IN THE

Supreme Court of Virginia

RECORD NO. 190449

THOMAS BYRNE,

Appellant,

v.

CITY OF ALEXANDRIA, et al.,

Appellees.

BRIEF OF AMICUS CURIAE OF THE VIRGINIA ASSOCIATION OF DEFENSE ATTORNEYS

George A. Somerville (VSB No. 22419)
Harman, Claytor, Corrigan & Wellman
P.O. Box 70280
Richmond, Virginia 23255
(804) 677-5028 (Phone)
(804) 747-6085 (Fax)
gsomerville@hccw.com

Counsel for Amicus Curiae

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (804) 644-0477

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The Virginia Association of Defense Attorneys (VADA) respectfully submits the following brief amicus curiae, with the consents of all parties.

INTRODUCTION

The motion craving oyer is an ancient common law procedure with significant modern utility. It allows courts to decide cases controlled by documents on the merits, at the demurrer stage, eliding evasion and preventing unnecessary waste of both judicial and litigant resources – both by ending insubstantial cases at the threshold and by resolving controlling questions of law and thereby facilitating settlements and other prompt resolutions of litigated disputes.

The utility of the oyer procedure has been called into question by a Circuit Court decision, *Antigone v. Taustin*, 98 Va. Cir. 213 (Fairfax 2018), which holds that its application is limited (absent agreement of the parties) to deeds and letters of probate and administration. Plaintiff-Appellant Thomas Byrne asks this Court to endorse *Antigone*'s reasoning and holding, thereby confining the oyer procedure to a narrow category of documents, narrowing its function, and reducing its usefulness to the bench and bar alike. The VADA respectfully submits that the *Antigone* court misread the common law precedents and, in any event, that this Court should ratify the common law evolution that has followed the late 19th Century decision cited in that case.

INTEREST OF AMICUS

The VADA is a non-profit, statewide bar organization of more than 700 members whose practice is devoted primarily to the defense of civil actions. The VADA seeks to promote fairness and integrity in the civil justice system. It submits briefs amicus curiae in appropriate cases involving significant legal issues which, in the VADA's view, have the potential to upset the "level playing field" which the law of Virginia provides to all civil litigants. The VADA submits this brief because it believes that endorsement of the narrowing interpretation of the oyer procedure announced in *Antigone* and advocated by plaintiff in this appeal would impose unnecessary delays and costs on both courts and litigants and would be contrary to the ends of justice.[1]

STATEMENT OF THE CASE AND MATERIAL PROCEEDINGS BELOW

The VADA adopts Appellee City of Alexandria's and Plaintiff-Appellant Thomas Byrne's Statements of the Nature of the Case and Material Proceedings Below.

STATEMENT OF FACTS

The VADA adopts the City's and Plaintiff's Statements of the Facts.

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[1] No party's counsel authored this brief, either in whole or in part, and no person other than the VADA provided any funding for the preparation of this brief.

The VADA takes no position on the issues presented by plaintiff's second assignment of error.

ARGUMENT

I. The applicable standard of review.

The issue presented by the appeal and addressed in this Brief is a question of law, reviewable de novo. *E.g.*, *Webb v. Virginian-Pilot Media Cos.*, 287 Va. 84, 88 (2014).

II. The oyer procedure should apply, without limitation, to documents on which an action is founded.

A. The ancient common law origins of the oyer procedure.

The precise origin of the oyer procedure is obscured by the mists of time, but scholars agree that it originated at a time when many litigants were illiterate and allowed a defendant to demand that an instrument on which a plaintiff's claim was founded be read to him. *See* IV *Blackstone's Commentaries* 299 (Tucker ed. 1803) ("*Blackstone's Commentaries*"); IV John B. Minor, *Institutes of Common and Statute Law* 732-33 (3d ed. 1893) ("(*Minor's Institutes*") ("The word *oyer* is Norman French, and simply means a claim on the part of the person resorting to it to *hear the writ* or the *writing in question read to him*").[2]

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[2] Italics in quotations from *Blackstone's Commentaries* and *Minor's Institutes* appear in the originals. Underlines are added for emphasis.

A recent Circuit Court decision cites "references to *oyer* as early as the 14th Century." *Hartline v. Hartline*, No. CL19-8159 (Norfolk Cir. Nov. 14, 2019), letter opinion at 5 n.3 (copy attached) (citations omitted). That decision also points out that "the common law evolves; it is not chiseled in stone." *Id*. at 5

There are indications in the treatises that at early common law, a defendant could only "crave *oyer* of the writ, or of the bond, or other specialty upon which the action is brought." *Blackstone's Commentaries* 299 (footnote omitted).[3] Professor Minor went so far as to say that "[i]t was a rule of the *common law*, rigorously enforced, that the adversary could only *crave oyer* of specialties and letters of probate and administration, in those cases where *profert* had been made of them in the declaration or other pleading to be answered." *Minor's Institutes* 733. In *Smith's Adm'r v. Lloyd's Ex'x*, 57 Va. (16 Gratt.) 295 (1862), however, the Court noted that English legislation in 1852 provided that "'it shall not be necessary to make profert of *any deed or other document* mentioned or relied on in any pleading; and if profert shall be made it shall not entitle the opposite party to crave oyer of, or set out upon oyer, such deed or other document'" and added that "[o]ur Code, enacted a few years before, did not go so far; but only dispensed with the necessity of making profert, while *it retained the right of craving oyer in like manner*, as if profert were made." *Id*. at 305 (emphases added).

The ancient authorities also indicate that motions craving oyer served similar purposes at early common law as they do in Virginia today. Thus Blackstone stated that when oyer was invoked, "the whole [writ, bond, or "other specialty"] is

[3] A "specialty" is a contract under seal. *Black's Law Dictionary* 1571 (rev. 4th ed. 1968). *See also* B. Garner, ed., *Black's Law Dictionary* 344, 1434 (8th ed. 2004).

entered *verbatim* on the record, and the defendant may take advantage of any condition or other part of it, not stated in the plaintiff's declaration." *Blackstone's Commentaries* 299. *Minor's Institutes* states similarly, at 733, that when "*oyer* is thus craved, the whole writ or writing is entered *verbatim on the record*, and the defendant may then take advantage of anything which may appear in it. He may, therefore, *demur* for any essential variance between the instrument as described in the pleading and as it appears upon *oyer*."

B. Early Virginia decisions.

The oyer device was in use in colonial Virginia by at least the middle of the 18th century. Even then, it was not limited, as the Circuit Court held in *Antigone*, to deeds and letters of probate and administration – unless the term "deeds" is understood more broadly than its contemporary meaning, as including all written instruments under seal, as discussed *infra* at 13-14.

Thus in *Senior v. Morris*, 2 Va. Colonial Dec. B129, 1741 WL 2 (General Court 1741), a declaration on a bond "to stand to the Award of Fleming & Baber arbitrators," "[t]he Deft. Craved Oyer & pleaded no Award." *Id*., 1741 WL 2, at *1. In *Hill v. Henry*, 2 Va. Colonial Dec. B138, 1741 WL 3 (General Court 1741), a suit by Clopton's executor (Hill) to recover £2.2.9 and 837 pounds of tobacco, the defendant executor (Henry) claimed that his intestate (Syme) and not Hill was actually Clopton's executor. The Court opined "that a Man may have two Wills &

several Ex'ors" and that "the Deft should have craved Oyer of the Probate & then have pleaded that Syme & the Plt. were both made Ex'ors And then the matter would have appeared clearly & judicially to the Court." *Id*., 1741 WL 2, at *2.

As far as counsel is able to determine, this Court (known then as the Supreme Court of Appeals) first mentioned oyer in *Smith v. Harmanson*, 1 Va. (1 Wash.) 6 (1791), an action of debt on a bond. In that case, the Court simply noted that "oyer is not prayed." *Id*. at 6. In *Braxton v. Winslow*, 1 Va. (1 Wash.) 31, 31 (1791), an action by a decedent's creditor on the executor's performance bond, "[a]fter Oyer of the bond and condition, the defendants pleaded conditions performed." In *Mandeville v. Perry*, 10 Va. (6 Call) 78, 83 (1806), Judge Tucker opined that the record of which the Court "is to take notice in cases at common law" includes "[p]apers of which a profert is made, or oyer demanded."

Browne v. David Ross & Co., 8 Va. (4 Call) 221 (1791), was a suit on a bond given by the executor of an estate. "There was no oyer of the bond; but the appearance bail pleaded that the defendant had paid the debt in the declaration mentioned, and the plaintiffs took issue." *Id*. at 221. At the trial, "the defendant objected that the bond did not agree with the declaration; and therefore ought not to be received as evidence; but the objection [was] overruled" and judgment was entered for the plaintiff. *Id*. at 221-22. This Court affirmed, reasoning in part that "if the defendant had, in fact, paid the debt, and wished to avail himself of it, he

ought, according to the strictness of pleading, to have craved oyer of the bond, and pleaded payment of the sum in the condition; which would have made the bond part of the declaration, and shewn the day when it became payable." *Id*. at 223.[4]

In re Bailey, 3 Va. (1 Va. Cas.) 258, 1798 WL 249 (General Court 1798), demonstrates that Virginia courts have long recognized that the oyer procedure extends far beyond deeds and letters of probate and administration. Bailey was indicted for murder and filed pleas of *autrefois acquit* (previous acquittal) as to murder and *autrefois convict* as to manslaughter. In what appears to be a statement of the case,[5] the Court acknowledged "[s]ome doubts … as to the manner in which the court ought to proceed" and explained:

> Sir M. Hale lays it down as a rule, that if a record be pleaded in bar, or declared upon in the same court, the other party shall not plead *nul tiel record*, but have oyer of the record; but if it be in another court he shall plead *nul tiel record*, or the tenor thereof: and in that case the court will award a certiorari to remove the record before them, and respite the plea till he can remove his acquittal into court.

In *Burress v. Commonwealth*, 68 Va. (27 Gratt.) 934 (1876), and *Commonwealth v. Quann*, 4 Va. (2 Va. Cas.) 89 (General Court 1817), which likewise involved pleas of *autrefois acquit*, the shoe was on the other foot and the prosecutors craved oyer

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[4] Seemingly less consequential failures of defendants to crave oyer also were noted in *Peter v. Cocke*, 1 Va. (1 Wash.) 257, 257 (1794); *Stevens v. Taliaferro*, 1 Va. (1 Wash.) 155, 155 (1793); *Hubbard v. Blow*, 1 Va. (1 Wash.) 70, 70 (1791); and other cases too numerous to mention.

[5] Judges Tucker and Prentis filed opinions. The passage quoted in the text precedes both.

of the records of the earlier proceedings, to show that the prosecutions were for different offenses. *See also Commonwealth v. Cawood*, 4 Va. (2 Va. Cas.) 527, 551 (General Court 1826) (oyer of an indictment).

In *Greenhow v. Buck*, 19 Va. (5 Munf.) 263 (1816), the defendant prayed oyer of an Act of Assembly. *Id*. at 268.

In *Cromwell v. Tate's Ex'r*, 34 Va. (7 Leigh) 301, 305 (1836), the Court stated that if the defendant "denied that the instrument declared on was a deed, he might crave *oyer* and demur." (Underlining added.) And *Price v. Via's Heirs*, 49 Va. (8 Gratt.) 79 (1851), a suit to enforce an arbitration award, the defendants were granted oyer of the covenant and award. *Id*. at 81. Again there is no suggestion that either the Court or counsel questioned the propriety of the procedure.

The same is true of *Friend v. Woods*, 50 Va. (9 Gratt.) 37 (1852), an action on an appeal bond, where the defendants craved oyer of the appellate record. And in *Hutsonpiller's Adm'r v. Stover's Adm'r*, 53 Va. (12 Gratt.) 579 (1855), where the question was whether a prior judgment was against two defendants or only one, the Court stated expressly that the defendant "should have craved oyer of the record [of the prior case], and demurred." *Id*. at 587.

The oyer procedure assumed something resembling its modern importance in *Cowling v. Justices of Nansemond County*, 27 Va. (6 Rand.) 349 (1828), and *Bennett's Ex'r v. Giles*, 33 Va. (6 Leigh) 316 (1835). In *Cowling* the court held

that on a demurrer to the declaration, "by oyer taken of the bond and condition, they became a part of it, and might be demurred to for any defect apparent on their face." *Id*. at 352. In *Bennett's Ex'r*, a suit by the Governor against an executor on a sheriff's official bond, the declaration alleged a breach of a bond dated August 14, 1811. "The defendant craved *oyer* of the bond and condition; and the bond shewn upon the oyer craved, was dated the 6th August 1810, instead of the 14th August 1811, the date of the bond counted on in the declaration." *Id*. at 317. The variance was held fatal; "and upon demurrer, where the defendant has taken *oyer*, he may take advantage of the variance." *Id*. at 318.

Failure to crave oyer led to the opposite result in *Sterrett v. Teaford*, 45 Va. (4 Gratt.) 84 (1847), where the Court held that a similar question of variance "between the promissory note in the proceedings mentioned, and the writing obligatory of which *profert* is made in the second count of the plaintiff's declaration," was "not presented by the demurrer to that count of the declaration, no *oyer* having been craved of the last mentioned writing." *Id*. at 85. The Circuit Court therefore erred in sustaining that demurrer. *Id*. *Cf. Carthrae v. Brown*, 30 Va. (3 Leigh) 98, 98 (1831) (covenant was not "set out in the pleadings upon *oyer*," and the question was "whether the declaration shewed good cause of action"; appellate court could "only look at the covenant *as pleaded* in the declaration").

In *Welch v. McDonald*, 85 Va. 500 (1888), this Court again suggested – in stronger terms – that a defendant should have craved oyer of a governing document (a construction contract) to facilitate an expeditious decision on the merits:

> The suit is an action of trespass on the case for breach of contract. The declaration avers the contract, without stating the express provision in it of payment by the defendants of five dollars per day for every day's delay in fulfilling the contract after the 22d day of June, 1886, and claims consequential damages. The defendants did not crave oyer of the contract, but demurred to the declaration, and to each count thereof. The first and second counts are right in the case set out. The radical difference between the contract declared on and the one really made and put in evidence did not then appear, and the demurrer was properly overruled as to these counts. Had oyer of the contract been craved, and the true contract made known to the court, the demurrer to these counts ought to have been, and doubtless would have been, sustained.

Id. at 504. *See also Chesapeake & O. Ry. Co v. Chapman*, 115 Va. 32, 36-37 (1913), where this Court held that it was unable to determine whether there was a variance between the declaration and the writ issued upon the declaration,

> since no oyer was craved of the writ for the purpose of making it a part of the record. If the amendment of the declaration produced the alleged variance, plaintiff in error could have craved oyer of the writ for the purpose of making the variance appear, and thereupon, if the variance appeared, moved to quash the writ because of the variance between it and the declaration; but this was not done ….

Additional cases invoking oyer include (among many others) *Triplett v. Goff's Adm'r*, 83 Va. 784 (1887) (oyer of a bond and demurrer to the declaration); *Carter v. Noland*, 86 Va. 568 (1890) (same); *Wood v. Commonwealth*, 25 Va. (4 Rand.) 329 (1826) (oyer of a "recognizance" (bail bond), in an action to enforce

the obligation against guarantors when defendant failed to appear for trial; guarantors' demurrer sustained); *Commonwealth v. Fulks*, 94 Va. 585 (1897) (same); *Cannon v. Commonwealth*, 96 Va. 573 (1899) (same)[6]; *Blankenship v. Ely*, 98 Va. 359 (1900) (oyer of an injunction bond and demurrer to the declaration); *Bemiss v. Commonwealth*, 113 Va. 489 (1912) (oyer of a supersedeas bond and demurrer to the "notice"); *Burton v. Frank A. Seifert Plastic Relief Co*., 108 Va. 338, 350 (1908) (no error denying oyer of a contract because the action was not founded on the contract).

One lesson that must be taken from this perhaps overlong discussion is that prior to the *Langhorne* decision, discussed below, the oyer procedure was invoked in numerous and various cases, a large majority but not nearly all of them based on written contracts. Indeed, only a few of the earlier cases fell within *Langhorne*'s limitation (which was dictum, as discussed below) to deeds and letters of probate and administration.

C. The *Langhorne* decision.

The *Antigone* court relied primarily on *Langhorne v. Richmond Ry. Co.*, 91 Va. 369, 372 (1895), as support for its holding that oyer is limited to deeds and letters of probate and administration. *Langhorne* was a personal injury suit against

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[6] *Fulks* and *Cannon* were both decided less than four years after *Langhorne v. Richmond Ry. Co.*, 91 Va. 369 (1895), discussed below. Neither of them cited *Langhorne* or observed the limitations on oyer described in that decision.

two railway companies – "an action of trespass on the case … for an injury." *Id*. at 370. One of the companies had conveyed all of its assets to the other and become consolidated with it, and the "declaration" described those transactions and cited the relevant documents. *See id*. at 370-71.

> Preliminary to, and as a part of his demurrer, the defendant craved oyer of all the writings mentioned in the declaration. These writings consisted of deeds of trust, petitions to and ordinances of the common council of the city of Richmond, a deed from the trustees in two of the deeds of trust to the purchasers at a sale made under them, and a deed from the Richmond City Railway Company to the Richmond Railway & Electric Company.

Id. at 372. That motion craving oyer was transparently improper, as the Court explained: "None of these writings ought to have been, or could properly be, considered upon the demurrer. The plaintiff did not claim under them. They were mentioned in the declaration by way of inducement or introduction to other matters that it was necessary to allege, and not for the purpose of showing right or title in the plaintiff." *Id*.

The Court then proceeded, however, to announce that "[t]he right to crave oyer of papers mentioned in a pleading applies, as a general rule, only to deeds and letters of probate and administration, not to other writings, and only applies to a deed when the party pleading relies upon the direct and intrinsic operation of the deed." *Id*. That announcement was simply dictum; and as far as counsel is able to determine, this Court has cited *Langhorne* for that proposition only twice: in *Smith*

v. Wolsiefer, 119 Va. 247, 250 (1916), and *Grubbs v. Nat'l Life Maturity Ins. Co.*, 94 Va. 589, 591 (1897).

Grubbs was a pair of actions on life insurance policies; the defendant craved oyer of the policies and demurred to the declaration. Citing *Langhorne*, the Court stated that "[a]s a general rule, the right to crave oyer of papers mentioned in a pleading applies only to deeds and letters of probate and administration, not to other writings, and only applies to a deed when the party pleading relies upon the direct and intrinsic operation of the deed." *Id*. The Court nevertheless addressed the case on the merits. (The principal question was whether the policies were sealed instruments, "upon which an action of assumpsit will not lie." *Id*. at 590. The Court held that whether a document is a sealed instrument is a question of fact, "to be presented at the hearing by proper motion or plea, but not by a demurrer to the declaration." *Id*. at 591.) And in *Smith v. Wolsiefer*, the Court described the "proceeding … by which the defendant craved oyer of the lease" as "unusual," citing *Langhorne*, but held that the plaintiff had waived "any objection" by consenting to consideration of the lease in the trial court. 119 Va. at 250-51.

A likely source of confusion, which may not have been recognized by this Court in *Langhorne*, *Grubbs*, or *Smith*, or by the Circuit Court in *Antigone*, is the evolution of the meaning of the word "deed." Today it is understood as referring only to a conveyance of real property, and that has probably been the case for

many decades. But that has not always been true. *See* B. Garner, ed., *Black's Law Dictionary* 444 (8th ed. 2004) (quoting R.A. Brown, THE LAW OF PERSONAL PROPERTY § 46 at 118-19 (2d ed. 1955)):

> "What then is a deed? Unfortunately the word is not free from ambiguity. In the original and technical sense a deed is a written instrument under the seal of the party executing it. Because, however, of the wide use of such instruments in the conveyance of real estate, it has come to mean in popular acceptance any formal conveyance for the transfer of land or of an interest therein. The dual use of the term has crept into language of courts and law writers, so that in reading of cases it is difficult to determine whether the word is used in the first and original sense, or whether it connotes a formal instrument of the type ordinarily employed for the conveyance of land."

See also, *e.g.*, *Interstate R. Co v. Roberts*, 127 Va. 688, 692 (1920) ("Technically speaking, the second paper is a deed because it is a writing signed, sealed, and delivered, but it is not taxable as such under section 13, because that section only imposes a recording tax on deeds conveying property, and this paper does not purport to convey anything ….").

If the word "deed" is understood in its "original and technical sense" as referring generally to any "written instrument," *Black's Law Dictionary* (8th ed.) 444 – but omitting the requirement of sealing – then *Langhorne* and *Antigone* pose no major limitation to the usefulness of the oyer procedure in modern civil practice. The importance of the practice of sealing has greatly diminished in modern practice (*see generally* Code §§ 8.01-246(2), 8.2-203, 8.2A-203, 11-3, 38.2-2420, 49-18.1, and 55.1-624), and Plaintiff acknowledges that the oyer

doctrine has long since been "expanded" to include unsealed contracts. Brief of Appellant at 8. In fact, oyer was allowed of a contract that was not under seal as early as *Terrell v. Page's Adm'r*, 13 Va. (3 Hen. & M.) 118 (1808). There is no suggestion in that opinion that either the Court or counsel questioned the propriety of the procedure. *See also*, *e.g.*, W.H. Bryson, *Bryson on Virginia Civil Procedure* § 6.03[3] (5th ed. 2017). It should not be subject to any question today.

D. Later decisions.

Decisions subsequent to *Langhorne*, *Grubbs*, and *Smith v. Wolsiefer* have not even acknowledged, much less followed, the limitations stated in those decisions – until *Antigone*. Thus in *Allen v. Commonwealth*, 122 Va. 834 (1918), a criminal prosecution for larceny of a check, the defendant craved oyer of the check and moved to quash because of a variance; the Court held that the variance was immaterial but did not question the procedure. *Commonwealth v. Springer*, 138 Va. 719 (1924), another criminal case, involved oyer of a recognizance, as in the earlier *Wood* and *Cannon* cases cited above.

In *Aetna Co. v. Earle-Lansdell Co.*, 142 Va. 435 (1925), an action against the surety on a road contractor's performance bond, the surety craved oyer of the bond and demurred. In *Waller v. Welch*, 154 Va. 652 (1930), a suit for breach of a contract to obtain an option to purchase real estate, the defendants craved oyer of the alleged option and demurred on the ground that it "was not an option, and,

therefore, the notice was insufficient in law because of an apparent variance." *Id*. at 658.

Culpeper National Bank v. Morris, 168 Va. 379 (1937), is recognized as an important decision in this area. The Bank's bill of complaint alleged that it was a judgment lien creditor of two individuals, heirs at law of their mother, who had forfeited their interest in their mother's estate by a compromise agreement (not to contest the mother's will) in a prior case. The Bank claimed that the agreement was null and void as to lien creditors of the heirs. The executors and beneficiaries named in the will "claimed oyer of the complete record in the former suit brought to contest the will, and demurred to the bill." *Id*. at 382.

The trial court sustained the demurrer. The Bank appealed from a final order entered after it declined to amend, arguing that the trial court erred by granting oyer of the record of the former suit. This Court had no trouble rejecting that argument:

> No intelligent construction of any writing or record can be made unless all of the essential parts of such paper or record are produced. A litigant has no right to put blinkers on the court and attempt to restrict its vision to only such parts of the record as the litigant thinks tend to support his view. When a court is asked to make a ruling upon *any paper or record*, it is its duty to require the pleader to produce all material parts.

Id. at 382-83 (emphasis added).

In *Jared and Donna Murayama 1997 Trust v. NISC Holdings, LLC*, 284 Va. 234 (2012), the Trust claimed that it was damaged from selling stock to defendant NISC for less than its fair market value, pursuant to a settlement agreement, as a result of its reliance on NISC's fraudulent omissions and misrepresentations. The Circuit Court sustained a demurrer. This Court affirmed, "summariz[ing] the facts as alleged in the Trust's second amended complaint" and "includ[ing] in the summary relevant provisions of the settlement agreement, as the defendants properly submitted the agreement for the circuit court's consideration through its motion craving oyer." *Id*. at 238. *See also*, *e.g.*, *Hensel Phelps Construction Co. v. Thompson Masonry Contractor, Inc.*, 292 Va. 695, 700 (2016) (citing *EMAC, L.L.C. v. County of Hanover*, 291 Va. 13, 20-21 (2016)) ("As this case was decided on a plea in bar and demurrer, the Court considers the facts as pled by Hensel Phelps in its complaint as well as the contract documents produced by Hensel Phelps in response to a motion craving oyer.").

A defendant's failure to crave oyer again tied the courts' and litigants' hands in *Riverside Healthcare Ass'n, Inc. v. Forbes*, 281 Va. 522, 534 (2011) ("the circuit court erred in considering the Trustee's accounting because it was neither an exhibit accompanying the pleading nor a document produced in response to a motion craving oyer."), as in the earlier *Hutsonpiller's Adm'r*, *Sterrett*, *Carthrae*, and *Welch* decisions, among others.

Plaintiff's suggestion that the issue in this case is a potential "expansion of the use of oyer and demurrer at the first stage of a case," Brief of Appellant at 11, is mistaken. Circuit Courts throughout this Commonwealth routinely employ the oyer device, and do it correctly, to incorporate documents on which plaintiffs' claims are based – primarily but not exclusively contracts – into complaints and consider them in ruling on demurrers. A handful of cases decided within only the last two years, both granting and denying motions craving oyer, is cited in the footnote.[7] Many dozens (probably hundreds) more could be added. As Judge Martin stated in *Hartline v. Hartline*, No. CL19-8159 (Norfolk Cir. Nov. 14, 2019), *Antigone* is simply "an outlier." *Id*., letter opinion at 7 (copy attached). The recognized rule is stated in § 2.07[9] of the *Virginia Civil Benchbook for Judges and Lawyers* (2018-2019 ed.): "The motion craving oyer seeks an order from the court that the adversary produce a governing instrument for incorporation with the pleadings." A statement by the General Court in 1840 is apropos here: "The practice throughout the commonwealth for a long series of years, hitherto

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[7] *PM Lube, LLC v. County of Loudoun*, 100 Va. Cir. 395, 404-06 (Loudoun Co. 2018) (motion denied; "a court should only grant a motion to crave oyer if the document sought 'is essential to the plaintiff's complaint.' … In other words, the document sought 'must serve as more than mere evidence[ ]' – it must be vital to the complaint.") (citations omitted); *Hooper v. Union Bank and Trust*, 100 Va. Cir. 130, 130 (Chesapeake 2018); *Occidental Fire & Casualty Company v. AREVA Inc.*, 100 Va. Cir. 45, 49 (Nelson Co. 2018).

without a serious doubt of its correctness, ought to be considered as settling the law in that respect." *Commonwealth v. Stockley*, 37 Va. (10 Leigh) 678, 683.

Plaintiff's perception of a "trend among the trial court in Virginia to view oyer as an expansive doctrine allowing for any number of instruments to be read as part of the complaint," Brief of Appellant at 12, likewise is mistaken. "[T]he 'medical record' or particular parts of it," *id*., is not a document on which a medical negligence claim is based, and plaintiff cites no decision embodying such an improperly "expansive" understanding of the oyer doctrine. But even if such a risk is more real than exaggerated, the Court's Opinion in this case should serve to define the doctrine's proper scope and application.

E. The oyer procedure serves a valuable purpose in modern Virginia practice.

This Court concisely described the function and value of the oyer procedure as follows, in *Ward's Equipment, Inc. v. New Holland North America, Inc.*, 254 Va. 379, 382 (1997) (citing *Hechler Chevrolet, Inc. v. General Motors Corp.*, 230 Va. 396, 398 (1985), and *Fun v. Virginia Military Institute*, 245 Va. 249, 253 (1993)):

> When a demurrant's motion craving oyer has been granted, the court in ruling on the demurrer may properly consider the facts alleged as amplified by any written agreement added to the record on the motion…. Furthermore … a court considering a demurrer may ignore a party's factual allegations contradicted by the terms of authentic, unambiguous documents that properly are a part of the pleadings.

See also, *e.g.*, *Kaltman v. All American Pest Control, Inc.*, 281 Va. 483, 488 (2011) (defendants filed motions craving oyer for the agreement between the parties; the circuit court granted the motions, and the agreement "became a part of the pleadings"); *Welch v. McDonald*, 85 Va. at 504 ("Had oyer of the contract been craved, and the true contract made known to the court, the demurrer to these counts ought to have been, and doubtless would have been, sustained.").

Invocation of the oyer procedure also can serve to disclose that claims are defective or insubstantial, when nothing is produced in response to the motion. Thus in *Pulte Home Corp. v. Parex, Inc.*, 265 Va. 518 (2003), a cross-claim defendant (Parex) "filed a motion referencing the allegations in the cross-claim with respect to oral and written express warranties and craving oyer," seeking "'any alleged contract or agreement and any alleged express warranty forming the basis'" of a breach of express warranty count in Pulte's cross-claim. *Id*. at 523. "Pulte responded that it was 'not yet in possession of any written contract entered into by Parex, nor any written warranty issued by Parex' but would soon serve requests for documents upon Parex, the subcontractors, and the supplier." *Id*. Pulte was thus "left with the naked allegation in its cross-claim that its approval of the use of the EIFS was based upon the express oral or written warranties of Parex 'by way of affirmations of fact, promises, descriptions, and/or use of samples and/or models regarding the appearance, durability, and/or water-resistance of

[EIFS].'" That allegation "merely parroted the language of Code § 8.2-313, which sets forth several *legal* bases for the creation of express warranties, and amounted to no more than a legal conclusion," *id*., and the cross-claim failed to state a claim for breach of an express warranty. *Id*. at 523-24.

Plaintiff argues that trial courts should "avoid short circuiting litigation and deciding cases without permitting the parties to reach a trial on the merits." Brief of Appellant at 10 (citations omitted). There is some truth in that remark, but it only goes so far. Taken to its logical extent – as plaintiff seemingly asks this Court to do – that precept would suggest that demurrers should always be rejected, to "permi[t] the parties to reach a trial on the merits," *id*. That is not the law in Virginia, nor should it be. When a complaint states "no case in law," *County School Board v. Snead*, 198 Va. at 100, 103 (1956), neither the defendants nor the courts should be burdened with any further proceedings in that case. So too when "authentic, unambiguous documents that properly are a part of the pleadings" contradict a party's factual allegations. *Ward's Equipment*, 254 Va. at 382. "A litigant has no right to put blinkers on the court and attempt to restrict its vision to only such parts of the record as the litigant thinks tend to support his view." *Culpeper National Bank v. Morris*, 168 Va. at 382-83.

F. *Langhorne*'s dictum should be disapproved.

As discussed above, the statement in *Langhorne* that the oyer procedure is limited to deeds and letters of probate and administration was dictum. The Court first explained the plaintiff did not base his claim on any of the "writings" at issue, and therefore they could not properly have been considered upon the demurrer in any event. That was enough; the language cited by the Circuit Court in *Antigone* was merely a gratuitous statement of opinion on matters that could not have affected the outcome of the case.[8] The VADA therefore does not ask that *Langhorne* be overruled. It was correctly decided. The VADA asks, however, that *Langhorne*'s dictum be disapproved.

The foregoing descriptions of the long series of decisions both preceding and following *Langhorne* and its limited progeny (*Smith v. Wolsiefer* and *Grubbs v. Nat'l Life*) should suffice to demonstrate that the statements in those decisions, like the decision in *Antigone*, are "outliers." Those decisions aside, this Court has never limited the oyer procedure to deeds (unless "deeds" is understood as

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[8] The same is true of *Smith v. Wolsiefer*, 119 Va. 247. The Court stated that the proceeding "by which the defendant craved oyer of [a] lease" was "unusual" but held that any error was waived in the trial court. *Id*. at 250-51. Likewise in *Grubbs v. Nat'l Life Maturity Ins. Co.*, 94 Va. 589, the Court mentioned the *Langhorne* limitation but assumed *arguendo* "that the defendants had the right to crave oyer of the policy sued on," holding that the question whether the policy was a sealed instrument was "one of fact, to be presented at the hearing by proper motion or plea, but not by a demurrer to the declaration." *Id*. at 591.

referring to all written instruments, as discussed above) and letters of probate and administration. Oyer has been employed to bring bonds (including executors' bonds, contractors' performance bonds, sheriffs' official bonds, supersedeas bonds, and "recognizances" (bail bonds)); a check, in a prosecution for larceny; promissory notes and endorsements; arbitration awards; records of previous civil and criminal proceedings; and in at least one case (*Greenhow v. Buck*, 19 Va. 263) an Act of Assembly before courts for consideration on demurrers (and various pleas, under older modes of practice).

Even if *Langhorne* and its progeny correctly announced an applicable rule of common law at the time they were decided, they should now be overruled. As discussed above, the oyer procedure has considerable utility in contemporary practice, and there is no valid reason why it should not continue to apply to all documents that form the basis of a plaintiff's claim – primarily including but by no means limited to written contracts. As this Court has recognized,

> Stare decisis "is not an inexorable command." … It "was never meant to prevent a careful evolution of the law. Stare decisis, pushed to extremes, would mean the law, once stated by the courts, could never be changed by the courts."
>
> Without such change, we would be compelled
>
> to ignore our duty to develop the orderly evolution of the common law of this Commonwealth. Indeed, this Court's obligation to reexamine critically its precedent ... enhance[s] confidence in the judiciary and strengthen[s] the importance of stare decisis in our jurisprudence.

> Although we have only done so on rare occasions, we have not hesitated to reexamine our precedent in proper cases and overrule such precedent when warranted.

Home Paramount Pest Control Cos. v. Shaffer, 282 Va. 412, 419 (2011) (quoting *Nunnally v. Artis*, 254 Va. 247, 253 (1997); internal citations omitted). "One condition warranting a departure from precedent is where the law has changed in the interval between the earlier precedent and the case before us." *Id*.

> [T]he courts in Virginia operate under a statutory mandate which provides that the common law of England, if not repugnant to the principles of the Bill of Rights or the Virginia Constitution, continues in full force and effect within the State, and shall "be the rule of decision, except as altered by the General Assembly," Code § [1-200]. But this does not mean that common law rules are forever chiseled in stone, never changing. The common law is dynamic, evolves to meet developing societal problems, and is adaptable to society's requirements at the time of its application by the Court.

Cline v. Dunlora South, LLC, 284 Va. 102, 106-07 (2012) (quoting *Williamson v. Old Brogue, Inc.*, 232 Va. 350, 353 (1986)). *See also*, *e.g.*, *Corriveau v. State Farm Mutual Automobile Ins. Co.*, ___ Va. ___, Record No. 181533, slip op. at 9 (Dec. 19, 2019) (quoting *Home Paramount* and *Nunnally*); *Midkiff v. Midkiff*, 201 Va. 829, 832 (1960) (quoting 15 C.J.S., Common Law, § 2, p. 613):

> "The common law does not consist of definite rules which are absolute, fixed, and immutable like the statute law, but it is a flexible body of principles which are designed to meet, and are susceptible of adaptation to, new institutions, conditions, usages, and practices, as the progress of society may require…."

CONCLUSION

For all of the foregoing reasons, the VADA respectfully submits that this Court should now hold that the oyer procedure applies, without limitation, to documents on which an action is founded.

Respectfully submitted,

The Virginia Association
of Defense Attorneys

By: *George A. Somerville*
Counsel

George A. Somerville (VSB No. 22419)
Harman, Claytor, Corrigan & Wellman
P.O. Box 70280
Richmond, Virginia 23255
(804) 677-5028 (Phone)
(804) 747-6085 (Fax)
gsomerville@hccw.com

Certificate

I hereby certify that this brief amicus curiae complies with Rule 5:26 and that true copies of this brief, in Portable Document Format (PDF) format, were filed with the Clerk of this Court and served on counsel for all parties, named below, on December 30, 2019:

Warner F. Young III, Esquire
11350 Random Hills Road, Suite 700
Fairfax, VA 22030
wyoung@abhylaw.com
Counsel for Appellant

Amy Miller, Esquire
Martin J. Amundson, Esquire
Buchanan Ingersoll & Rooney PC
1737 King Street, Suite 500
Alexandria, VA 22314-2727
amy.miller@bipc.com
martin.amundson@bipc.com
Counsel for Appellees

George A. Somerville

ADDENDUM

FOURTH JUDICIAL CIRCUIT OF VIRGINIA
CIRCUIT COURT OF THE CITY OF NORFOLK

EVERETT A. MARTIN JR.
JUDGE

150 ST. PAUL'S BOULEVARD, SUITE 800
NORFOLK, VIRGINIA 23510

November 14, 2019

Christy L. Murphy, Esq.
Bischoff Martingayle, P.C.
208 East Plume Street, Suite 247
Norfolk, Virginia 23510

Frank A. Edgar, Esq.
Goldstein, Edgar & Reagan
741 J. Clyde Morris Boulevard
Newport News, Virginia 23601

Re: Jeffrey Hartline v. Tracy Hartline
Civil No.: CL19-8159

Dear Ms. Murphy and Mr. Edgar:

The parties are divorced. To avoid confusion, I shall refer to them by their status in this case, not in the underlying cases out of which this malicious prosecution action arises.

The plaintiff alleges the defendant swore out five criminal warrants against him for trespass, *Code of Virginia* § 18.2-119, on or about December 27, 2017. The dates of the offenses were between August of 2012 and January of 2016.[1] He further alleges the defendant arranged to have him arrested on these charges two days later at the airport in the presence of his girlfriend and her family; that she filmed the arrest; that she sent copies of the film to his family members "telling them that he and his 'whore' wife (sic) needed to feel pain." ¶8.

He also alleges the defendant swore out a protective order and a warrant for assault and battery against him on or about February 15, 2019, for events occurring that day.

He alleges throughout the complaint that the defendant "used false information" and "falsely represent[ed] facts." He does not state what the false information and facts are. He does not quote from any criminal complaints or other documents the defendant may have signed before

[1] The statute of limitations for most misdemeanors, including trespass, is one year. *Code* § 19.2-8. No one knows why a magistrate issued the warrants after the limitations period had clearly expired.

a magistrate to obtain the warrants or the protective order, nor does he attach them as exhibits to the complaint. He pleads the criminal charges and protective order were all ultimately dismissed.

The defendant has demurred on several grounds and craved *oyer*.

Privilege

Most of the briefs and the arguments were on this issue, but upon further reflection, I have decided it is premature to rule on it because the plaintiff does not quote from any documents or testimony in his complaint. He simply alleges whatever statements the defendant made or information she provided was false.

Probable Cause

There are four bases for the demurrer concerning probable cause. First are bald statements that probable cause existed. This is a trial issue.

Second, with respect to the protective order,[2] she alleges there was probable cause as a judge of the Juvenile and Domestic Relations District Court issued a protective order after a hearing with both parties present. The complaint, however, states the protective order petition was dismissed after a full trial on the merits on May 9, 2019. On demurrer, I cannot consider facts stated in the demurrer that are not in the complaint.

Third, she claims the criminal charges and the protective order were issued by a magistrate upon a finding of probable cause. However, the "issuance of the warrant does not conclusively prove probable cause because of the very existence of the law permitting malicious prosecution actions . . . ." *Niese v. Klos,* 216 Va. 701, 704, 222 S.E.2d 798, 801 (1976). The same rule should apply to a magistrate's issuance of an emergency protective order.

The remaining ground is the failure to plead sufficient facts. I partly sustain the demurrer on this ground. The plaintiff pleads insufficient facts to demonstrate the lack of probable cause for the 2017 criminal charges and the protective order.

With respect to the 2019 assault and battery charge, he does allege a fact: an Old Dominion University police officer found no probable cause to arrest him. ¶12. With respect to the 2017 criminal charges, the only fact he states is: "The magistrate released Jeffrey with no bond

[2] The defendant has not demurred to an action for malicious prosecution based on a civil matter for which the plaintiff was not arrested or his property seized.

once he heard the true story about the alleged crimes." ¶9. Release by a magistrate after arrest does not indicate a lack of probable cause to believe the accused committed an offense; rather, it shows a lack of probable cause to believe (1) the accused will not appear for trial, and (2) his liberty will be an unreasonable danger to himself or the public. *Code* § 19.2-120 (A). For the protective order and the 2017 criminal charges, he pleads false representations (discussed *infra*) and "there was no probable cause." The latter is a legal conclusion. *Lewis v. Kei,* 281 Va. 715, 723, 708 S.E.2d 884, 890 (2011).

Malice

The defendant claims the plaintiff has not pleaded sufficient facts to allege malice and thus support his claim for punitive damages. I find the allegations of paragraph 8 of the complaint, briefly summarized above, are sufficient to plead malice.

Falsity

The defendant also claims the plaintiff has not pleaded sufficient facts to support his allegation that her statements, whatever they were, were false. I agree. The plaintiff does allege she testified falsely, but he does not state the particulars of the falsity.

In *Craft v. Moloney Belting Co.,* 117 Va. 480, 85 S.E. 486 (1915), an action for malicious prosecution, the trial court sustained a demurrer. Two of the issues on appeal were whether the declaration set out conclusions of law or fact and did the declaration need to set out the statements the defendants allegedly knew to be false. As pertinent to this case, omitting the discussion of suborning false statements, the Court held:

> As it seems to us, the charge in the declaration here that the defendants, by means of evidence which they knew to be false, caused the plaintiff to be convicted, is merely a conclusion of law to be drawn from the facts . . . .
>
> By electing to set up that the conviction was obtained by testimony which the defendants knew to be false, the plaintiff brought his case within the rules governing an action for false representations, and in that class of cases it is well settled the false representations must be set out . . . .
>
> It might well be asked in this case, as there is nothing in the

> declaration to give that information, . . . What were the false statements? All which information the defendants were entitled to, and those facts were essential, not only to the plaintiff's right of recovery, but to his right to maintain his action.

117 Va. at. 482-84, 85 S.E. at 487. I sustain the demurrer on this ground.

Motion Craving Oyer

The defendant has craved *oyer* of the statements she made to the magistrate, the protective orders, and the order dissolving the protective order. The plaintiff argues I should deny the motion for the reasons given in *Antigone v. Taustin,* 98 Va. Cir. 213 (Fairfax 2018). There, Judge Oblon held *oyer* could only be had, absent agreement of the parties, of deeds and letters of probate and administration and supplements to documents related to deeds or probate attached to the complaint.

In *Welch v. McDonald,* 85 Va. 500, 8 S.E. 711 (1888), an action for breach of a construction contract, the jury returned a verdict for the plaintiff and the defendants appealed. One of the errors assigned was the overruling of their demurrer. The Supreme Court ruled:

> The defendants did not crave oyer of the contract, but demurred to the declaration and to each count thereof . . . . The radical difference between the contract declared on, and the one really made and put in evidence, did not *then* appear; and the demurrer was properly overruled as to these counts. Had oyer of the contract been craved, and the true contract made known to the court, the demurrer to these counts ought to have been, and, doubtless, would have been sustained.

85 Va. at 504, 8 S.E. at 713.

Two cases less than a decade later did hold that *oyer* of papers mentioned in a pleading could only be craved of deeds and letters of probate and administration and not to other writings. *Grubbs v. National Life, etc.,* 94 Va. 589, 591, 27 S.E. 464, 465 (1897); *Langhorne v. Richmond City Ry. Co.,* 91 Va. 369, 372, 22 S.E. 159, 160 (1895). Neither case mentioned *Welch.* In *Burton v. Seifert & Co.,* 108 Va. 338, 350, 61 S.E. 933, 938 (1908), a suit on a construction payment bond, the Court held the circuit court was correct to deny *oyer* of the contract because the action

"was not upon the contract;" the Court did not rule that *oyer* did not lie for a contract. However, the Supreme Court restated the holdings of *Grubbs* and *Langhorne* in *Smith v. Wolsiefer,* 119 Va. 247, 250, 89 S.E. 115, 116 (1916), where it observed it was "unusual" for a defendant to have craved *oyer* of a lease, but that all parties had consented. It might be concluded that a century ago the law was muddled concerning which documents were subject to *oyer*.

Oyer is a common law procedure of medieval origin[3], and the common law evolves; it is not chiseled in stone.[4] *Oyer* has evolved in Virginia in the last century, and for an ancient procedure it has recently attracted much attention.

In *Culpepper National Bank v. Morris,* 168 Va. 379, 191 S.E. 764 (1937), the bank was a judgment creditor of the heirs at law of a decedent. In a suit *devisavit vel non,* a jury returned a verdict against the validity of a will, but the court set aside the verdict based upon a compromise between the parties to admit the will to probate. The judgment debtors of the bank took nothing under the will.

The bank brought suit to declare the order setting aside the jury verdict void as to the lien creditors of the heirs. The defendants in the bank's suit claimed *oyer* of the complete record of the first suit and demurred. The trial court sustained the demurrer, and the bank appealed the trial court's grant of *oyer*.

The Supreme Court noted the bank described the proceedings in the first suit, the evidence introduced, and other aspects of the case, but filed only a small part of the record as exhibits, and then asked the trial court to accept its construction of the entire record by inspection of those parts it chose to introduce. The Supreme Court would not have it and affirmed:

> No intelligent construction of any writing or record can be made unless all of the essential parts of such paper or record are produced. A litigant has no right to put blinkers[5] on the court and attempt to restrict its vision to only such parts of the record as the litigant thinks tend to support his view. When a court is asked to make a ruling upon any paper or record, it is its duty

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[3] There are references to *oyer* as early as the 14th Century, I *Comyns' Digest*, "Abatement," I. 22 (1780) (referring to the 22nd year of Edward III - 1349); XVI *Viner's Abridgment*, "Oyer of Records, Deeds &c," (B) 7 (1743) (referring to the 3rd year of Henry IV – 1401). The Common Law Procedure Act of 1852, 15 & 16 Vict., c. 76, abolished *oyer* in England. It thrives in Virginia.

[4] "At no time has the common law stood still . . . . But never has the law been exempt from the ceaseless alteration to which all human creations are subject." J. H. Baker, *An Introduction to English Legal History* 195-96 (4th ed. 2002).

[5] "3. either of two leather straps on a bridle, to prevent a horse from seeing sideways; a blinder," *The Random House Dictionary of the English Language* (1967).

to require the pleader to produce all material parts.

168 Va. at 382-83, 191 S.E. at 765.

In the more recent cases involving *oyer* to reach the Supreme Court, it appears the plaintiffs agreed to *oyer*, but in several the circuit courts had sustained demurrers and dismissed the actions and the Supreme Court affirmed. *Hechler Chevrolet v. General Motors Corporation,* 230 Va. 396, 337 S.E.2d 744 (1985) (agreements between the parties); *Ward's Equipment v. New Holland North America,* 254 Va. 379, 493 S.E.2d 516 (1997) (dealer agreement); *Pulte Homes v. Parex,* 265 Va. 518, 579 S.E.2d 188 (2003) (warranty); *Dodge v. Randolph-Macon,* 276 Va. 1, 661 S.E.2d 801 (2008) (various documents). Had the circuit courts "short-circuited" litigation through an improper procedure, one would expect the Supreme Court to have commented, especially in *Ward's Equipment*, where the plaintiff agreed to *oyer* in the circuit court but on appeal claimed it was error for the circuit court to have considered the document produced.

Most of the reported Virginia circuit court opinions on motions craving *oyer* restrict the procedure to documents that form the basis of the complaint. Merely referring to a document in a complaint will not justify *oyer*. Nor is *oyer* a substitute for Rule 4:9. *Marios v. VEPCO,* CL2019-1068 (Fairfax 2019); *PM Lube v. County of Loudon*, 100 Va. Cir. 395 (Loudon 2018); *Horne v. Browder,* 91 Va. Cir. 77 (Prince George 2015); *Colonna's Shipyard v. Alpha Pipe Co.,* 2012 WL 6755957 (Norfolk 2012); *Penney v. Brock,* 84 Va. Cir. 459 (Accomack 2012); *Resk v. Roanoke County*, 73 Va. Cir. 272 (Roanoke 2007); *Virginia Beach Rehab Specialists v. Augustine Medical,* 58 Va. Cir. 379 (Norfolk 2002); *Colinsky Consulting v. Holloway,* 57 Va. Cir. 403 (Norfolk 2002); *Ragone v. Waldvogel*, 54 Va. Cir. 581 (Roanoke 2001); *Sjolinder v. American Enterprise Solutions,* 51 Va. Cir. 436 (Charlottesville 2000); *Spiller v. James River Corporation,* 32 Va. Cir. 300 (Richmond 1993); *Charter Communities v. Lees Hill Partnership*, 31 Va. Cir. 417 (Spotsylvania 1993).

A few other cases apply an arguably broader standard of "necessary to the plaintiff's claim" or "essential to the complaint." *Hooper v. Union Bank & Trust*, 100 Va. Cir. 130 (Chesapeake 2018); *Johnson Senior Center v. Dolan*, 97 Va. Cir. 76 (Amherst 2017); *Fielder's Choice Enterprise v. Augusta County,* 92 Va. Cir. 66 (Augusta 2015); *Monger v. Herring,* 79 Va. Cir. 470 (Rockingham 2009); *Station #2 v. Lynch,* 75 Va. Cir. 179 (Norfolk 2008); *Bagwell v. City of Norfolk,* 59 Va. Cir. 205 (Norfolk 2002). In some of the decisions two or all three of these standards are stated, so I may be drawing a distinction without a difference. Some of these decisions include "collateral documents."

The only other case of which I am aware that applied a more restrictive view of *oyer* is by Judge Horne. *Lugo v. City Council of Alexandria*, Case No. 18-3479 (Alexandria 2019), but he

believes *oyer* ought to be avoided. *Glass v. Trafalgar House Property*, 58 Va. Cir. 437 (Loudon 2002).

Professor Bryson was correct when he wrote: "Formerly oyer of instruments not under seal was not allowed, but now the practice is otherwise." *Virginia Civil Procedure*, §6.03 [3] (5th ed. 2017). Concluding *Antigone* is an outlier, however, does not mean the motion ought to be granted because an action for malicious prosecution is not based on documents. It is based on the defendant's knowledge and the evidence she possesses when she initiates the prosecution, her motive, and the conclusion of the prosecution in a manner favorable to the plaintiff. The criminal complaints, the petition for a protective order, the warrants, and the protective order may be evidence, but that does not make them subject to *oyer*. I deny the motion craving *oyer*.

An order reflecting these rulings is attached.

Sincerely yours,

Everett A. Martin, Jr.
Judge

EAMjr./mls