Caveat Appellant: Supreme Court Cracks Down on Insufficient Assignments of Error

by L. Steven Emmert

[Editor's Note: This was adapted from an article and postscripts originally posted on the author's website, Virginia Appellate News & Analysis, http://www.virginia-appeals.com/, beginning on June 18, 2008.]

Assignments of error are a very important part of every petition for appeal in the Supreme Court of Virginia. They are jurisdictional, and omitting them from your brief will inevitably result in your appeal's being euthanized at an early date by a procedural panel of the justices.

Several recent developments have convinced me that the Supreme Court is looking with much greater care at assignments and dismissing appeals where the assignments aren't satisfactory. This, in turn, leads to the arrival of some very unwelcome orders in attorneys' mail, followed by very delicate conversations with the client, describing how the lawyer's mistake has scuttled the appeal.

Some of the rulings I'll describe here caught me by surprise. They signal the need for every appellant's counsel to reevaluate how he or she crafts assignments.

Assignments: The Rule

The Supreme Court has described the purposes of assignments in these terms: "[A]ssignments of error serve several distinct and important functions. Their chief function is to identify those errors made by a circuit court with reasonable certainty so that this Court and opposing counsel can consider the points on which an appellant seeks a reversal of a judgment. In addition, assignments of error also enable an appellee to prepare an effective brief in opposition to the granting of an appeal, to determine which portions of the trial record should be included in the parties' joint appendix, and to determine whether any cross-error should be assigned." *Friedline v. Commonwealth*, 265 Va. 273, 278 (2003).

Virginia is one of only five states that use "binding" assignments of error — those that irreversibly restrict the scope of the appeal to the issues framed thereby. Here, assignments frame the permissible appellate issues much as initial and responsive pleadings do in trial courts. If you plead a cause of action for negligence, the trial court won't listen to your argument or admit your evidence on a breach of contract claim.

Let's start with the relevant text from Rule 5:17(c):

> Under a separate heading entitled "Assignments of Error," the petition [for appeal] shall list the specific errors in the rulings below upon which the appellant intends to rely. Only errors assigned in the petition for appeal will be noticed by this court. Where appeal is taken from a judgment of the Court of Appeals, only assignments of error relating to questions presented in, or to actions taken by, the Court of Appeals may be included in the petition for appeal to this court. An assignment of error which merely states that the judgment or award is contrary to the law or the evidence is not sufficient. If the petition for appeal does not contain assignments of error, the appeal will be dismissed.

Each of these sentences contains a useful lesson in its own right. The first sentence creates the requirement, and gives us the only available guidance on the level of detail required: "shall list the specific errors in the rulings below." (Just what "specific" means in that sentence is the subject of considerable discussion.) The second sentence tells you that if you assign errors only to issues A, B, and C, then the Court won't consider your argument on alleged legal errors D and E. If you want the Supreme Court to consider an issue, you must list it. So far, so good.

The third sentence contains an important procedural guideline. If you're coming from a loss in the Virginia Court of Appeals, keep in mind

that the Supreme Court must address its ultimate ruling to that court, not to the trial court. That means that you have to assign error to what the Court of Appeals did, not to what the trial court did. (If you're chicken-hearted about this, it is permissible to use the following language: "The Court of Appeals and the trial court erred in ruling that …") In the fourth sentence, the rule gives us one example of an assignment that doesn't measure up to the requirement of specificity. And the final sentence announces the death penalty for petitions that contain no assignments at all.

A direct violation of the rule has always been fatal.

Unfortunately, that same death penalty awaits appellants who submit insufficient assignments. If you do include assignments of error, but they aren't specific enough, the Court will dismiss your petition for appeal, citing Rule 5:17(c). (In effect, the rule is applied as though the words, "or does not contain sufficient assignments of error," were added.) And you don't get a do-over; you will not be permitted to amend your assignment to make it comply with the rule (as you would have the opportunity to do in the trial court if your complaint had been impermissibly fuzzy). Your appeal simply dies, and all you can do is place phone calls to your client and your insurance carrier.

Racheting Up Enforcement

A direct violation of the rule has always been fatal. For example, the Commonwealth Transportation Commissioner saw one legal argument die a premature death last year, when it listed the following assignment in a condemnation appeal: "The trial court erred in failing to find that the jury commissioners' report is contrary to the evidence at trial." The Court ruled that this assignment directly violates the fourth sentence of the rule. *CTC v. Target Corp.*, 274 Va. 341, 352-53 (2007).

I saw at least anecdotal evidence that the Court ratcheted up its enforcement of this rule in 2008. As a result, many assignments that I would once have regarded as safe are now insufficient in the eyes of the Court. Here are some of last year's developments:

- In May, the Supreme Court issued an order directing a Tidewater attorney (who has, I understand, a substantial appellate practice) to show cause why his privilege to practice in that Court should not be suspended. The reasons behind this order are many in number but uniform in nature — he's had nine appeals dismissed for procedural violations, most of those relating to assignments of error.

- On June 4, as I sat in the Supreme Court awaiting my turn to argue orally, I saw an appeal by the Commonwealth in a sexually violent predator case. The Chief Justice interrupted the assistant attorney general and asked how her assignment of error was sufficient. He then read it aloud, and I think I can paraphrase it accurately here: "The trial court erred in excluding the expert testimony of Dr. John Jones." I wondered to myself what could be wrong with that assignment. After all, the lawyer seemed to "lay his finger on the error." That's been the standard for assignments for a long time in Virginia, going back at least to *First Nat'l Bank v. William R. Trigg Co.*, 106 Va. 327, 342 (1907) (quoting an 1810 New York case).

- On June 10, the court entered an order dismissing an appeal for an insufficient assignment in a legal malpractice case. In that appeal, the lone assignment read, "The trial court erred in granting [the appellee's] motion for summary judgment." Again, this assignment specified the exact legal ruling that was being appealed, but the Supreme Court found it wanting.

Contrast that dismissal with the successful appeal of *Shutler v. Augusta Heath Care*, 272 Va. 87 (2006), the Supreme Court granted Shutler's petition based on the following single assignment of error: "The trial court erred in granting the defendant's motion for summary judgment."

There is, you will readily discern, no meaningful difference between these two assignments. But the *Shutler* assignment led to a reversal, while the one in the legal malpractice claim led to a dismissal.

The Supreme Court since has granted rehearing in the legal malpractice case, thereby reinstating the appeal on the Court's docket. But at least one justice evidently felt that it was unfair to change course on the entire appellate bar with no advance notice. I have no idea whether the appellant will get his writ, nor whether the judg-

ment will ultimately be reversed. But at least the Court has righted what I see as an injustice against the lawyer or the appellant, who might have been facing a bar complaint for suffering a procedural dismissal that he could not possibly have seen coming.

With the June 10 ruling, I finally put the three developments together and made an unmistakable deduction: The Court is getting noticeably tougher on appellants in evaluating the sufficiency of assignments, and it has done so without advance notice.

Don't Change the Wording

Vagueness is not the only assignment-related issue that gets the Court's unwelcome attention. One particularly venal sin (just ask any justice and watch as the skin on the back of his or her neck gets red) is an appellant trying to change the wording of the assignments after getting a writ. Perhaps the writ panel asked pointed questions, and he wants to ensure that his wording is sufficient.

Unfortunately, no dice. The general rule is that once you file your petition, the language of the assignment is chiseled in stone. I am aware of no exceptions to this rule. I believe you could get leave of Court, if you ask for it nicely, to correct something like an obvious typographical or spelling error, but I have never seen this done. I cannot conceive that the Court would ever consent to a substantive change.

This sin is venal and not mortal because it doesn't necessarily carry the death penalty. You can still proceed with your appeal, but you'll be limited to the original assignment as set forth in your petition. See, for example, *Hamilton Dev. Co. v. Broad Rock Club*, 248 Va. 40, 43-44 (1994). Of course, you will have alienated the Court by doing this, as the justices will perceive that you're trying to pull a fast one.

How to Protect Your Appeals

So, what's a careful appellant to do? It would be easy to overreact and craft assignments that are replete with detail — say, two pages apiece. The trouble with that is that now the assignments are taking over the brief. This kind of assignment is part of what got the Tidewater lawyer the show cause order last month. Two pages each is just too long.

The best advice I can give you is something I heard recently from one of the justices – use the word "because" in your assignments. For example, if the appellant in the legal malpractice case had written, "The trial court erred in granting [the appellee's] motion for summary judgment, because a material dispute of fact existed on causation," then I sense his appeal would still retain vitality. Similarly, if the lawyer in the sexually violent predator case had written, "The trial court erroneously ruled that the expert testimony of Dr. John Jones was speculative and therefore inadmissible," the Supreme Court would have the detail it needs to evaluate the issues in the appeal in something other than a vacuum.

This new development has alarmed experienced appellate attorneys. I regard this as a very unfortunate trend, because, among other reasons, it's always best to have decisions made on the merits instead of on technical rules violations. In addition, those who follow the Court only casually may well chalk this up to a common misperception that the justices look for any excuse they can find to dismiss as many cases as possible, purely to cut down on their workload. But the Court has the right to interpret its rules as it sees fit, and it is not wrong to view this kind of defect in terms of the Court's very jurisdiction. Jurisdiction is something the Court will never take lightly.

Despite the grant rehearing in the June 10 legal malpractice case, The Court has not retreated from its sterner emphasis on detail in assignments. That ship has sailed. The notice is out now, and future appeals will probably not be handled quite so leniently. ■