In the

Supreme Court of Virginia

At Richmond

Record No. 141297

GINA M. COLLETT,

Appellant,

– v. –

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

Appellees.

BRIEF OF APPELLEES DION C. HAYLE and 1273 WEST OCEAN VIEW, LLC

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Appellant,

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

Appellees.

I. STATEMENT OF CASE AND MATERIAL PROCEEDINGS BELOW

Appellant Gina M. Collett's ("Collett") Statement of the Case and Material Proceedings Below is somewhat accurate. Any reference to the Joint Appendix will be indicated by (JA_____).

Collett filed separate suits for damages and injunctive relief against the owners of the properties on either side of her residence. The property located at 1273 West Ocean View Avenue, formerly owned by Dion C. Hayle ("Hayle"), is currently owned by 1273 West Ocean View, LLC ("1273 WOV"). The property located at 1287 West Ocean View Avenue is owned by

Gary and Margaret H. Cordovana (collectively "the Cordovanas"). Both suits asserted claims under Norfolk Ordinance § 36-17(b) and common law. The two matters were consolidated by Order dated October 30, 2013. Hayle, 1273 WOV and the Cordovanas (collectively "the Neighbors") filed responsive pleadings and Demurrers.

Following a hearing on December 18, 2013, the trial court entered an Order sustaining the Demurrers to the portion of the Complaint relating to Norfolk Ordinance § 36-17(b), without leave to amend. The court sustained the Demurrers to the common law claims, with leave to amend within thirty (30) days. With reference to the common law claims, the trial court stated as follows:

> The Kurpiel case that you all mentioned, the plaintiffs set out a catalog of things they allege the defendants had done that caused the water to run onto their property. All that's been alleged here is that due to development and/or neglect the defendants' property failed to properly drain after rain events. And in the case of Mullins against Greer, 226 Va. 587, the Supreme Court said, "Accordingly, one may, in the reasonable development of his property, grade it…or erect a building thereon…and not be liable for discharging additional diffused surface water as a result thereof."

> I don't think anything's been pleaded here other than they built on it, whether they were somehow in some specified manner neglectful.

(T. 12/18/13 p. 15) (JA 63).

Collett filed the First Amended Complaint on January 14, 2014, asserting claims for negligence, trespass and nuisance. The First Amended Complaint alleges that Norfolk City Ordinance § 36-17(b) sets the standard of care for handling of rainwater and run-off for Hayle and 1273 WOV. The amendment includes additional paragraphs setting forth conversations and interactions between the parties. The Complaint does not provide specific details for any actions taken by Hayle or 1273 WOV which contributed to the problem with the Collett property, nor does it provide the dates on which any such activity occurred. Hayle and 1273 WOV filed responsive pleadings and a Demurrer to the First Amended Complaint on February 19, 2014. Following a hearing on March 18, 2014, the trial court entered an Order sustaining the Demurrer. The court gave Collett twenty-one (21) days to file a Second Amended Complaint. In doing so, the trial court

again stated that Norfolk Ordinance § 36-17(b) was not applicable to the plaintiff's case. (T. 3/18/14 p. 23) (JA 123).

Collett filed the Second Amended Complaint on March 31, 2014. Hayle and 1273 WOV filed responsive pleadings and a Demurrer on April 17, 2014. The Second Amended Complaint includes an "Introduction" section stating that Collett was proceeding under theories of trespass, nuisance, negligence *per se* and ordinary negligence. The Second Amended Complaint re-alleges that Norfolk Ordinance §36-17(b) sets the standard of care of the handling of rain water and run-off by Hayle and 1273 WOV. The Second Amended Complaint further alleges that the conduct of Hayle and 1273 WOV constitutes a violation of the Norfolk Code of Ordinances on Nuisances, specifically §27-2. The Second Amended Complaint does not allege any specific actions taken by Hayle or 1273 WOV to cause the problem on the Collett property, nor does it provide the dates on which any such actions took place. On June 26, 2014, after hearing argument on the Demurrer, the court entered a final Order dismissing the case against all defendants with prejudice.

II. QUESTION PRESENTED

Did the trial court err in sustaining the Demurrer when the Second Amended Complaint fails to state sufficient facts to permit a cause of action for negligence, negligence *per se,* trespass or nuisance against defendants Hayle or 1273 WOV?

III. STATEMENT OF FACTS

The Second Amended Complaint asserts claims against Hayle and 1273 WOV under theories of trespass, nuisance, negligence and negligence *per se*. The Complaint alleges that the property formerly owned by Hayle and currently owned by 1273 WOV, "fails to drain properly during and after rain events," and that a rain and storm run-off drain from the Hayle property to the Collett property and causes flooding. 2nd Am. Compl. ¶6 (JA 128). The Complaint alleges that allowing storm water and run-off to flow onto the land of another constitutes trespass and/or nuisance. 2nd Am. Compl. ¶9 (JA 129-130). The Complaint further alleges that the "manner in which the defendants' property has been developed, maintained and altered has been

unreasonable, careless and reckless. . . ." 2nd Am. Compl. ¶10 (JA 130).

The Complaint alleges that Hayle and 1273 WOV "created and/are maintaining conditions that are 'annoying, obnoxious, offensive irritating or detrimental or potentially hazardous or detrimental to the health safety, comfort and general welfare of the public or the environment. . . .'" 2nd Am. Compl. ¶11 (citing Norfolk Ordinance §27-2) (JA 130-131). The Complaint alleges that Norfolk Code Ordinance §36-17(b) creates a standard of care for the handling of water drainage by neighboring landowners. 2nd Am. Compl. ¶11 (JA 130-131). The Complaint alleges that Hayle and 1273 WOV violated the standard of care when they "allowed and continue to allow their massive quantities of polluted run-off to flow onto Collett's property in an uncontrolled manner." 2nd Am. Compl. ¶12 (JA 131). Finally, the Complaint alleges that Hayle and 1273 WOV "have modified the topography of their property such that it has exacerbated the problem and essentially guarantees that Collett will suffer water-related

damages every time a significant rain event occurs. 2nd Am. Compl. ¶13 (JA 131-132).

The only specific allegations applicable to Hayle and 1273 WOV are contained in Paragraph 21. Paragraph 21 of the Complaint alleges that Hayle "periodically dumped mulch and made other modifications to the property in an effort to address water issues, and that the property was modified in such a manner that it increased water flow onto the Collett property. 2nd Am. Compl. ¶21 (JA 134-135). The Complaint further alleges that "the dumping of additional material onto Hayle's property . . . raised the level of the property, and in the absence of drain pumps, an adequate berm, gutters and drain pipes and/or proper grading, the modifications to Hayle's property and lack of adequate maintenance essentially guaranteed that water would flow onto Collett's property. . . ." 2nd Am. Compl. ¶21 (JA 134-135). The Complaint fails to provide any dates when such action took place.

IV. LAW AND ARGUMENT

A. Standard of Review

"A trial court's decision sustaining a demurrer presents a question of law which we review *de novo*." Squire v. Va. Hous. Dev. Auth., 287 Va. 507, 514 (2014) (internal citation omitted). "It is well-established that a demurrer accepts as true all facts properly pled, as well as reasonable inferences from those facts." Id. (internal quotation marks and citation omitted). See also, *Kurpiel v. Hicks*, 284 Va. 347, 353 (2012).

B. The Second Amended Complaint fails to allege sufficient facts to demonstrate that Hayle or 1273 WOV took any action to modify the property in order to permit a cause of action under Virginia law.

The Second Amended Complaint fails to identify any actions taken by Hayle or 1273 WOV to modify the property in such a manner as to permit a cause of action under Virginia law with respect to surface water. The Virginia Supreme Court defines surface water as the water "'diffused over the surface of the ground . . . until it reaches some well defined channel.'" *Mullins v. Greer*, 226 Va. 587, 589; 311 S.E.2d 110, 111-112 (1984)

(quoting *Howlett v. South Norfolk*, 193 Va. 562, 568, 69 S.E. 2d 346, 348 (1952)). Virginia follows a modified common law rule on the handling of surface water:

> Under this rule, 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." Accordingly, one may, in the reasonable development of his property, grade it, or erect a building thereon, and not be liable for discharging additional diffused surface water as a result thereof.

Mullins at 589, 112 (internal citations omitted); *see also Kurpiel v. Hicks*, 284 Va. 347, 354, 731 S.E.2d 921, 925 (2012); *Noltemeier v. Higgenbotham*, 32 Va. Cir. 388, 391 (Spotsylvania Co. Cir. Ct. 1994); *Atkins v. Parsons*, 23 Va. Cir. 473, 474 (Campbell Co. Cir. Ct. 1991).

In *Kurpiel v Hicks*, the Kurpiels filed a Complaint for declaratory judgment and civil damages against Hicks alleging common law trespass. The Kurpiels argued that the Hicks developed their land in an unreasonable manner so as to cause storm water to flow upon and damage the Kurpiels' property. *Kurpiel* at 349, 922. Hicks filed a Demurrer to the Complaint. The trial court sustained Hicks' Demurrer with leave to amend. *Id*. at

350, 923. The Amended Complaint listed additional facts in support of the claim for trespass. *Id.* Specifically, the Kurpiels added the following allegations:

> Hicks (1) began to develop their property, which adjoined the Kurpiels' property, for residential use in early 2007; (2) stripped their land "of virtually all vegetation"; (3) "excessively cleared [their land] in violation of state law and county regulations"; (4) did not utilize proper drainage controls; (5) "left the land unvegetated longer than necessary"; (6) "replaced plants along the respective properties' border "with insufficient and inadequate vegetative cover"; (7) "significantly altered the storm water drainage situation, changed the elevation of the land, and brought in additional fill, which…caused excessive storm water to flow from the Hicks' property onto the Kurpiel lands"; (8) knew that a storm water problem did not exist prior to their development of their property, but continued to "develop[] their property without regard to creating a new problem"; and (9) failed to control resulting sediment loads and siltation running onto the Kurpiel[s'] property."

Id. Hicks filed a Demurrer to the Amended Complaint. The trial court sustained Hicks' Demurrer to the Amended Complaint and dismissed the case. *Id*. at 351, 924. The Kurpiels appealed. On appeal, the Supreme Court found that the Amended Complaint alleged sufficient facts to state a cause of action for common law trespass under the modified common law rule applicable to surface

water. *Id.* at 357, 926- 927. In doing so, the court noted that the Amended Complaint alleged specific facts supporting the claim that the Hicks failed to develop their land in a reasonable manner, and that the Hicks' actions were careless and unnecessary. *Id*. at 356, 926.

In the current matter, the Second Amended Complaint does not describe any actions on the part of Hayle or 1273 WOV which would merit a deviation from the modified common law rule applicable to surface water, nor does it provide any details about who developed and/or modified the property, what actions were taken during such development, when the development or modification occurred, or whether Hayle and/or 1273 WOV owned the property when it was developed and/or modified. Without such details, it is impossible for Hayle and/or 1273 WOV to evaluate the allegations and prepare an adequate defense to the allegations.

Paragraph 21 of the Second Amended Complaint is the only paragraph which addresses specific modifications to the property allegedly completed by Hayle and/or 1273 WOV. Paragraph 21

alleges that Hayle and/or 1273 WOV, "periodically dumped mulch and made other modifications . . . in an effort to address water issues," that "the property was modified in such a manner that it actually increased water flow. . . ," and that "with the dumping of additional material onto Hayle's property, it raised the level of the property, and in the absence of drain pumps, adequate berm, gutters and drain pipes and/or proper grading, the modifications to Hayle's property and lack of adequate maintenance essentially guaranteed that water would flow onto Collett's property. . . ." 2nd Am. Compl. ¶21 (JA 134-135). The act of depositing mulch onto property does not constitute bad faith, nor does it show wanton, unnecessary, or careless action take on the part of Hayle or 1273 WOV in disregard of the consequences to the Collett property. Such allegations do not provide the specificity contained in the *Kurpiel* Amended Complaint, nor do they rise to the level which mandate a deviation from the modified common law rule adopted by this court.

C. Collett's Second Amended Complaint fails to state a cause of action for negligence because it improperly relies upon § 36-17(b) of the Norfolk City Code to establish the standard of care.

Chapter 36 of the Norfolk City Code is entitled "Rat and Mosquito Control." Norfolk City Ordinance § 36-17(b) states as follows:

> The owner of any lot within the city shall see that it drains to the street upon which it abuts, or to a creek, if it abuts on a creek; and the owner of any lot upon which water accumulates and does not drain off to the street or creek upon which it abuts shall be required by the director of public health or the director of public works or their designees to properly fill the lot, so that the water will drain to the street or creek and not accumulate; or, if the director or his designee deems it proper, the owner of such lot shall be required, by drain pipes or otherwise, to properly drain the lot to the street or creek, as the case may be. Any owner who shall, after ten (10) days' notice from the director of public health or his designee to himself or to his tenant or occupant, fail to properly fill or drain his lot shall be guilty of a Class 1 misdemeanor.

Norfolk City Ordinance § 36-17(b) (JA 162-163).

1. Norfolk City Ordinance § 36-17(b) is not implicated because Collett is not a member of the class of persons that the statute was intended to protect.

The "failure to comply with the requirements of a legislative enactment does not constitute actionable negligence unless the

injured person is a member of a class for whose benefit the legislation was enacted." *See Butler v. Frieden*, 208 Va. 352, 353, 158 S.E.2d 121, 122 (1967). The purpose of Norfolk City Ordinance § 36-17(b) is delineated in the fact that its enforcement is vested with the director of public health, and in the fact that it immediately follows the section prohibiting collection of water in which mosquitoes may breed.

Collett cannot rely on Norfolk City Ordinance § 36-17(b) as a basis for recovery against Hayle and/or 1273 WOV or to obtain an injunctive relief because she is not among the class of persons whom the statute is designed to protect, nor does she allege the type of harm which the ordinance was designed to redress. Collett's cause of action relates to the flow of surface water from neighboring properties following rainfall. Norfolk City Ordinance § 36-17(b) is not designed to protect neighboring properties from the effects of heavy rainfall, but rather is intended to eliminate conditions that attract and allow breeding of rats, mosquitoes, and flies on one's own property. Collett's allegation that she, at times,

has mosquitoes in her yard, is not sufficient to bring her within the class of persons protected by this ordinance.

2. Collett's proposed interpretation of Norfolk City Ordinance § 36-17(b) should not be permitted because it conflicts with Virginia's Common Law.

A statute or ordinance should not be interpreted to change or modify common law unless the legislature expressly states an intent to do so. *See First Am. Title Ins. Co. v. W. Sur. Co.*, 283 Va. 389, 398, 722 S.E.2d 637, 640 (2012); *see also Boyd v. Commonwealth*, 236 Va. 346, 349, 374 S.E.2d 301, 302 (1988) ("The common law will not be considered as altered or changed by statute unless the legislative intent is plainly manifested."); *Lucas v. Med. Facilities of Am., Inc.*, 74 Va. Cir. 206, 209- 210, (Roanoke Co. Cir. Ct. 2007).

Virginia follows the modified common law rule, which defines surface water as a "common enemy" that each landowner may fight off as best he can, so long as he does so reasonably, in good faith and not wantonly, unnecessarily or carelessly. *Mullins* at 589, 112 (internal citations omitted). "Accordingly, one may, in the reasonable development of his property, grade it, or erect a

building thereon, and not be liable for discharging additional diffused surface water as a result thereof." *Id*.

The modified common law rule does not forbid the discharge or run-off of rainwater from one property to another. Collett's proposed construction of § 36-17 seeks to impose such a prohibition. Norfolk City Ordinance § 36-17(b), if given the meaning asserted by Collett, would impermissibly overturn and/or modify the common law rule for all Norfolk residents.

3. Collett's negligence claim fails to state a cause of action because it is nothing more than a restatement of her claim for violation of Norfolk Ordinance § 36-17(b).

Collett's claim for negligence is nothing more than a restatement of the allegations of negligence per se under the auspices that Hayle and 1273 WOV are liable for a violation of Section 36-17(b) of the Norfolk Code. As previously stated herein, Chapter 36 of the Norfolk City Code, entitled "Rat and Mosquito Control," does not provide a private right of action or civil remedy for a violation of any provision contained therein. The remedy and/or penalty contemplated by Chapter 36 of the Norfolk City

Code is enunciated within the statute and does not include the rights asserted in the Second Amended Complaint.

D. The Second Amended Complaint fails to state a claim for nuisance.

The Second Amended Complaint does not allege sufficient facts to support a claim for nuisance under Virginia law. Virginia law describes the term "nuisance" as "everything that endangers life or health, or obstructs the reasonable and comfortable use of property." *Bowers v. Westvaco. Corp.,* 244 Va. 139, 144, 419 S.E.2d 661, 665 (1992). "Not every trifling or imaginary annoyance that may offend the sensibilities of a fastidious person is actionable." *Martin v. Moore*, 263 Va. 640, 648, 561 S.E.2d 672, 677 (1963). *See also Nat'l Energy Corp. v. O'Quinn,* 223 Va. 83, 85, 286 S.E.2d 181, 182 (1992). The discomfort and annoyance must cause substantial harm to the individual, causing a material disturbance or annoyance in use of the realty. *Id*. See also *Miller v. Pace*, 84 Va. Cir. 500 (Fairfax Cir. Ct. 2012) (sustaining a demurrer as to the plaintiff's nuisance claim and holding that the plaintiff's inability to repair or inspect her wall due to the

defendant's maintenance of an adjoining retaining wall, was not enough to constitute an endangerment to reasonable and comfortable use of her property.)

The Second Amended Complaint fails to state a cause of action because plaintiff does not list any specific actions on the part of Hayle or 1273 WOV which constitute to a nuisance. To the contrary, the Second Amended Complaint makes general references to an alleged nuisance, i.e. in ¶9 ("[c]ausing or negligently allowing storm water and other polluted run-off to flow upon the lands of another may constitute trespass, nuisance and/or negligence…") (JA 129-130), in ¶11 (the Neighbors "have created and/are maintaining conditions that are 'annoying, obnoxious, offensive, irritating or detrimental or potentially hazardous or detrimental to the health safety, comfort and general welfare of the public or the environment. . . . Defendants have made no serious efforts to drain their polluted water to the street (or elsewhere), and they have asserted that they have no duty to make any such efforts") (JA 130-131).

Collett relies on § 27-2 of the Norfolk City Code to establish a standard of care for a nuisance claim. Chapter 27 of the Norfolk City Code, however, provides that violators of the Chapter are guilty of a Class 2 misdemeanor. It further mandates that enforcement of the Chapter is vested exclusively in the director of public health, his designee and law enforcement officials. Norfolk City Ordinance § 27-1, § 27-3 (JA 165-166). Nothing in the Chapter contemplates or creates a cause of action for private nuisance. Collette, therefore, has no right to pursue a cause of action under Norfolk City Ordinance § 27-1, et. seq. against Hayle or 1273 WOV.

E. The Second Amended Complaint does not allege sufficient facts to support a claim for injunctive relief.

In evaluating a request for a temporary injunction, the Court weighs four factors: (1) the likelihood that the plaintiff will suffer irreparable harm without a preliminary injunction; (2) the likelihood of harm to the defendant imposed by an injunction; (3) the likelihood that the plaintiff will prevail on the merits of the claim; and (4) the impact of an injunction on the public interest.

See Villalobos v. City of Norfolk, 62 Va. Cir. 158, 158-159 (Norfolk Cir. Ct. 2003); *see also Midgette v. Arlington Props.,* 83 Va. Cir. 26, 28 (Chesapeake Cir. Ct. 2011). In order to state a claim for permanent injunctive relief, a plaintiff must allege irreparable harm and the lack of an adequate remedy at law. *See Midgette at 28*. A Demurrer is properly sustained where the Complaint fails to allege these elements. *See Id*.

In the instant case, the Second Amended Complaint does not allege any facts sufficient to demonstrate that Collett will suffer irreparable harm without injunctive relief, or that she will likely prevail on the merits. In addition, the remedy sought 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. Collett is therefore not entitled to injunctive relief under the facts of this case.

V. CONCLUSION

The trial court correctly sustained the Demurrers filed by Hayle or 1273 WOV to Collett's Second Amended Complaint

because the Complaint fails to state a valid cause of action for negligence, negligence *per se,* trespass, or nuisance, and further fails to state a claim upon which appropriate relief can be granted. Hayle and 1273 WOV respectfully request that the Court affirm the trial court's Order of June 26, 2014, dismissing the Second Amended Complaint with prejudice.

DION C. HAYLE and

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CERTIFICATE

The undersigned hereby certified the following:

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6. This brief complies with Rule 5:26 and 5:28.

7. Fifteen copies of the foregoing Brief of Appellees were hand delivered to the Clerk's office on this 13th day of February, 2015. This same date, three copies of the same were sent via third party commercial carrier to all counsel of record at the above addresses.

/s/ Todd M. Fiorella
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