

# VIRGINIA DOCKET REVIEW

## THE ROLE OF VIRGINIA EVIDENCE LAW IN *COLAS V. TYREE*

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## INTRODUCTION

The Supreme Court of Virginia recently decided a significant case involving an all-too-common circumstance: a police officer's use of deadly force against a person suffering a mental health crisis. The case was *Colas v. Tyree*<sup>1</sup> and the court was bitterly divided, with four justices finding in favor of the officer and three justices siding with the decedent, Jeffrey Tyree. There is much that could be said about law and policy in this area, but here I would like to focus on the role that Virginia evidence law played—or perhaps did not play—in the court's majority opinion.

What makes this topic worthy of exploration is the odd fact that the majority opinion fails to address what appear to be powerful pieces of evidence noted by the dissent. Below, I attempt to piece together why the majority may have rejected the dissent's arguments and consider whether that decision is justified. I focus on the possibility that the majority viewed the evidence cited in the dissent as *categorically* insufficient to justify a ruling for Tyree's Estate. I conclude that, although there is some precedential support for a categorical holding of this sort, that precedent does not certainly apply and, in any event, is ripe for a critical reexamination by the court.

## I. THE FACTS

*Colas v. Tyree* arose out of the tragic death of Jeffrey Tyree at the hands of a police officer. On February 9, 2019, Tyree found himself several days into an acute mental breakdown. At one point, a family member summoned the police because Tyree's behavior had become aggressive. Some ten to fifteen officers eventually arrived, among them Detective Bradley Colas and Officer Nigal Tuft-Williams. A several hour stand-off ensued with Tyree holding a "military-style knife" for much of the time.<sup>2</sup>

At one point, Officer Tuft-Williams attempted to tackle Tyree to end the stand-off. The tackle resulted in Tyree and Tuft-Williams lying on the ground next to each other. The parties' versions of events diverge here, but according to Detective Colas—whose testimony would be crucial at trial—Tyree raised his knife and ap-

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1. \_\_\_ Va. \_\_\_, 882 S.E.2d 625 (2023).

2. *Id.* at \_\_\_, 882 S.E.2d at 628.

peared to be about to stab Tuft-Williams. With little time to act, Colas shot and killed Tyree.<sup>3</sup>

## II. THE CASE AT TRIAL

Tyree's Estate brought suit in state court against Colas and Tuft-Williams, alleging gross negligence and battery.<sup>4</sup> The case hinged on whether Detective Colas reasonably believed that Tyree presented a risk of harm to Officer Tuft-Williams. If so, Colas and Tuft-Williams would win. If not, Tyree's Estate would win.

The case made its way to trial and, as is common in shooting cases of this sort, the Estate found itself in a tough position because its best witness, Jeffrey Tyree himself, was dead. As a result, the Estate was forced to rely on the testimony of the defendants themselves to prove the Estate's case. At one point, the Estate called Colas to the stand and asked him why he shot Tyree.<sup>5</sup> Colas' response, which was to become the centerpiece of the supreme court appeal, was as follows:

"[W]hen I fired the shot at [Tyree], it was to save Officer Tuft-Williams' life because [Tyree] was holding this knife up in the air toward Officer Tuft-Williams and it looked like he was about to stab Officer Tuft-Williams."<sup>6</sup>

Before the case was submitted to the jury, Colas and Tuft-Williams argued that the Estate lacked sufficient evidence to prove their case. In their view, the jury was bound to accept Colas' uncontradicted testimony as true, with the result being that Colas and Tuft-Williams must win. The court rejected this argument and submitted the case to the jury, who returned a verdict in favor of Tyree's Estate on the battery claim (but not the gross negligence claim).<sup>7</sup> Colas and Tuft-Williams, however, appealed to the Supreme Court of Virginia on the battery claim.<sup>8</sup>

## III. THE CASE IN THE SUPREME COURT

In a divided 4-3 opinion, the Supreme Court of Virginia reversed and handed Colas and Tuft-Williams a final judgment in their

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3. *Id.* at \_\_, 882 S.E.2d at 629.

4. *Id.* at \_\_, 882 S.E.2d at 630.

5. *Id.* at \_\_, 882 S.E.2d at 629.

6. *Id.* at \_\_, 882 S.E.2d at 629 (alteration in original).

7. *Id.* at \_\_, 882 S.E.2d at 629–30.

8. *Id.* at \_\_, 882 S.E.2d at 629.

favor. What justified this result, in the majority's view at least, was the "adverse party witness rule."

The adverse party witness rule holds that "when an adverse party is called and examined by an opposing party, the latter is bound by all of the former's testimony that is uncontradicted and is not inherently improbable."<sup>9</sup> Colas was an adverse party witness, which means that Tyree's Estate was bound by Colas' testimony—but *only to the extent the testimony was uncontradicted and reasonably believable*. Colas, of course, testified that Tyree posed an imminent risk of death to Tuft-Williams; thus, if that testimony was uncontradicted and believable on its face, a jury would be required to believe it and the Estate should lose. Reviewing the other testimony presented in the case, the court found that there was no evidence suggesting that Tyree *did not* pose a risk to Tuft-Williams, which means the jury would be required to believe Colas and find that the shooting was justified.<sup>10</sup>

The dissent responded with several arguments, but chief among them was the argument that Colas' testimony was not, in fact, uncontradicted. According to the dissent, there was substantial evidence that Tyree did *not* pose a threat to Colas, including (1) testimony from officers on the scene stating that Tyree had not actually threatened any officers, (2) evidence that Tyree, because he was physically weak and walked with a cane, would not have posed a serious risk to Tuft-Williams, (3) testimony that Tuft-Williams' tackle of Tyree would have significantly compromised Tyree's ability to attack Tuft-Williams, (4) evidence that, although Tyree was holding the knife up in the air, he was not swinging it toward Tuft-Williams, and (5) evidence that no other officer found it appropriate to draw a weapon when Tyree was near Tuft-Williams.<sup>11</sup>

Strangely, the majority opinion did not engage with the dissent's argument that Colas' testimony was in fact contradicted. One is thus left to wonder *why* the dissent's arguments failed to persuade a majority of the court. In the following section, I explore the possibility that the majority deemed the evidence cited by the dissent to be categorically incapable of contradicting Colas' testimony.

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9. Economopoulos v. Kolaitis, 259 Va. 806, 812, 528 S.E.2d 714, 718 (2000).

10. *Colas*, \_\_ Va. at \_\_, 882 S.E.2d at 632–35.

11. *Id.* at \_\_, 882 S.E.2d at 638–39.

#### IV. A CATEGORICAL LIMITATION?

Broadly speaking, there are two potential explanations for the court's holding. First, the court might have found that the evidence cited by the dissent was simply too insubstantial to create a dispute of fact. Although evidence may not be weighed or the credibility of witnesses considered, a plaintiff must still produce more than a "scintilla" of evidence to survive a defense motion to strike.<sup>12</sup> Perhaps the court regarded the evidence cited by the dissent as nothing more than a mere scintilla.

Second, the court might have found that the dissent's evidence, because of its nature, was *categorically* insufficient to create a dispute of fact. A hint that the court took this approach can be found in the court's explanation of the adverse party witness rule. In that explanation, the court was careful to note that: "we have repeatedly rejected the notion that the 'positive testimony' of an adverse party witness—specific factual testimony—can be overcome by other evidence, such as inferences drawn from primary facts, or 'negative' testimony from a witness."<sup>13</sup>

This passage charts a possible pathway to the court's rejection of the evidence cited by the dissent. If the court regarded Colas' testimony as "positive testimony," and regarded the evidence noted by the dissent as either (1) "negative testimony" or (2) "inferences drawn from primary facts," it would be justified in holding Colas' testimony cannot be "overcome" by the evidence cited in the dissent. Below, I explore the court's description of these aspects of Virginia evidence law and whether that law, properly understood, could lead the court to the result it reached.

##### A. *Positive and Negative Testimony*

Virginia law distinguishes between "positive" and "negative" testimony. "Positive testimony" is testimony by a witness that they "saw or heard a particular thing at a particular time," while "negative testimony" is testimony that the witness, "with the same opportunities [to observe the thing], . . . did not see or hear it."<sup>14</sup> In Virginia, negative testimony on its own is insufficient to overcome

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12. *Norfolk & W. Ry. Co. v. Greenfield*, 219 Va. 122, 132, 244 S.E.2d 781, 786 (1978) ("a scintilla [of evidence] is not enough" to defeat a motion to strike).

13. *Colas*, \_\_ Va. at \_\_, 882 S.E.2d at 631.

14. *Southern Ry. Co. v. Barden*, 200 Va. 98, 102, 104 S.E.2d 13, 16 (1958).

positive testimony.<sup>15</sup> To illustrate, suppose that P sues D for injuries arising from a car accident on a busy street, and D testifies that he “honked his horn before the collision.” If P merely testifies that she “did not hear a horn,” Virginia evidence law *requires* the jury to find that D honked his horn.

To be sure, if P is able to additionally testify that she had a good opportunity to hear the horn and would have likely heard it if D had in fact honked his horn, her testimony that she did not hear the horn would count as “positive evidence.”<sup>16</sup> Such evidence would be sufficient to create a dispute with D’s testimony and allow P to survive a motion to strike.

Turning to the facts of *Colas v. Tyree*, Colas’ testimony was plainly positive; he testified that he saw a specific event at specific time. Given this, if the evidence cited by the dissent is regarded as negative, Virginia evidence law would hold that Colas’ testimony must prevail.

It is difficult to know for sure without a full investigation of the trial transcript whether the evidence cited by the dissent was entirely negative, but some of it might have been. Take, for example, evidence that other officers at the scene did not apparently perceive Tyree to be so dangerous that they felt justified in unholstering their guns. This evidence, which essentially amounts to “I did not see Tyree behaving dangerously,” would only count as “positive evidence” if those officers were specifically paying attention to all of Tyree’s actions and would have perceived such a threat if possible.<sup>17</sup> With ten to fifteen officers on the scene performing different functions, it is quite possible that some officers who testified that Tyree was not a threat were not sufficiently attentive to each and every act by Tyree. As such, this evidence could potentially be regarded as negative testimony that would fail to overcome Colas’ positive testimony.

Other evidence, however, appears positive. Take, for example, evidence that Tyree was physically weak and often needed a cane to walk. On one hand, this evidence might appear “negative” because it was offered to prove the absence of some fact asserted by an adverse party witness. Yet this misunderstands the meaning of “negative evidence.” Negative evidence is not simply evidence that

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15. *Colas*, \_\_ Va. at \_\_, 882 S.E.2d at 631.

16. *National Union Fire Ins. Co. v. Bruce*, 208 Va. 595, 598, 159 S.E.2d 815, 818 (1968).

17. *See id.*

“negates” some other piece of evidence; otherwise, the moniker would apply to nearly all evidence. Rather, negative evidence is evidence that suggests non-occurrence through non-observation (e.g., “I did not hear a horn, so D must not have honked his horn.”). Evidence that Tyree was too feeble to pose a risk to Tuft-Williams is not of this nature.

To see this more clearly, consider again the honking horn. In response to D’s claim that he honked his horn, suppose that P presents evidence that D’s horn was in fact inoperable at the time of the accident. Such evidence is not negative: it does not suggest non-occurrence through non-observation. Instead, it suggests non-occurrence through physical impossibility. The Estate’s evidence is much the same here. If Tyree was in fact quite feeble, that would make his risk to Tuft-Williams a physical impossibility.

Thus, while some of the evidence cited by the dissent may be regarded as negative, at least some of it can be properly regarded as positive as well. This means that Virginia evidence law could support part of the court’s holding, but not all of it. Given that the positive-negative distinction could be doing some work in *Colas*, it is worth highlighting a problem with this rule that the Supreme Court of Virginia has apparently failed to address: how a court should account for the credibility of the witness providing positive testimony.

To see the problem, suppose that P sued D for injuries she sustained when she slipped on a recently-mopped floor in D’s store. At trial, P testified that she never saw a “caution” sign warning her of the unsafe condition. D testifies, however, that, he placed such a sign there just before P entered the area. In reality, D never placed the sign there; he is lying to avoid liability. On cross examination, P impeaches D by pointing out that he failed to note this during his deposition.

It is not hard to see the problem here: a jury could reasonably disbelieve D based on his inconsistent statements but simultaneously be *required* to believe D because his testimony is positive and P’s testimony is negative. What sense is there to a rule that requires a jury to believe a witness that it would otherwise be quite justified in disbelieving? If credibility determinations are the province of the jury, should not the jury be entitled to reject D’s testimony?

To be sure, the Supreme Court of Virginia does not appear oblivious to this issue. The court has stated several times that the pre-

emptive force of a witness' positive testimony only arises if his credibility is "unimpeached."<sup>18</sup> Yet, despite this apparent caveat, one is hard-pressed to find even a single case in which credibility problems have nullified the force of a witness' positive testimony.

Perhaps the reason no such case can be found is because the issue is only likely to arise on a motion to strike and it is axiomatic that a court may not consider the credibility of witnesses on a motion to strike.<sup>19</sup> How could a trial court simultaneously ignore and give weight to the credibility of witnesses? To be sure, this is not necessarily an insoluble problem. If it desired, the supreme court could presumably craft an exception to the ordinary rule that courts may not consider credibility on a motion to strike. The court could explain that credibility could be considered, but only for the purpose of determining the force to give to positive testimony.

Such an approach, however, would swallow the rule. Just about every witness subject to cross examination will suffer at least *some* damage to her credibility. Even the disinterested witness renowned for her honesty will have her perception or memory questioned to some degree. "But wasn't your view of the stoplight partially obscured to by that tree branch?" Or, "If you can't remember a simple fact like whether it was raining at the time of accident, doesn't that suggest your memory is not reliable?" If nearly every witness offering positive testimony will have had their credibility impeached to some degree, then positive testimony will almost never acquire preemptive force over negative testimony.

The better course here is simply to abandon the rule that positive testimony offered by an unimpeached witness automatically overcomes negative testimony. The parties should be free to argue in closing that negative testimony should not be entitled to as much weight as positive testimony, and to argue that a witness' lack of credibility is good reason to discount the weight of testimony, regardless of whether it is positive or negative. The cost of such an approach is that, on rare occasions, an exceedingly weak case may make it to the jury and the jury, whether confused or otherwise, finds for party with weak evidence. This is a small, if

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18. *Norfolk & W. Ry. Co. v. Greenfield*, 219 Va. 122, 130, 244 S.E.2d 781, 785 (1978) (witness' positive testimony only overcomes negative testimony if witness' "credibility is unimpeached"); *S. Ry. Co. v. Berry*, 172 Va. 266, 279, 1 S.E.2d 261, 266 (1939); *Chesapeake & Ohio Ry. Co. v. Jacobs*, 166 Va. 11, 17, 183 S.E. 221, 224 (1936); *see also* *S. Ry. Co. v. Barden*, 200 Va. 98, 103, 104 S.E.2d 13, 16 (1958) (positive testimony only overcomes negative testimony "if the witnesses are of equal credibility").

19. *Austin v. Shoney's, Inc.*, 254 Va. 134, 138, 486 S.E.2d 285, 287 (1997).



not tiny cost, especially considering that, outside of this narrow area of law, objectively weak claims are routinely permitted submitted to a jury.

A final note: this Section has observed that some (but not all) of the evidence cited in the dissent could be regarded as “negative” and thus would be forced to yield to positive evidence provided by Colas. If Colas’ credibility is relevant to the force of his positive testimony, however, then it is quite likely that none of Colas’ testimony could categorically overcome the evidence cited by the dissent. Without the luxury of a full trial transcript, it is impossible to say for sure whether Colas suffered any impeachment, but in a case of this importance being handled by experienced attorneys, it is hard to believe that Colas escaped without having his credibility questioned in at least some way. Thus, if the positive-negative rule accounts for credibility, it likely should not have applied here. Conversely, if the rule does not account for credibility, it is deeply flawed and should be promptly reconsidered.

#### *B. Inferences Drawn From Primary Facts*

Not only is negative testimony insufficient to “overcome” the positive testimony of an adverse party witness, so too are “inferences drawn from primary facts.”<sup>20</sup> The operation of this rule is best understood by considering *Ragland v. Rutledge*,<sup>21</sup> the case cited by the court in support of its rule<sup>22</sup> and the case in which the phrase “inferences drawn from primary facts” first appears.

In *Ragland*, the plaintiff (Benjamin Ragland) was a passenger on a bus driving west in the right lane of a road with two west-bound lanes. At some point, a truck driving the same direction in the left lane pulled nearly even with the bus.<sup>23</sup> Soon after this, the bus made a right turn and the back left corner of the bus caught the front right corner of the truck, which caused Ragland’s injury.<sup>24</sup>

Ragland sued the truck driver for his injuries. To win his case, Ragland needed to prove that the truck driver veered from his lane into the bus’s lane. Ragland first called the bus driver as a witness

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20. *Colas*, 882 S.E.2d at 631.

21. 234 Va. 215, 361 S.E.2d 133 (1987).

22. *Colas*, 882 S.E.2d at 631–32.

23. *Ragland*, 234 Va. at 216, 361 S.E.2d at 134.

24. *Id.*

and she testified that she never veered from her lane.<sup>25</sup> Ragland then called the truck driver—an adverse party witness—who testified that he never veered from his lane.<sup>26</sup> At the close of the evidence, the truck driver moved to strike the evidence, contending that, under the adverse party witness rule, the jury must accept his testimony that he remained in his lane.<sup>27</sup> The Circuit Court granted the motion to strike and Ragland appealed.<sup>28</sup>

In the Supreme Court of Virginia, Ragland argued that the jury was entitled to find in his favor. As the court characterized his argument,

The plaintiff argues . . . that reasonably to be inferred from the bus driver's testimony that the bus was in the correct lane, and from the fact that the two vehicles made contact, is the conclusion that the truck was partially in the wrong lane at the time of the accident. This *inference drawn from primary facts*, the argument continues, is sufficient to establish a prima facie case of negligence and causation.<sup>29</sup>

The court rejected this argument. The problem with the argument was the Virginia evidentiary rule that “inferences are never allowed to stand against ascertained and established facts.”<sup>30</sup> Under the adverse party witness rule, the truck driver's testimony that he stayed in his lane is an “established fact.” To counter that established fact, in the eyes of the court at least, Ragland needed to do more than simply point to inferences drawn from other facts suggesting that the truck left its lane of travel.

Returning to *Colas*, it does appear that the rule in *Ragland*—strictly applied—favors the finding that Colas' testimony was not contradicted. Under *Ragland*, Colas' testimony that Tyree presented a serious risk of harm to Tuft-Williams counts as an “established fact” under the adverse party rule. It was thus necessary for the Estate to do more than simply argue that other evidence permits the inference that Tyree did not pose a risk. If the Estate could have mustered evidence from a witness to the effect of “I was watching Tyree the entire time and can definitively say that Tyree never raised a knife in the air,” it seems that the court would have let the jury verdict stand. But because the Estate could only point

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25. *Id.* at 217–18, 361 S.E.2d at 134.

26. *Id.* at 218, 361 S.E.2d at 135.

27. *Id.* at 217–18, 361 S.E.2d at 134–35.

28. *Id.* at 218, S.E.2d at 134.

29. *Id.* at 218–19, 361 S.E.2d at 135 (emphasis added).

30. *Id.* at 219, 361 S.E.2d at 135.

to evidence creating an *inference* that Tyree did not pose a risk of harm, it was forced to accept Colas' testimony as binding on it.

It is impossible to know whether the court in fact applied the rule in *Ragland* to the evidence cited in the *Colas* dissent. The court's citation to *Ragland* and its categorical "reject[ion]" that "inferences drawn from primary facts" can "overcome" "positive testimony" certainly raises the distinct possibility.<sup>31</sup> Given this, it is worth exploring rule in *Ragland* more closely. This exploration reveals that *Ragland's* statement that "inferences are never allowed to stand against ascertained and established facts" is deeply flawed.

To begin with, the *Ragland* court fails to cite any actual authority for its categorical rejection of inferential evidence. To be sure, the court did cite some cases; it is simply that those cases fail to support its assertion. The main authority cited by the court was *Southern Railway Co. v. Mays*.<sup>32</sup> That case, however, in no way held that that "inferences are *never* allowed to stand against ascertained and established facts."<sup>33</sup> Rather, it merely held that, where a man was killed when he stepped in front of a train, a defense motion to strike should have been granted because there were "no facts or circumstances proved or any inferences that may be drawn from those which are established that furnish any explanation of decedent's action."<sup>34</sup> The court's opinion makes clear that, if there *were* "any inferences that may be drawn," those inferences would be relevant to the motion to strike and not categorically irrelevant.<sup>35</sup>

In addition to *Southern Railway*, the court cited three additional cases. One case, *Virginia Transit Co. v. Schain*, dealt with inferences, but simply held that "[u]nder [the] circumstances [presented]," the "tenuous inference sought to be drawn by the plaintiff" was insufficient to overcome other evidence suggesting the defendant was not liable.<sup>36</sup> Two other cases—*Hall v. Commonwealth* and *Schmitt v. Redd*—dealt only with whether a legal presumption

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31. *Colas v. Tyree*, \_\_ Va. \_\_, 882 S.E.2d 625, 631 (2023).

32. *Ragland*, 234 Va. at 219, 361 S.E.2d at 135 (citing *Southern Ry. Co. v. Mays*, 192 Va. 68, 63 S.E.2d 720 (1951)).

33. *Id.* (emphasis added) (reasoning that *Southern Railway Co.* did so hold); *see also Southern Ry. Co.*, 192 Va. at 76, 63 S.E. at 725.

34. *Southern Ry. Co.*, 192 Va. at 76, 63 S.E.2d at 725.

35. *Id.*

36. 205 Va. 373, 380, 137 S.E.2d 22, 27 (1964) (emphasis added).

may overcome positive testimony.<sup>37</sup> The fact that a presumption of innocence, for example, cannot be used to overcome actual evidence of guilt, says nothing about whether inferences drawn from facts can be used to overcome evidence of guilt. And indeed, the law is clear that inferences may achieve that result.<sup>38</sup>

Not only does the court's denigration of inferences in *Ragland* lack specific authority, it is contradicted by the well-established rule that circumstantial evidence—evidence “from which a fact in issue may reasonably be inferred”<sup>39</sup>—stands on equal footing with direct evidence.<sup>40</sup> This makes perfect sense because much circumstantial evidence (e.g., DNA evidence) is “not subject to the human frailties of perception, memory, and truthful recital” and is thus “often more reliable than the accounts of eyewitnesses.”<sup>41</sup>

Finally, a variation on the Estate's evidence in *Colas* can illustrate the folly of the rule stated in *Ragland*. Suppose that Colas testified that Tyree was holding the raised knife in his right hand, and that the Estate countered this evidence with testimony from a physician stating that Tyree was physically unable to raise his right arm because it was fully paralyzed. Such evidence would contradict Colas' testimony through inference, but the evidence would certainly be sufficient for a jury to doubt the accuracy of Colas' testimony. Yet if the logic of *Ragland* is to stand, a jury would be required to believe Colas' version of events.

In light of these problems, the result in *Ragland* is better explained not by the per se impotence of “inferences drawn from primary facts,” but rather from the fact that the plaintiff's evidence in that case was in “equipose”—*i.e.*, equally capable of supporting a judgment for the plaintiff or defendant.<sup>42</sup> In such a situation, a jury could do little more than flip a coin to render a verdict. This

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37. *Hall v. Commonwealth*, 178 Va. 22, 27, 16 S.E.2d 304, 305 (1941); *Schmitt v. Redd*, 151 Va. 333, 342–44, 143 S.E. 884, 887 (1928).

38. *See Haskins v. Commonwealth*, 42 Va. App. 1, 6, 602 S.E.2d 402, 404 (2004) (“[I]n drug cases no less than any other, it ‘is axiomatic that any fact that can be proved by direct evidence may be proved by circumstantial evidence.’”).

39. *Commonwealth v. Hudson*, 265 Va. 505, 512, 578 S.E.2d 781, 785 (2003) (circumstantial evidence is evidence “offered to prove a fact not directly in issue, from which a fact in issue may reasonably be inferred”).

40. *Id.* (“There is no distinction in the law between the weight or value to be given to either direct or circumstantial evidence.”).

41. *See Epperly v. Commonwealth*, 224 Va. 214, 228, 294 S.E.2d 882, 890 (1982) (“Because [circumstantial evidence] is not subject to the human frailties of perception, memory, and truthful recital, it is often more reliable than the accounts of eyewitnesses.”).

42. *Haskins*, 44 Va. App. at 10, 602 S.E.2d at 406.

sort of “conjecture or speculation” is fundamentally at odds with the sort of rational decision making that legitimates our legal system.<sup>43</sup> Understood as such, *Ragland* does not support the categorical exclusion of inferential evidence in a determination of whether an adverse party witness’ testimony is contradicted.

#### CONCLUSION

The discussion above attempts to discern why the majority in *Colas* did not find the evidence cited by the dissent sufficient to contradict the testimony of an adverse party witness. While there are no definitive answers, it certainly appears possible that the majority viewed some or all of the dissent’s evidence as “negative testimony” or “inferences drawn from primary facts.” If so, the result in *Colas* may appear justified to some degree. Yet a deeper analysis of the law in this area suggests that, if this is the basis for the court’s ruling, the ruling is deeply flawed. Positive testimony should not be applied without a consideration of a witness’ credibility, and *Colas*’ credibility was almost certainly impeached to some degree here. Additionally, *Ragland v. Rutledge* cannot be reasonably read to create a categorical bar on inferential factfinding. Whether *Colas* creates new law in this regard or simply reinforces old law, the court should promptly revisit and revise its precedent in this area of Virginia evidence law.

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43. *Beale v. Jones*, 210 Va. 519, 522, 171 S.E.2d 851, 853 (1970).