In The

Supreme Court of Virginia

RECORD NO. 141297

GINA M. COLLETT,

Appellant,

v.

GARY B. CORDOVANA, MARGARET H. CORDOVANA, DION C. HAYLE and 1273 WEST OCEAN VIEW, LLC,

Appellees.

REPLY BRIEF OF APPELLANT

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REPLY BRIEF OF APPELLANT

NOW COMES Gina M. Collett ("Collett"), and files this Reply Brief, pursuant to Rule 5:29 of the Rules of the Supreme Court of Virginia, for consideration by this Honorable Court.

I. STANDARD OF REVIEW

This is an appeal of a final order entered in the Circuit Court of the City of Norfolk dismissing Collett's case on demurrers filed by appellees. Accordingly, it is important to keep in mind the appropriate standard of review:

> Well-established principles guide our review of a trial court's judgment sustaining a demurrer.
>
> > The purpose of a demurrer is to determine whether a [complaint] states a cause of action upon which the requested relief may be granted. A demurrer tests the legal sufficiency of facts alleged in the pleadings, not the strength of proof. Accordingly, we accept as true all

> properly pled facts and all inferences fairly drawn from those facts. Because the decision whether to grant a demurrer involves issues of law, we review the circuit court's judgment de novo.

Kurpiel v. Hicks, 284 Va. 347, 353 (2012), quoting Abi-Najm v. Concord Condo., LLC, 280 Va. 350, 356-57 (2010).

II. ISSUES REGARDING THE APPELLEES' STATEMENT OF FACTS

In each of their briefs,[1] the appellees ("Neighbors") have not set forth a complete, accurate "Statement of Facts". Collett respectfully refers the Court to her Statement of Facts found at pp. 5-14 of her opening "Brief of Appellant".

In Hayle's Brief at p. 5, it is asserted that Collett's "Complaint alleges that allowing storm water and run-off to flow onto the land of another constitutes trespass and/or a nuisance," and the brief cites "2nd Am. Compl. ¶9 (JA 129-130)" as support for this statement. Actually, this is what ¶9 states:

> 9. Causing or negligently allowing storm water and other polluted run-off to flow upon the lands of another may constitute trespass, nuisance and/or negligence (per se and/or ordinary). See e.g.,

[1] The brief filed on behalf of the Cordovanas will be referred to as "Cordovanas' Brief", and the brief filed on behalf of Dion C. Hayle and 1273 West Ocean, LLC will be referred to as "Hayle's Brief".

> Hampton Roads Sanitation District v. McDonnell, 234 Va. 235, 240 (1987) (agreeing with the trial court's ruling "as a matter of law that [the defendant] was guilty of trespass" in a case involving discharged sewerage and other pollutants); Martin v. Moore, 263 Va. 640, 647-50 (2002) (discussing in detail the law of nuisances in a case involving a dispute between neighbors, and affirming a trial court's award of damages on a nuisance claim); Bowers v. Westvaco Corporation, 244 Va. 139, 144-46 (1992) (discussing the law of nuisances in a case involving a dispute between neighbors in which, *inter alia*, complaints were made relating to water run-off). Additionally, when a defendant is demonstrated to have violated a statute, ordinance or other regulation that exists for the purpose of protecting the public from potential harms and/or hazards, an aggrieved party may assert a cause of action and may recover based thereon pursuant to a "negligence per se" theory. Kaltman v. All American Pest Control, 281 Va. 483 (2011). In this instance, defendants are in violation of both common law duties and specific duties and responsibilities imposed by ordinances that exist to protect the public.

Accordingly, Collett has alleged much more than merely "allowing storm water and run-off to flow onto the land of another" as a basis for claims of trespass and nuisance.

In the Cordovanas' Brief, the Statement of Facts found at p. 2-4 omits many material facts that have been asserted by Collett, including these assertions:

(1) The Cordovanas are "responsible for directing massive quantities of water run-off and pollutants from their [property] onto [Collett's

property], thus causing significant and ongoing damage, financially and emotionally." 2nd Am. Compl. ¶1; JA 127.

(2) The Cordovanas "have modified the topography of their property such that it has exacerbated the problem [of polluted water run-off] and essentially guarantees that Collett will suffer water-related damages every time a significant rain event occurs." 2nd Am. Compl. ¶13; JA 131-32.

(3) The "quantity of water being dumped by the [Neighbors] into Collett's property is unreasonable and overwhelming. She has sustained not only financial damage, but significant and ongoing stress and emotional damage." 2nd Am. Compl. ¶14; JA 132.

(4) The Cordovanas have dumped loads of gravel onto their property at least twice, each time raising it four inches or higher, and graded the gravel/property "in such a manner as to ensure that water would flow from the Cordovanas' property onto Collett's property." 2nd Am. Compl. ¶¶16, 18.; JA 133.

Finally, although not set forth in the sections of their briefs labeled "Statement of Facts", the Neighbors repeatedly make factual assertions regarding Collett's allegations that are inaccurate and misleading. For instance, the Cordovanas assert the following:

(1) "Collett takes the position that merely allowing storm water to flow onto the lands of another constitutes negligence." Cordovanas' Brief, p. 15.

(2) "In her Second Amended Consolidated Complaint, Collett has attempted to state an obligation on the Cordovanas to affirmatively control all storm water on their property." Cordovanas' Brief, p. 16.

(3) "In this case, Collett alleges that rain and storm run-off drains from the Appellees' properties toward her own. However, Collett has not alleged any facts showing that the Cordovanas have taken any action with their property that was done in bad faith, wantonly, unnecessarily, or carelessly so as to fall within an exception to the common law rule of no liability. In the Second Amended Consolidated Complaint, Collett alleges that (sic) no more than the Cordovanas graded their property." Cordovanas' Brief, p. 18.

(4) "Again, Collett has not alleged any facts showing that the Cordovanas have taken any action with their property that was done in bad faith, wantonly, unnecessarily, or carelessly so as to

fall within an exception to the common law rule of no liability." Cordovanas' Brief, p. 19.

Hayle asserts:

(1) "Collett's allegation that she, at times, has mosquitos in her yard, is not sufficient to bring her within the class of persons protected by [Norfolk City Ordinance § 36-17(b)]." Hayle's Brief, pp. 14-15.

(2) "[The injunctive relief sought by Collett] would require that the neighboring properties find a means by which to prevent rain water from accumulating on the Collett property in its entirety, an impossibility given the elevation of the Collett property." Hayle's Brief, p. 20.

The above quotes from the Neighbors' briefs are flawed in that they variously overstate, understate or misstate what Collett has alleged. Pursuant to the demurrer standard of review, the facts asserted by Collett are to be assumed as true, including all reasonable inferences. Kurpiel v. Hicks, 284 Va. 347, 353 (2012); Sales v. Kecoughtan Housing Co., 279 Va. 475, 478 (2010). In making their arguments, the Neighbors frequently stray from this standard.

III. LAW AND ARGUMENT

A. Trespass

All parties appear to recognize the importance of this Court's decision in Kurpiel v. Hicks, 284 Va. 347 (2012). See, Collett's Brief, pp. 15-18; Cordovanas' Brief, p. 20; Hayle's Brief, pp. 9-12. However, the Neighbors claim that Collett cannot rely on the Kurpiel opinion because they assert that Collett's allegations are not specific enough, or not as specific as what the Kurpiels alleged. The Neighbors are mistaken.

First, the Kurpiel opinion does not articulate any heightened pleading standard or requirement for trespass cases. While this Court did discuss the detailed factual allegations set forth in the Kurpiel lawsuit improperly dismissed by the trial court on demurrer, the opinion does not stand for the proposition that any plaintiff asserting a claim of trespass must include a long laundry-list of factual allegations in order to articulate a claim.

Second, the Neighbors fail to acknowledge that Collett did, in fact, include many specific allegations that are materially indistinguishable from several of those listed in Kurpiel. This is the key paragraph in Kurpiel listing ten specific allegations made by the Kurpiels, and those that are the same as or similar to allegations made by Collett are in bold print:

> Moreover, the Kurpiels alleged in their amended complaint that the Hicks "did not develop their land in

> a reasonable manner" and that the Hicks' actions were "careless, and unnecessary" because they (1) stripped their land "of virtually all vegetation, including unauthorized removal of vegetation within the Resource Protection Area, a protected land disturbance zone established by the Chesapeake Bay Preservation Act"; (2) "cleared and/or improperly disturbed these protected areas" on their property; (3) "excessively cleared [their land] in violation of state law and County regulations"; **(4) "did extensive regrading of the property"; (5) changed the elevation of the property; (6) "brought in additional fill dirt";** (7) "left the land unvegetated longer than necessary"; (8) demanded the Kurpiels remove plantings along the property border, and then "replaced such plants with insufficient and inadequate vegetation cover"; **(9) did not use proper drainage controls; and (10) "failed to control sediment loads and siltation running onto the Kurpiel[s'] property."**

Kurpiel, 284 Va. at 356 (emphasis added); see Collett's 2nd Am. Compl. ¶¶1, 6, 10, 12-14, 16, 18, 21-22; JA 127-35.

The very next paragraph in the Kurpiel opinion explains why it is inappropriate for a trial court to resolve such allegations and contested issues on demurrer:

> Whether the actions taken by the Hicks in developing their property were in fact reasonable, in good faith and not wanton, unnecessary or careless, is a factual question to be decided by the fact finder, not a question of law to be decided on demurrer. See Mullins, 226 Va. at 589, 311 S.E.2d at 112 (stating that "surface water is a common enemy, and each landowner may fight it off as best he can, provided he does so reasonably and in good faith and not

> wantonly, unnecessarily or carelessly") (internal quotation marks omitted); McGehee, 108 Va. at 513, 62 S.E. at 358 (concluding that the trial court erred because "[t]he question, whether or not the [defendant], in the construction of its road and improvement of the grounds and approaches to its station, was reasonably prudent and careful to avoid injury to the plaintiff from the flooding of surface water, ought to have been submitted to the jury"). Significantly, "we accept as true all properly pled facts and all inferences fairly drawn from those facts" when reviewing a trial court's decision to sustain a demurrer. Abi-Najm, 280 Va. at 357, 699 S.E.2d at 487.

Kurpiel, 284 Va. at 356-57.

Pursuant to the analysis that led this Court to reverse the trial court in Kurpiel, the same result should be reached in this appeal.

B. Nuisance

As with their flawed arguments regarding Collett's trespass allegations, the Neighbors erroneously suggest that there is a heightened specificity requirement applicable to Collett's nuisance claim, and they gloss over the factual allegations that Collett included in her lawsuit. See Cordovanas' Brief, pp. 17-18; Hayle's Brief pp. 17-19. Many of Collett's factual allegations overlap with those deemed sufficient to affirm a judgment rendered in favor of residents who proved that a neighboring business caused damaging nuisance conditions in Bowers v. Westvaco Corporation, 244 Va. 139 (1992). Without belaboring the point, it takes evidence to determine the

reasonableness or unreasonableness of the Neighbors' conduct, and the trial court committed error by denying Collett the opportunity to develop and present her case.

C. Negligence

As Collett asserted in her opening "Brief of Appellant", Rule 3:18(b) states that an "allegation of negligence...is sufficient without specifying the particulars of the negligence." Collett's Brief, p. 20. Collett's pleading is replete with allegations asserting that the Neighbors were negligent and caused her damages. 2nd Am. Compl. ¶¶1, 9, 27-29; JA 127-29, 137. Tellingly, the Neighbors do not address this argument, nor mention Rule 3:18(b). See Cordovanas' Brief, pp. 14-17; Hayle's Brief, pp. 16-17.

Collett's allegations exceed what is required by Rule 3:18(b). As she asserted in ¶9 (JA 129-30) of her lawsuit, "[Neighbors] are in violation of both common law duties and specific duties and responsibilities imposed by ordinances that exist to protect the public". This allegation, combined with the other detailed factual allegations set forth in the lawsuit, should be more than sufficient to overcome demurrers. See e.g., Kaltman v. All American Pest Control, Inc., 281 Va. 483, 493 (2011) (reversing a trial court judgment that sustained demurrers to negligence and negligence *per se* claims, and explaining that with the negligence counts, the plaintiffs "alleged that

[defendants] breached common law and statutory duties", and that the "trial court erred when it sustained the demurrers to the [plaintiffs'] negligence counts.").

D. Negligence *per se*

In her opening brief, Collett begins her argument regarding negligence *per se* with an important block quote from Kaltman v. All American Pest Control, Inc., 281 Va. 483, 496 (2011), and it is clearly the primary authority upon which she relies. Collett's Brief, pp. 22-24.[2] Instead of acknowledging and attempting to distinguish or explain Kaltman, the Neighbors ignore the case and do not cite it. Cordovanas' Brief, pp. 4-13; Hayle's Brief, pp. 13-16.

In her lawsuit, Collett cited two local ordinances in support of her claims, and she described specific facts relating to the purposes of the ordinances and the reasons why she should be considered to be a member of the "class of persons for whose benefit the [ordinances were] enacted." Kaltman, 281 Va. at 496. Collett pled everything required by Kaltman. At a bare minimum, she was entitled to develop and present her evidence to the extent that the parties disagree about the purposes of the ordinances, their applicability to the subject dispute, etc. Just as this Court found the plaintiffs' allegations

[2] Collett also cited the Kaltman opinion in her Second Amended Consolidated Complaint at ¶9; JA 130.

sufficient to support negligence *per se* claims in Kaltman (thus requiring reversal of the trial court order sustaining demurrers) (281 Va. at 498), the same result should be reached here.

E. The relief Collett requested is appropriate

Collett asserted in her pleading that the Neighbors are liable to her pursuant to theories of trespass, nuisance, negligence *per se* and ordinary negligence. 2nd Am. Compl. ¶27; JA 137.

Collett further asserted that because the Neighbors are and have been on direct notice of their failures, and because they have flatly refused to take reasonable and appropriate steps to handle the drainage failures associated with their properties, their conduct must be viewed as reckless and/or intentional. "To the extent that the trier of fact in this matter finds recklessness and/or intentional misconduct on the part of the defendants, punitive damages may be awarded and are hereby requested." 2nd Am. Compl. ¶29, citing Wyatt v. McDermott, 283 Va. 685, 700-01 (2012); JA 137.

In addition to seeking compensatory and punitive damages, Collett requested injunctive relief because damages are ongoing and there is a very substantial and real threat of future damages. 2nd Am. Compl. ¶30, citing Waltman v. King William County School Board, 81 Va. Cir. 381, 383, 2010 Va.

Cir. LEXIS 129, **4 (Norfolk City 2010), which quotes and relies on Fancher v. Fagella, 274 Va. 549, 556 (2007); JA 138.

In her prayer for relief, Collett reiterated her request for compensatory and punitive damages, as well as temporary and permanent injunctive relief. JA 138-39.

The propriety of the relief that Collett seeks is not susceptible to determination at the demurrer stage. In the event of reversal and remand, Collett should be permitted to pursue the relief she requested.

IV. REQUEST FOR RELIEF

Because Collett's Second Amended Consolidated Complaint is sufficient to state causes of action for trespass, nuisance, negligence and negligence *per se*, and because Collett made appropriate requests for relief, this Court should reverse the trial court's order sustaining the demurrers and remand this matter for further proceedings.

GINA M. COLLETT

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CERTIFICATE

I, Kevin E. Martingayle, counsel of record for appellant, hereby certify that:

1. On this 27th day of February, 2015, appellant has complied with Rule 5:26(h) by filing a CD-ROM and fifteen copies of the Reply Brief with Clerk of the Supreme Court of Virginia, and serving, via UPS Ground Transportation, three copies and a CD-Rom of the same to:

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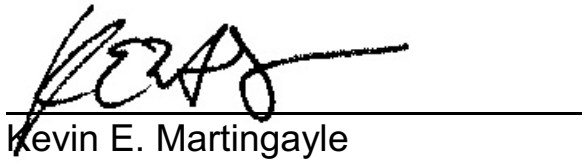
2. The number of words contained in this brief is 2,622, and exclusive of the certificate, the page count is 14 pages, thus complying with Rule 5:26(b).

3. Counsel for Appellant desires to present oral argument, in person.



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