an additional ground supporting the ruling below, an appeal to the Supreme Court must address both the ruling of the trial court and the ruling of the Court of Appeals of Virginia on the other basis.[28]

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[22] *See, e.g.*, Arrington v. Commonwealth, No. 0124-21-3, 2022 WL 1086085 (Va. Ct. App. Apr. 12, 2022); AlBritton v. Commonwealth, 299 Va. 392, 412 (2021) (explaining that if an assignment of error says that a ruling was error "because" of a certain ground, then the court's analysis is limited to that basis and cannot go beyond it); Ferguson v. Stokes, 287 Va. 446, 452–53 (2014); Manchester Oaks Homeowners Ass'n, Inc. v. Batt, 284 Va. 409, 421–23 (2012); Parker-Smith v. Sto Corp., 262 Va. 432, 441 (2001) ("Since the court had an independent basis for dismissing the fraud counts that is not the subject of an assignment of error, we cannot consider the arguments advanced by [the appellant] regarding her fraud claims."); Rash v. Hilb, Rogal & Hamilton Co., 251 Va. 281, 286 (1996).

[23] Riddick v. Commonwealth, 72 Va. App. 132, 146 (2020).

[24] *E.g.*, Heinrich Schepers GMBH & CO, KG v. Whitaker, 280 Va. 507, 514 (2010).

[25] *See Findlay*, 287 Va. at 115–16 (2014); Commonwealth v. Herring, 288 Va. 59, 67–73 (2014); Mowbray v. Commonwealth, No. 140735, 2015 WL 10945040, at *2 (Va., Feb. 13, 2015) ("[A]n assignment of error need only identify the ruling at issue with such specificity that it 'puts the court and opposing counsel on notice' as to the ruling that the appellant believes to be erroneous."); Coke v. City of Hampton Dep't of Soc. Servs., No. 1254-20-1, 2022 WL 362929, at *1 n.2 (Va. Ct. App. Feb. 8, 2022) ("An assignment of error need not include 'why it was error' for the trial court to make the ruling an appellate challenges." (citation omitted)).

[26] *Findlay*, 287 Va. at 116.

[27] *Id.*; *see, e.g.,* Moison v. Commonwealth, 302 Va. 417, 420 (2023) (holding that "the syntax of an assignment of error cabins the error that this Court can consider").

[28] Rankin v. Commonwealth, 297 Va. 199 (2019).

Specificity should be tempered with the requirement for conciseness. One way to reveal an inexperienced appellate advocate, frustrate an appellate court, or risk being overly specific is to turn assignments of error into "mini-briefs" better suited for the argument sections. An assignment of error that is complicated and lengthy is in danger of being unpersuasive or, worse, subject to waiver. Thus, if a draft assignment of error takes up more than a few lines of text, an advocate should revisit the wording and either break it up into multiple assignments or streamline it by moving some of the material to the argument section.

A saving grace in some cases is that an appellate court may reach an issue that is not referenced in an assignment of error if the lower court's ruling was void ab initio, such as when the lower court lacked subject matter jurisdiction to rule on a case.[29]

3. How Many Is Too Many?

In the world of appeals of right, in the majority of cases heard in the Court of Appeals of Virginia, parties no longer have to convince an appellate court to accept certain assignments of error to have them heard on their merits with full briefing and argument. Thus, theoretically, there is no limit to the number of assignments of error that a party may raise in a brief. While there may be strategic reasons to limit the number raised at the petition stage in a discretionary appeal (apart from the applicable page limitations spelled out in the Rules), there is no limit to the number that a party may raise at the petition for appeal stage.

Certainly, the ability to take a belt-and-suspenders approach and raise numerous assignments of error to ensure all issues are covered in an appeal should give some comfort to appellate practitioners seeking to avoid procedural default. It is certainly good practice to take advantage of that opportunity to avoid any procedural problems in appropriate circumstances, especially in an appeal of right.

But practitioners should be careful about including so many assignments of error that they appear to be employing the strategy of "throwing buckets of mud at the wall and seeing what sticks." Criticizing a circuit court for making error upon error, instead of reaching an incorrect conclusion on one or a few issues, could diminish the credibility of all the arguments, as it is unlikely that any trial judge made so many errors in one case. Further, many ineffective assignments of error create "noise" that may distract the court from better arguments that may be buried in certain assignments of error. Thus, an effective appellate practitioner "picks his battles" instead of noting every potential issue in a case. This strategic determination should consider which arguments were preserved, whether there could be procedural default on a particular issue, the merits of the argument, the standard of review, the right-result-wrong-reason doctrine, and the harmless

[29] *E.g.*, Amin v. County of Henrico, 286 Va. 231, 234–37 (2013); Morrison v. Bestler, 239 Va. 166, 169–70 (1990).

error rule.[30] Instead, the assignments of error should focus the appellate court on the issue or issues that have the best chance of success.[31]

4. Final Takeaways on Assignments of Error

One of the easiest ways to lose an issue or an appeal entirely is by slipshod framing and expression of assignments of error. Practitioners should spend considerable time and attention on them to ensure they are airtight from a waiver perspective and that they are persuasive.

II. Misstep Two: Missing the Required Designations for Appendices or Assignments of Error

Appellate litigants should be careful not to miss the requirements to designate assignments of error or contents for an appendix.

In the Court of Appeals of Virginia, if the trial court's record is electronic, there is no separate requirement for an appendix that includes the material from the record that is germane to the appeal. In the rare (but still potential) case that the circuit court record is only in paper form, an appendix is still required in the Court of Appeals. In that circumstance, the parties may jointly file a designation of materials for an appendix within fifteen days of receipt of the record of the trial court (in appeals of right) or the certificate of appeal is issued by the trial court (in discretionary appeals). Absent agreement, the appellant has to designate such materials by this fifteen-day deadline, and appellee has ten days thereafter to make its designations.[32]

But whether or not an appendix is required, appellants and appellees are required to submit preliminary nonbinding assignments of error within this same time frame in appeals of right, and, in a granted discretionary appeal in the Court of Appeals of Virginia, the granted assignments of error and cross-error in the same timeline as above.[33]

Notably, the Rules now state that these assignment of error submissions are "preliminary" and "nonbinding."[34] These designations "are intended to assist the parties in designating the contents of the appendix and narrowing the issues in controversy."[35]

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[30] *See* Rachel Yates, *Less Is More: Winning with Fewer Assignments of Error*, Yates App. L., https://yatesappeals.com/how-many-appeal-issues-are-toomany/ (last visited Nov. 7, 2025) ("If you have too many [assignments of error], judges will not know which to take seriously. You lose credibility as an appellate advocate and judges (and their law clerks!) lose focus with unnecessary length.").

[31] *See id.*; Jay O'Keeffe, *What's the Right Number of Assignments of Error*, De Novo: A Va. App. L. Blog (Feb. 22, 2016), https://www.virginiaappellatelaw.com/2016/02/articles/appellate-practice/whats-the-right-number-of-assignments-of-error/ (discussing the benefits of having fewer assignments of error).

[32] Va. Sup. Ct. R. 5A:25(d).

[33] *Id.* 5A:19(b)(1), 5A:25(a)(1), 5A:25(d).

[34] *Id.* 5A:25(d).

[35] *Id.* Prior versions of the Rules did not state that the designation of assignments of error was "preliminary" or "nonbinding." But the Court amended the Rules effective August 24, 2024, to permit a change in the assignments

The assignments of error and cross-error "become fixed" once the principal brief is filed and cannot "be substantively changed without leave of Court."[36]

Assignments of error designated in appeals of right in the Court of Appeals of Virginia became nonbinding pursuant to a 2024 change in the Rules of the Supreme Court of Virginia.[37] The Court of Appeals of Virginia recently explained:

> The additional flexibility afforded by the 2024 amendment accommodates the reality that the parties and their counsel usually develop a clearer and deeper understanding of how best to frame the issues by the time each side's principal brief is due. By contrast, the preliminary designation of assignments of error and cross-error occurs early in the appellate process "to assist the parties in designating the contents of the appendix"—if one is required, *see* Rule 5A:25(a)—and in "narrowing the issues in controversy," Rule 5A:25(d).[38]

The court has cautioned, however, that it "expects the parties and counsel to act in good faith and to avoid gamesmanship when designating preliminary assignments of error and cross-error."[39] It further noted that Rule 5A:25(f) "provides a potential sanction for misconduct."[40]

Unlike the Court of Appeals of Virginia, the Supreme Court's rule preset is that an appendix is required. Those requirements are included in Rule 5:32. The appellant is responsible for preparing and filing the appendix. The parties can agree to jointly designate contents for the appendix within fifteen days after the certificate of the clerk. Absent an agreement, appellant must designate contents of the appendix within fifteen days after issuance of the certificate of appeal and appellee has fifteen days after receiving appellant's designation to file its own designation of other parts of the record it wants to include in the appendix.[41]

It is possible that the Supreme Court sua sponte, or after a party files a motion within ten days after issuance of a writ granting a petition for appeal, may dispense with the requirement for an appendix and address the case on the entire record—similar to the Court of Appeals of Virginia in electronic record cases.[42]

While parties should endeavor to include all required material in the appendix and any material germane to the issues in the appeal, the Supreme Court may

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of error in the opening brief without seeking leave of court or filing additional assignments of error or cross-error. November 21, 2023 Amendment to the Rules of the Supreme Court of Virginia (effective January 20, 2024), *available at* https://www.vacourts.gov/static/courts/scv/amendments/rule_5a_25.pdf

[36] Sisco v. Holtzman, 85 Va. App. 431, 433–34 (2025); *see also* Va. Sup. Ct. R. 5A:20(c)(4).

[37] November 21, 2023 Amendment to the Rules of the Supreme Court of Virginia (effective January 20, 2024), *available at* https://www.vacourts.gov/static/courts/scv/amendments/rule_5a_25.pdf.

[38] *Sisco*, 85 Va. App. at 433–34.

[39] *Id.* at 433 n.1.

[40] *Id.*

[41] Va. Sup. Ct. R. 5:32(b)(1).

[42] *Id.* 5:32(c). Notably, in situations where an appendix would otherwise be required in the court of appeals, that court may also enter an order dispensing with the need for an appendix. Va. Sup. Ct. R. 5A:25(b).

review material in the record that is not included in the appendix.[43] This is also the case when Supreme Court appendices are used in the Court of Appeals of Virginia.[44]

III. Misstep Three: "Bad Brief" Error

Even when the proper assignments of error have been successfully drafted, a brief may still lead to a loss. Assignments of error alone are not enough—they must specify the proper standard of review, argument, and appropriate authorities.[45] Skipping or skimping on the arguments and authorities with the aim of relying on oral argument is a recipe for disaster. The failure to adequately support assignments of error in a brief could result in a waiver of those arguments, colloquially known among the appellate bar as a "bad-brief" waiver.[46]

Rules 5:27(d) and Rule 5A:20(e) dictate what must be included in an opening brief before the Supreme Court of Virginia and the Court of Appeals of Virginia, respectively:

> The standard of review, the argument, and the authorities relating to each assignment of error. With respect to each assignment of error, the standard of review and the argument—including principles of law and the authorities—must be stated in one place and not scattered through the brief. At the option of counsel, the argument may be preceded by a short summary.

Courts have applied these Rules stringently since "[u]nsupported assertions of error do not merit appellate consideration."[47] Appellate courts will not construct appellants' arguments for them[48] and will strike assignments of error on the basis of bad-brief waiver. It is worth noting that the Court of Appeals of Virginia will deem arguments waived for bad briefing, whether or not appellee raises this as a

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[43] *Id.* 5:32(a)(2), 5:32(b)(1).

[44] *Id.* 5A:25(h).

[45] *See* Va. Sup. Ct. R. 5:17(c)(5), 5:27(d), 5:28(d), 5A:12(c)(5), 5A:20(e), 5A:21(d), 5A:21(e)(2); *see also id.* 5A:26.

[46] Professor Benjamin J. Madison and Graham K. Bryant, "Appeals to the Court of Appeals of Virginia and the Supreme Court of Virginia," in Appellate Practice—Virginia and Federal Courts 69 (Hon. Frank K. Friedman & L. Steven Emmert, ed., 2023); Hon. Frank K. Friedman, "Preserving Error in the Trial Court and Beyond," in Appellate Practice—Virginia and Federal Courts 408 (Hon. Frank K. Friedman & L. Steven Emmert, ed., 2023); Jay O'Keeffe, *SCOVA on Bad-Brief Waiver and Affidavits at Summary Judgment*, De Novo: A Va App. L. Blog (Feb. 4, 2021), https://www.virginiaappellatelaw.com/2021/02/articles/opinions-and-analysis/scova-on-bad-brief-waiver-and-affidavits-at-summary-judgment/; *see, e.g.,* Amazon Logistics, Inc. v. Virginia Emp. Comm'n, __ Va. __, __ 912 S.E.2d 290, 294 (Va. 2025).

[47] Bartley v. Commonwealth, 67 Va. App. 740, 744 (2017) (internal citations omitted).

[48] *See* Church Mut. Ins. Co., S.I. v. Ephesus Richmond Seventh-Day Adventist Church, 84 Va. App. 371, 380 (2025) ("It simply is not the appellate court's 'role … to … construct a litigant's case or arguments.'" (quoting Parrish v. Callahan, 78 Va. App. 630, 647 n.13, 892 S.E.2d 384 (2023))).

defense, because "the Rules of the Supreme Court are rules and not suggestions; we expect litigants before this Court to abide by them."[49]

To avoid bad-brief waiver, an appellant must do more than reiterate the contents of the assignments of error.[50] Bad-brief waiver typically applies "if a brief assigns error on one ground, but then fails to specifically argue those grounds in the body of the brief" because the arguments are considered inadequately developed.[51] The Court of Appeals of Virginia expects appellants to present "a legal prism through which to view [an] alleged error" and is unwilling to accept "skeletal" arguments.[52]

The Court of Appeals of Virginia expects fully constructed arguments for *every* assignment of error, and unsupported assignments of error may be deemed waived, even if arguments supporting other assignments of error are closely related.[53] Raising too many assignments of error increases the likelihood that some of them will be waived for insufficient briefing.[54]

Bad-brief waiver also applies "when the argument on brief, even if carefully crafted and legally persuasive, nonetheless has little, if anything, to do with the assignment of error."[55] Including arguments unrelated to the assignment of error can result in the court deeming the entire section waived under the bad-brief rule.[56] For example, in *Zinner v. Washington Gas Light Co.*, appellant's assignment of error, as drafted, argued that the circuit court should have deferred to a zoning board's interpretation of a zoning ordinance, but appellant's brief added arguments that the circuit court heard so much new evidence beyond the board that it made a separate decision.[57] The court deemed the entire assignment of error waived for the inclusion of this new argument, noting that it ran afoul of the prohibition against bad briefing.[58] Even an arguably related, but ultimately different argument, will not withstand the bad-brief waiver.[59]

In sum, well-written assignments of error could be rendered nugatory by the failure to sufficiently support them with argument and authorities. To avoid

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[49] Coward v. Wellmont Health Sys., 295 Va. 351, 367 (2018) (internal citations and quotations omitted); *see also* Prieto v. Commonwealth, 283 Va. 149, 159 (2012) (sua sponte holding that at least 131 out of 195 assignments of error are waived for bad briefing).

[50] *See, e.g.*, Muhammad v. Commonwealth, 269 Va. 451, 477–78 (2005) (striking two assignments of error for mere restatement and citation to argument embedded in the record upon Commonwealth's argument).

[51] Amazon Logistics, Inc. v. Virginia Emp. Comm'n, __ Va. __, __, 912 S.E. 2d 290, 294 (Va. 2025) (citation and internal quotation marks omitted).

[52] *Coward*, 295 Va. at 367 (citations and internal quotations omitted).

[53] Laveist v. Laveist, No. 1845–15–1, 2016 WL 1317683, at *4 (Va. Ct. App., Apr. 5, 2016) (appellant claimed his fourth and fifth assignments of error were encompassed by the argument for his first three; the court rejected this and waived the assignments of error).

[54] *See, e.g.*, *Prieto*, 283 Va. at 159.

[55] *Id*. (internal citations and quotation marks omitted).

[56] Zinner v. Washington Gas Light Co., 85 Va. App. 220, 246 n.12 (2025).

[57] *Id.*

[58] *Id.*

[59] *See, e.g.*, John Crane, Inc. v. Hardick, 283 Va. 358, 376 (2012) (assignment of error claiming that trial court erred in allowed evidence to be introduced deemed waived when the argument section discussed sufficiency of evidence).

bad-brief waiver, remain focused on the drafted assignments of error, support them with sufficient argument and authorities, and ensure that each is supported in a way that enables the appellate court to draw the connection between the argument and the assignment of error. To this end, appellate advocates are well served by identifying the assignment of error in the headings for the various argument sections so that there can be no mistake in drafting or in a court reviewing that all assignments of error are supported by argument and authorities.

IV. Misstep Four: *Manchester Oaks* Waiver

Success on race day requires attention to detail and focus to ensure that no rules are violated. The same can be said about litigating on appeal. Part of writing effective assignments of error and crafting strong arguments is covering all bases for appeal. Verifying that every articulated basis for a ruling has been assigned error is key to success.

"It is well-settled that a party who challenges the ruling of a lower court must on appeal assign error to each articulated basis for that ruling."[60] If opposing counsel, or even the appellate court itself, recognizes that the trial court had a legitimate, unchallenged independent basis for its ruling, even the most persuasive arguments challenging other bases could be practically worthless.[61] However, failing to assign error to all bases for the ruling does not, in and of itself, end the analysis.[62] The Court of Appeals of Virginia must then determine that the undisputed holding is one that "would legally constitute a freestanding basis in support of the [lower] court's decision … . But, in making that [evaluation], we do not examine the underlying merits of the alternative holding—for that is the very thing being waived by the appellant as a result of his failure to [assign error to it] on appeal."[63]

In *Manchester Oaks*, an HOA appealed the circuit court's determination that an amendment to the association's declaration was invalid on three of the six stated legal grounds.[64] One of the uncontested grounds for the decision was that the amendment was improper because there was inadequate notice of it under the declaration.[65] Without reviewing the factual correctness of the decision, the Court of Appeals of Virginia held that the legal conclusion that inadequate notice would render the amendment invalid was accurate and, therefore, a separate and independent basis to affirm existed.[66]

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[60] Manchester Oaks Homeowners Ass'n, Inc. v. Batt, 284 Va. 409, 421 (2012) (citing United Leasing Corp. v. Thrift Ins. Corp., 247 Va. 299, 307–08 (1994)).

[61] *See* Rash v. Hilb, Rogal & Hamilton Co., 251 Va. 281, 286, 467 S.E.2d 791, 795 (1996) ("[W]e cannot consider these arguments advanced by the [appellant] because there is an independent basis to support the [ruling below] on these issues and that basis has not been challenged on appeal.").

[62] *Manchester Oaks*, 284 Va. at 422.

[63] *Id*. (citation and internal quotation marks omitted).

[64] *Id.* at 421.

[65] *Id.* at 422.

[66] *Id.* at 423.

Further, *Manchester Oaks* waiver can come into play when an assignment of error is broad enough to encompass all bases but the supporting arguments do not address all separate and independent bases for the lower court's decision.[67]

Thus, appellate advocates, when drafting assignments of error and in supporting them with arguments, should make sure that all separate and independent bases of a ruling are challenged.

V. Misstep Five: Voluntary Payment of a Judgment

Voluntary payment of a judgment while an appeal is pending can also cause the appeal to go "behind the wall." Virginia courts have drawn a bright line that "'[v]oluntary payment of a judgment deprives the payor of the right of appeal.'"[68] Although it may be understandable for a client to want to get ahead of the troubles associated with collections proceedings, stop the bleeding with interest, or avoid having to go to the trouble and expense of obtaining a suspension bond, voluntarily paying a judgment while challenging it on appeal will doom the appeal.[69]

In *Nestler v. Scarabelli*, the court articulated the reason for the voluntary payment doctrine:

> Under the voluntary payment doctrine, absent a showing of fraud or other misconduct, claimants cannot demand that a court return money that they voluntarily paid to another. In other words, if one voluntarily makes a payment which the law would not compel him to make, he cannot afterwards assign his ignorance of the law as a reason why the state should furnish him with legal remedies to recover it. Additionally, the party paying the illegal demand must do so with a full knowledge of all the facts which render such demand illegal.[70]

The Court of Appeals of Virginia considers voluntary payment to be a signal that the litigation has ended by the parties' own voluntary actions.[71] Of note is that this doctrine applies to appellants *and* appellees who voluntarily pay a judgment.[72]

In *Citizens Bank & Trust Co.*, the defendant-appellant sent the plaintiff "a check in the full amount of the judgment," which was "sent voluntarily before any proceedings were instituted to execute on the judgment" and was made,

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[67] *See, e.g.*, Colonna's Ship Yard Inc. v. Virginia Nat. Gas, No. 200949, 2021 WL 5829811 (Va., Dec. 9, 2021).

[68] Sheehy v. Williams, 299 Va. 274, 279 (2020) (quoting Citizens Bank & Tr. Co. v. Crewe Factory Sales Corp., 254 Va. 355, 355 (1997)).

[69] *See generally* Citizens Bank & Trust Co. v. Crewe Factory Sales Corp., 254 Va. 355 (1997).

[70] 77 Va. App. 440, 465–66 (2023) (internal quotation marks omitted); *see also* Sheehy v. Williams, 299 Va. 274, 279 (2020) ("The antonym of voluntary—involuntary—does not mean inconvenient. If 'the law would not compel him to make' the payment, the party making the payment has made it voluntarily.") (quoting Kent Sinclair, Sinclair on Virginia Remedies § 9-2, at 9–5 (5th ed. 2016)).

[71] Premier Homes Grp., LLC v. Pinnacle Flooring Sols., LLC, No. 2201-23-4, 2025 WL 1633770 (Va. Ct. App., June 10, 2025) (quoting *Sheehy*, 299 Va. at 279).

[72] *Id.* (waiving assignments of cross error pursuant to the voluntary payment doctrine).

according to appellant, "in satisfaction of the trial court's judgment."[73] The *Citizens Bank* court dismissed the matter based upon the voluntary payment doctrine without considering any further argument.

The debtor bears the burden of showing that such a payment was involuntary.[74] Defenses against the voluntary payment doctrine include the plaintiff's need to release his person or property from detention, to prevent an immediate seizure of his person or property,[75] or fraud or other tortious conduct.[76]

For example, in *Carlucci*, the Court held that the voluntary payment doctrine did not apply where "payment by [defendant] followed the issuance by the plaintiff of an execution on its judgment and the filing by it of a suggestion in garnishment against [defendant] and [his employer]."[77] "The payment of a judgment under such circumstances is not such a voluntary payment as causes a loss of the right of appeal by the judgment debtor."[78]

But a written protest being filed along with the payment is not a defense.[79]

Litigants should therefore beware of the trap of paying a judgment while simultaneously challenging it on appeal.[80]

VI. Misstep Six: Not Addressing That the Record Is Missing Important Parts until It Is Too Late

One of the more challenging tasks for appellate litigators is familiarizing themselves with the record, which can be thousands of pages long. It may be challenging even for the attorney who was counsel at trial to remember everything that happened below. But it is even more challenging, if not impossible, for appellate counsel new to the case to know whether the record is complete. It is critical that confirmation of this be the first step in every appeal and further good reason for appellate counsel to consult with trial counsel.

The record on appeal from the trial court is prepared and transmitted by the circuit court clerk's office.[81] However, clerical errors occur, and portions of a record can be missing from the record the trial court has on file. It is imperative that an appellate lawyer recognize and correct these omissions as early as possible in the process. A party asking for a change in the ruling below has the burden to ensure that the record contains what is needed for an appellate court to review

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[73] *Citizens Bank*, 254 Va. at 355.

[74] Town of Phoebus v. Manhattan Soc. Club, 105 Va. 144, 149 (1906).

[75] Barrow v. County of Prince Edward, 121 Va. 1, 2–3 (1917).

[76] *Sheehy*, 299 Va. at 180.

[77] Carlucci v. Duck's Real Estate, Inc., 220 Va. 164, 166 (1979).

[78] *Id.*

[79] *Barrow*, 121 Va. at 2–3.

[80] *See, e.g.*, D.R. Horton, Inc. v. Board of Supervisors for County of Warren, 285 Va. 467 (2013) (refusing to find payment involuntary where defendant argued that failing to pay County fees resulted in refusal of building permits, risk of potential future action, an inability to immediately build and sell homes for profit, and that it protested through letters to the Board); *see generally* Robert K. Harwood, L.C. v. Chinchilla, 86 Va. App. 1, 20–24 (2025).

[81] *See* Va. Sup. Ct. R. 5:10, 5:11, 5:13(a), 5A:7, 5A:8, 5A:10, 5A:11; *see also id.* 5:15(a).

the issues it raises—an insufficient record will cause the appellate court to decline to review affected issues.[82]

Appellate lawyers should take heed of the Supreme Court's ruling in *Eckard v. Commonwealth*.[83] There, Eckard appealed his conviction on the basis of alleged juror misconduct.[84] At the trial court level, Eckard alleged that he submitted a written proffer after the judge refused to hold a hearing on the alleged misconduct.[85] The proffer was missing from the record and Eckard's counsel never contacted the trial court to inquire about the missing proffer.[86] Instead, counsel cited to the trial court's order denying the motion regarding the alleged misconduct and admitted to the appellate panel that he could not find the proffer in the record.[87] The Court of Appeals of Virginia did not consider the proffer because it was not in the record and subsequently affirmed the trial court's denial of Eckard's motion.[88]

The Supreme Court of Virginia affirmed the Court of Appeals of Virginia's ruling, noting that "[a]t no point prior to or after oral argument in the court of appeals, or at any time before the mandate was issued, did counsel make any effort to ensure that the appellate record was complete—even though members of the panel pointed out the omission and counsel openly acknowledged it."[89] Going further, the Supreme Court held that

> [i]f there was any error in the Court of Appeals proceeding, it was entirely Eckard's for not ensuring that the certified record transmitted to the Court of Appeals was complete. He had notice of the omission nearly nine months before oral argument when the Court of Appeals provided him with access to the digital record certified by the circuit court.[90]

In short, the Supreme Court made it clear that it is an appealing party's ultimate responsibility to ensure that the record is correct on appeal.

Thus, an appeal can be wrecked if a record is incomplete. If an appealing party believes there may be material missing from the trial court's record, doing nothing and hoping for the best should not be an option. Unless the party can resolve the issue expeditiously by communicating with the respective clerk's offices, the party can move for a writ of certiorari to have the record sent back from the appellate court to the lower court to supplement the record.[91]

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[82] *Id.* 5:11(a), 5A:8(4)(ii)

[83] 303 Va. 290 (2024).

[84] *Id.* at 295.

[85] *Id.* at 296–97.

[86] *Id.*

[87] *Id.* at 298.

[88] *Id.* at 299.

[89] *Id.* at 302.

[90] *Id.* at 304.

[91] Va. Code §§ 8.01-673(A), 8.01-675.4; *see also* Jay O'Keeffe, *What do you do when a document is missing from the record?*, De Novo: A Va. App. L. Blog (Feb. 20, 2025), https://www.virginiaappellatelaw.com/2025/02/articles/uncategorized/what-happens-when-a-document-is-missing-from-the-record/.

VII. Misstep Seven: Failing to Cross-Appeal

Failing to cross-appeal on a key issue can prevent an especially tricky pitfall where an appellee seeks greater relief than obtained below.

In *Virginia Marine Resources Commission v. Clark*,[92] the City of Virginia Beach applied to the Virginia Marine Resources Commission to install a pipeline in, on, and over state-owned bottomlands.[93] In the circuit court, individual residents appealed the VMRC's approval of the project.[94] The circuit court dismissed the petition for lack of standing and denied the residents' motion for leave to amend.[95] The residents appealed to the Court of Appeals of Virginia assigning error to both aspects of the circuit court's ruling.[96] The Court of Appeals of Virginia ruled that the circuit court erred in dismissing the case for lack of standing because the governing rule did not require that the petition contain sufficient allegations of standing and remanded for an evidentiary hearing on the issue.[97] The VMRC and the City appealed to the Supreme Court.[98] The residents filed an assignment of error arguing that the Court of Appeals of Virginia erred in remanding for an evidentiary hearing because the record demonstrated that the residents had standing.[99]

The Supreme Court ruled that the Court of Appeals of Virginia erred in holding that a petition was not "insulated" from a dispositive motion for lack of allegations establishing standing.[100] It then ruled that it could not decide whether the residents should have been given leave to amend because the residents did not cross-appeal on that issue to the Supreme Court, even though the Court of Appeals of Virginia did not rule on that question.[101]

The Supreme Court revisited and overruled *VMRC* in *Woodford v. Virginia Department of Taxation*.[102] The Court there explained that cross-error was required "only when an appellee seeks to modify or otherwise change a favorable judgment with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary."[103]

Of course, there could be strategic reasons to cross-appeal or not, but advocates should be aware of the potential of waiver on a key issue for failure to cross-appeal.

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92 281 Va. 679 (2011).

93 *Id.* at 682.

94 *Id.* at 683.

95 *Id.*

96 *Id.* at 684.

97 *Id.*

98 *Id.*

99 *Id.*

100 *Id.* at 685.

101 *Id.* at 688.

102 294 Va. 377, 390 n.4 (2017).

103 *Id.* (citations and internal quotation marks omitted); *see also* McMurtrie v. McMurtrie, No. 200404, 2021 WL 1569396, at *2 (Va., Apr. 22, 2021) (holding that rulings of the circuit court adverse to appellees were not challenged on appeal and thus were affirmed).

VIII. Misstep Eight: Failure to Timely and Properly Ask for Attorney Fees and Costs When You Could Be Entitled to Them

A good race day can miss being a great day if a race team squanders opportunities for success. In the same way, an appeal can be successful, but a party can inadvertently miss out on an opportunity for an even better outcome by failing to properly seek attorney fees expended on the appeal.

Rule 1:1A explains how an appellee who recovered attorney fees in the circuit court under a contract, statute, or other applicable law and who is successful on appeal, can return to the circuit court and seek additional attorney fees, costs, or both incurred on appeal in the action. But it has a quick deadline: thirty days after the entry of the final appellate judgment, defined as the issuance of the mandate or, when there is no mandate issued, the final judgment or order of the appellate court completing the matter. This is also applicable to the denial of a petition for appeal to the Supreme Court of Virginia, and the final appellate judgment date is the later of the date of the order denying the petition or the order denying a petition for rehearing of same.

The *Sidar v. Doe* decision is important on this point.[104] There, appellee received a favorable award of attorney fees at trial and prevailed in having the Supreme Court deny appellant's petition for appeal.[105] The Court's order denying the petition was dated September 9, 2022.[106] On October 7, 2022, appellee attempted to file her request for attorney fees incurred at the trial level pursuant to Rule 1:1A.[107] The circuit court refused to accept the application until the Supreme Court returned the case to the circuit court.[108] That did not happen until October 24, 2022.[109] Appellee then filed the application for fees on November 10, 2022. The trial court awarded fees.[110]

The Court of Appeals of Virginia reversed.[111] It drew an important distinction between the issuance of the mandate and the subsequent return of the case to the trial court.[112] The mandate issues on the date of the appellate judgment, so the thirty-day clock starts from that point, not when the trial court receives the record back from the appellate court, thus the request was untimely.[113] The Court of Appeals of Virginia concluded that the circuit court had concurrent jurisdiction after the issuance of the mandate to accept and hear the petition for additional fees.[114] It also

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104 80 Va. App. 579 (2024).

105 *Id.* at 582.

106 *Id.*

107 *Id.*

108 *Id.*

109 *Id*. at 582–83.

110 *Id.* at 583.

111 *Id.* at 587.

112 *Id.* at 585.

113 *Id.*

114 *Id.* at 586.

noted "substantial hardship" arising because the circuit court refused to accept the earlier attempt to file the petition, but concluded that it did not change the Court of Appeals of Virginia's conclusion that the request was untimely.[115]

Fees may also be awarded on appeal in the appellate court itself when there is sufficient authority for such recovery, but the party must request such award.[116]

Similarly, the prevailing party on appeal can request certain costs incurred in the appellate courts.[117] Compensable costs include the filing fee and printing costs in the preparation of briefs, appendices, and petitions for rehearing, as well as the costs incurred in the preparation of transcripts.[118] But the prevailing party must include a notarized bill of costs detailing the charges within fourteen days after the date of decision in the case.[119] Objections to such applications must be filed within ten days after the notarized bill of costs.[120]

Prevailing parties on appeal with good bases for an award of attorney fees must be cognizant of the mechanisms for obtaining an order for same and timely seek such relief.

IX. Misstep Nine: Approbating & Reprobating

A party cannot take one position at trial and thus invite a ruling one way by the trial court but then take the opposite position on appeal. "A litigant cannot 'approbate and reprobate by taking successive positions in the course of litigation that are either inconsistent with each other or mutually contradictory,' or else such arguments are waived."[121]

The approbat-reprobate doctrine, founded in Scottish law,[122] "applies both to assertions of fact and law and precludes litigants from playing fast and loose with the courts or blowing hot and cold depending on their perceived self-interests."[123] Litigants who assert a position on an issue are confined to it on appeal.[124] This doctrine applies when the proceeding involves identical parties.[125] Moreover, "the party asserting the inconsistent position must have also persuaded the court to accept that earlier position. Absent success in a prior proceeding, a party's later

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115 *Id.* at 587.

116 Va. Sup. Ct. R. 5:35(b); 5A:30(b).

117 *Id*. 5:35(a), (c), (d), 5A:30 (a),(c),(d); Va. Code § 17.1-604.

118 Va. Sup. Ct. R. 5:35(c), 5A:30(c). Notably, costs in the Supreme Court are limited to the actual costs incurred in printing or otherwise any brief filed in that Court, up to $500 for all briefs filed, and the actual cost incurred in printing or otherwise reproducing the appendix, unless the Court directs a lesser award for either. Va. Code § 17.1-605.

119 Va. Sup. Ct. R. 5:35(d), 5A:30(d).

120 *Id.* 5:35(e), 5A:30(e).

121 Amazon Logistics, Inc. v. Virginia Emp. Comm'n, __ Va. __, __, 912 S.E. 2d 290, 296 (Va. 2025) (quoting Rowe v. Commonwealth, 277 Va. 495, 502 (2009)); *see also* Commonwealth v. Holman, 303 Va. 62, 71–76 (2024).

122 Matthews v. Matthews, 277 Va. 522, 529 (2009).

123 Babcock & Wilcox Co. v. Areva NP, Inc., 292 Va. 165, 204–05 (2016) (internal citations omitted).

124 *Amazon Logistics, Inc.*, 912 S.E.2d at 296 (quoting *Matthews*, 277 Va. at 528).

125 *Matthews*, 277 Va. at 529.

inconsistent position introduces no risk of inconsistent court determinations, and thus poses little threat to judicial integrity."[126]

Although the ends-of-justice doctrine generally allows for an exception to the rule that issues must be preserved at the trial court "to enable this Court to attain the ends of justice,"[127] the exception does not apply to the approbate-reprobate doctrine.[128]

The Supreme Court of Virginia recently applied this doctrine in the *Amazon Logistics* case. In the underlying case, the trial court considered whether Amazon Flex drivers were independent contractors for unemployment compensation purposes.[129] The action was premised upon a single Flex driver, Mr. Diggs, until Amazon affirmatively sought a classwide ruling from the Virginia Employment Commission, asking that the Commission find all Flex drivers to be independent contractors.[130] The Commission made a classwide ruling but found that all Flex drivers were employees.[131]

On appeal, Amazon took a different approach, arguing that the record was insufficient to support a classwide ruling and claiming that it sought a limited decision only as to Diggs.[132] The Supreme Court deemed Amazon's arguments waived, noting that "[s]uch a contradictory shift in position to mitigate self-inflicted wounds violates the approbate-reprobate doctrine."[133]

X. Conclusion

Appellate practice can involve litigation of important, intellectually stimulating issues, but there are several pitfalls that can prevent appellate courts from ever reaching them. These pitfalls can come in the form of actions taken or not taken at trial or on appeal. Practitioners should pay close attention to the Rules of the Supreme Court and relevant statutes and be on the lookout for any issues that can harm an appeal or send it "behind the wall."

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126 *Id.*

127 *See generally* Va. Sup. Ct. R. 5A:18.

128 *See* Nelson v. Commonwealth, 71 Va. App. 397, 405 (2020) ("It can hardly be a grave injustice to a defendant's essential rights for a trial court to make an agreed-upon ruling.") (internal citations omitted).

129 *Amazon Logistics, Inc.*, 912 S.E. 2d at 292.

130 *Id.*

131 *Id.* at 293–94.

132 *Id.* at 296.

133 *Id.*