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.

BRIEF OF APPELLANT

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IN THE SUPREME COURT OF VIRGINIA

GINA M. COLLETT,

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v. Record No. 141297

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

OPENING BRIEF OF APPELLANT

NOW COMES Gina M. Collett ("Collett"), and files this Opening Brief of Appellant, pursuant to Rule 5:27 of the Rules of the Supreme Court of Virginia, for consideration by this Honorable Court.

I. INTRODUCTION

This is an appeal of a final order entered in the Circuit Court of the City of Norfolk dismissing a case on demurrers. In the litigation, Collett sought an award of damages and injunctive relief because the appellees are responsible for directing massive quantities of water run-off and pollutants from their properties onto Collett's property, thus causing significant and ongoing damage, financially and emotionally.

Collett asserted in detailed pleadings that the appellees are liable to her pursuant to theories of trespass, nuisance, negligence and negligence *per se*. However, she was never allowed to prove her case.

Collett respectfully contends that she pled valid causes of action, and that this is another example in which a trial court has "incorrectly short-circuited litigation pretrial and decided the dispute without permitting the parties to reach a trial on the merits." Assurance Data, Inc. v. Malyevac, 286 Va. 137, 139 (2013), quoting CaterCorp, Inc. v. Catering Concepts, Inc., 246 Va. 22, 24 (1993) (additional citations omitted).

II. STATEMENT OF THE CASE AND MATERIAL PROCEEDINGS BELOW

The litigation commenced in the trial court when Collett filed separate lawsuits against the property owners immediately adjacent to each side of the property where Collett lives. JA 1-14; 25-32. By order entered October 30, 2013, the cases were consolidated. JA 47-48.

On December 18, 2013, the trial court heard argument (JA 49-64) on demurrers previously filed by the appellees (hereinafter sometimes referred to as "Neighbors") (JA 15-24; 33-46), and at the conclusion of the hearing, entered a handwritten order sustaining the demurrers and granting leave for Collett to file an amended Complaint. JA 63-64. The basis for the trial court's ruling was stated on the record as follows:

> I'm going to sustain the demurrers to the claims based on the city ordinance without leave to amend and sustain the demurrers based on the common law claims with leave to amend. 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.

JA 62-63.

In January, 2014, Collett filed a timely "First Amended Consolidated Complaint" (JA 66-82), and added facts designed to cure the deficiencies identified by the trial court, particularly the concern that there were insufficient facts explaining how the Neighbors were "neglectful". JA 63.

Responsive pleadings were filed in opposition to the First Amended Consolidated Complaint, and included demurrers. JA 83-100. The demurrers were heard March 18, 2014 and extensive oral argument was presented to the court. JA 101-125. Without elaborating, the trial court concluded that the

Complaint failed to state a cause of action and that the cited local ordinance[1] governing drainage obligations did not apply "in any way". JA 123.

In accordance with the trial court's order sustaining the demurrers and granting leave to amend, Collett filed a "Second Amended Consolidated Complaint" (JA 127-148), and the responsive pleadings filed in opposition included demurrers. JA 149-182. The demurrers were heard on June 26, 2014 (JA 183-187), and the court declared that the demurrers would be "sustained without leave to further amend." JA 187. The trial court did not discuss or explain the impact of the additional facts and law included in the Second Amended Consolidated Complaint, nor was the ruling explained in any other way.

A final order was entered at the conclusion of the demurrer hearing on June 26, 2014. JA 189-90. Collett filed a timely Notice of Appeal and all other required documents, and an appeal was awarded in an order entered December 16, 2014. This Opening Brief of Appellant is now presented for consideration.

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[1] Norfolk City Ordinance § 36-17(b).

III. ASSIGNMENT OF ERROR[2]

Because the Second Amended Complaint articulates valid causes of action for trespass, nuisance, negligence and negligence *per se*, and because the pleading seeks appropriate relief, the trial court erred in dismissing the litigation as a result of the demurrers filed by the respondents.[3]

IV. STATEMENT OF FACTS[4]

A. Facts Common to All of the Appellees

The Second Amended Consolidated Complaint ("2nd Am. Compl.") begins with an introduction that summarizes the facts and issues as follows:

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2 The final order entered June 26, 2014 preserved Collett's objections. In addition, in each demurrer hearing, counsel for Collett objected to the demurrers being sustained. JA 64, 123-24, 187. Although Collett objected each time demurrers were sustained, this appeal is directed to dismissal of the Second Amended Consolidated Complaint because that is the final order that Collett seeks to have reversed, and it is the Second Amended Consolidated Complaint on which Collett desires to proceed if this matter is ultimately reversed and remanded for further proceedings on the merits. See e.g., Kurpiel v. Hicks, 284 Va. 347, 357 (2012) (reversing dismissal of a trespass action involving storm water run-off and remanding for trial on the amended complaint).

3 The Assignment of Error at the Petition for Appeal stage referred to "respondents", who are the same as the "appellees" and "Neighbors" in this brief.

4 When a case is decided on demurrer, the operative facts are derived from the pleadings. Sales v. Kecoughtan Housing Co., 279 Va. 475, 478 (2010) (reversing dismissal on demurrer). The Supreme Court considers the facts as alleged "and all those reasonably and fairly implied in the light most favorable to the non-moving party." Id. (internal citation omitted).

> In this litigation, plaintiff seeks an award of damages and injunctive relief because the defendants (directly and/or through their agents) are responsible for directing massive quantities of water run-off and pollutants from their properties onto plaintiff's property, thus causing significant and ongoing damage, financially and emotionally. The defendants are liable to plaintiff pursuant to theories of trespass, nuisance, negligence per se and ordinary negligence. The defendants are all on direct notice of the problems that their polluted water run-off is causing plaintiff, and they have made it clear that they do not plan to take any effective remedial steps unless and until ordered to do so. Accordingly, plaintiff has brought forward this litigation.

2nd Am. Compl. ¶1; JA 127-28.

Collett is the owner of property located in the City of Norfolk. 2nd Am. Compl. ¶2; JA 128. The Cordovanas own property immediately adjacent to one side of Collett's property, and Hayle was the owner of property located on the other side until he transferred the property by deed to 1273 West Ocean View, LLC ("1273 WOV") in July 2013. 2nd Am. Compl. ¶¶3-5; JA 128.

Due to development and/or neglect, the property formerly owned by Hayle and now owned by 1273 WOV fails to drain properly during and after rain events. The same problem exists regarding the property owned by the Cordovanas. Specifically, instead of draining to the street, a significant portion of the Neighbors' rain and storm run-off drains to Collett's property, regularly causing it to flood and sustain damage to both the real estate and

personal property. The run-off includes not only water, but also pollutants. 2nd Am. Compl. ¶6; JA 128-29.

In letters dated March 20, 2013, Collett, acting through her legal counsel, provided written notice to the Neighbors and demanded corrective action. Representatives of the Neighbors replied to the correspondence and denied legal responsibility. 2nd Am. Compl. ¶¶7-8; JA 129, 140-45.

The manner in which the Neighbors' property has been developed, maintained and altered has been unreasonable, careless and reckless, and has caused Collett to sustain serious and ongoing damages in violation of law. 2nd Am. Compl. ¶10; JA 130.

The Neighbors have created and are maintaining conditions that are annoying, obnoxious, offensive, irritating and hazardous. 2nd Am. Compl. ¶11; JA 130-31.

Despite having direct knowledge that polluted water run-off is damaging to Collett and her property, the Neighbors have failed and refused to make reasonable efforts to correct the problems. The Neighbors have made no serious efforts to drain their polluted water to the street as required by Norfolk Ordinance § 36-17(b), and they have asserted that they have no duty to make any such efforts at all. Id.

The Neighbors have modified the topography of their property such that it has exacerbated the drainage problems and essentially guarantees that Collett will suffer water-related damages every time a significant rain event occurs. 2nd Am. Compl. ¶13; JA 131-32.

In addition to damages caused to Collett's property as a result of direct contact with large quantities of water cascading from the Neighbors' properties, she is also forced to contend with pools of water that take hours and sometimes days to pump out of her backyard. As a result of being forced to accumulate and then pump out the water flowing from the Neighbors' yards, Collett's property has become a breeding ground for mosquitos and other pests during warm seasons. With swarming mosquitos and standing water, Collett's property is sometimes unusable for days at a time, and she often has to board her dog because the yard is flooded. If not for the large quantities of water directed and flowing from the Neighbors' property onto Collett's property, Collett would be able to handle and drain away her own natural water accumulation quantities in a reasonable time and at reasonable cost, but she is unable to handle the addition of the Neighbors' water run-off. Simply stated, 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.

The Neighbors' failure to make appropriate and reasonable provisions and plans for handling rain and storm run-off from their properties has caused significant and ongoing damages to Collett, both financially and emotionally. 2nd Am. Compl. ¶28; JA 137.

B. Additional Facts Regarding the Cordovanas

In November 2009, the Norfolk area was hit by a storm. As Collett was in the process of placing sandbags along the fence line between her property and the Cordovanas' property, Mr. Cordovana confronted Collett and stated that she could not place sandbags on her property along the property line. He further stated that he would not allow Collett to take measures to keep his water run-off on his property. 2nd Am. Compl. ¶15; JA 132-33.

In March 2010, the Cordovanas arranged for the dumping of a load of gravel on their parking lot, which raised it approximately four inches. The gravel was graded in such a manner as to ensure that water would flow from the Cordovanas' property onto Collett's property. 2nd Am. Compl. ¶16; JA 133.

In September 2010, another storm hit the Norfolk area. Mr. Cordovana again confronted Collett regarding her efforts to handle water run-off and

accumulation problems. As usual, Mr. Cordovana did not acknowledge or accept any responsibility for taking reasonable measures to dispose of the Cordovanas' water run-off. 2nd Am. Compl. ¶17 (emphasis in original); JA 133.

In August 2013, the Cordovanas arranged to have another load of gravel dumped on their rear parking lot, which raised it approximately four inches higher. This was done without a permit. City Officials came to the site, halted the work and stated that permits must be obtained. Nevertheless, the Cordovanas have failed and refused to take the simple steps required to complete the work on their property and ensure that their run-off drains to the street and not onto Collett's property. 2nd Am. Compl. ¶18; JA 133-34.

Mr. Cordovana has stated numerous times in the presence of and directly to Collett that he knows that she will pump the water out of her yard, and that he is not concerned about whatever problems she is encountering in dealing with the water run-off coming from the Cordovanas' property. 2nd Am. Compl. ¶19; JA 134.

C. <u>Additional Facts Regarding Hayle and 1273 WOV</u>

In 2008, the property manager for Hayle received one or more communications from the City of Norfolk Storm Water Management Division regarding Hayle's property. Accordingly, at least as early as 2008, if not

before, Hayle was aware of drainage defects relating to the property and obligations to take reasonable steps to ensure proper drainage. 2nd Am. Compl. ¶20; JA 134.

In the years following, Hayle was aware of drainage problems and his agents periodically dumped mulch and made other modifications to the property in an effort to address water issues. However, instead of making reasonable efforts to direct water run-off to the street, the property was modified in such a manner that it actually increased the water flow from Hayle's property onto Collett's property. With the dumping of additional material onto Hayle's property, it 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, notwithstanding her efforts to prevent such difficulties and in spite of her efforts to drain water out of her yard. 2nd Am. Compl. ¶21; JA 134-35.

For most of the period 2008 through the present, Hayle has been an absentee owner of his property (directly and/or through 1273 WOV). Accordingly, it has been Hayle's and 1273 WOV's duty to make sure that reasonable steps are taken to have proper maintenance conducted to deal with matters such as water run-off and drainage problems. They have failed

to meet this duty, thus causing Collett to sustain damages. 2nd Am. Compl. ¶22; JA 135.

When Hayle initially moved in his property, Collett discussed the flooding problems with him. Hayle shrugged it off and informed Collett that he was not concerned about it. 2nd Am. Compl. ¶23; JA 135.

Prior to 2009, Collett made repeated calls to Hayle's property manager and expressed concerns about the drainage problems associated with Hayle's property. She advised the property manager that the water was running from Hayle's property onto Collett's property. According to Hayle's agents, there was no plan to do anything because the water would eventually recede "naturally". 2nd Am. Compl. ¶24; JA 135.

At another point prior to the November 2009 storm, while Hayle was occupying and renting the unit he eventually he purchased, Hayle and Collett had a conversation about the drainage issues and Hayle said words to the effect, "Too bad - - you are the low point on the block." Collett pointed out that her property was not originally the low point, but because of fill being dumped on adjacent properties and other deliberate topographical changes made by the Neighbors, she was eventually made to be the low point. Essentially, the Neighbors had caused the problem that she was now forced to address. She requested that Hayle do the "right thing" and make

arrangements to drain/pump his own water run-off to the street. He never cured the problem. 2nd Am. Compl. ¶25; JA 135-36.

In a storm that struck Norfolk in November 2009, Hayle was occupying his property and had the opportunity to see for himself what happens with the property drainage when there is a significant rain event. Collett saw Hayle outside pacing up and down the street and looking at the situation with drainage. Hayle was visibly upset with the failure of his lot to drain appropriately in the November 2009 storm, and seemed happy to help Collett with her effort to pump water from her property until her pumping efforts caused water on Hayle's lot to go down significantly, and then he disappeared. In other words, Hayle's only efforts to assist Collett were made when those efforts benefitted Hayle's property. Otherwise, he made it plain that he was unconcerned with the fact that topographical alteration of his property was causing damage to Collett's property, and he expressed a lack of concern with the burden placed on Collett regarding having to pump water associated with Hayle's property. 2nd Am. Compl. ¶26; JA 136-37.

D. <u>Relief Requested by Collett</u>

Collett asserted 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.

V. LAW AND ARGUMENT

Because the Second Amended Complaint articulates valid causes of action for trespass, nuisance, negligence and negligence *per se*, and because the pleading seeks appropriate relief, the trial court erred in dismissing the litigation as a result of the demurrers filed by the respondents.

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); Sales v. Kecoughtan Housing Co., 279 Va. 475, 478 (2010).

B. Collett stated facts and law in support of valid causes of action

1. Trespass

In Kurpiel v. Hicks, 284 Va. 387 (2012)[5], the Court provided a thorough discussion and explanation of the law of trespass in the context of water drainage and run-off. The first principle the Court recognized is that "every

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[5] Collett cited Kurpiel in her lawsuit (2nd Am. Compl. ¶10; JA 130), and the trial court mentioned the decision in the first demurrer ruling. JA 62-63. Accordingly, Kurpiel was recognized as controlling authority from the beginning of the litigation and Collett pled facts of the kind recognized as sufficient in Kurpiel.

person is entitled to the exclusive and peaceful enjoyment of his own land, and to redress if such enjoyment shall be wrongfully interrupted by another." Id. at 353, citing Tate v. Ogg, 170 Va. 95, 99 (1938). Quoting Cooper v. Horn, 248 Va. 417, 423 (1994), the Court stated that a "trespass is an unauthorized entry on the property which results in interference with a property owner's possessory interest therein." Kurpiel, 284 Va. at 353.

Regarding surface water, the Kurpiel opinion notes that Virginia applies the "modified common law rule applicable to surface water." Id. at 354, citing Mullins v. Greer, 226 Va. 587, 589 (1984). Specifically, "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." Id.

Although property owners and neighbors have the right to protect their own property from damage that may be caused by surface water, a property owner's use of his own property "must be exercised in good faith, with no purpose to abridge or interfere with the rights of others, and with such care with respect to the property that may be affected by the use or improvement as not to inflict any injury beyond what is necessary." Kurpiel, 284 Va. at 355, quoting McGehee v. Tidewater Railway Co., 108 Va. 508, 510 (1908).

Applying these principles to the allegations made by the plaintiffs in the Kurpiel case, this Court determined that the factual allegations were sufficient for the Kurpiels to proceed, and a trial court order sustaining a demurrer was reversed.

At the first demurrer hearing held in this matter on December 18, 2013, the Kurpiel opinion was argued to the trial court, but the trial judge was of the opinion that the facts cited by Collett in her lawsuit were too thin to make Kurpiel applicable. JA 63. Accordingly, the lawsuit was amended twice after that, each time with additional facts, information and authority provided.

Collett contends that the Second Amended Consolidated Complaint, which actually cites Kurpiel in ¶10, provides ample factual support for the type of trespass claim recognized by this Court in Kurpiel and the authority cited therein. Among other things, Collett asserted that "the manner in which the defendants' property has been developed, maintained and altered has been unreasonable, careless and reckless, and has caused Collett to sustain serious and ongoing damages in violation of law." 2nd Am. Compl. ¶10; JA 130. Collett explained that the "defendants have modified the topography of their property such that it has exacerbated [water drainage problems and pollution] and essentially guarantees that Collett will suffer water-related damages every time a significant rain event occurs." 2nd Am. Compl. ¶13; JA

131-32. She alleged that the neighboring property owners have remained in perpetual violation of Norfolk city ordinances relating to drainage and nuisances, and that they have "failed and refused to make reasonable efforts to create the problems". 2nd Am. Compl. ¶11; JA 131. Collett described specific actions the neighbors had taken to alter their properties with the result that drainage of polluted water onto Collett's property has become worse. 2nd Am. Compl. ¶¶16, 18, 21; JA 133-34. Collett's factual allegations include many of the same complaints made by the plaintiffs in Kurpiel, 284 Va. at 356.

In summary, Collett provided precisely the type of factual allegations that were deemed sufficient to warrant reversal in the Kurpiel case. Respectfully, Collett contends that the same result should be reached in this appeal.

2. Nuisance

When use of property "becomes obnoxious to occupants of neighboring dwellings and renders enjoyment of the structures uncomfortable", such a use is a "nuisance". Bowers v. Westvaco Corporation, 244 Va. 139, 144 (1992) (internal quotation and citation omitted). "The term nuisance includes everything that endangers life or health, or obstructs the reasonable and comfortable use of property." Id. (internal quotation marks and citation omitted).

Citing Foley v. Harris, 223 Va. 20 (1982), the Bowers opinion reiterated that the Court broadly construes "an occupant's right to the use and enjoyment of land." Id., quoting Foley at 28.

The Bowers opinion affirmed a judgment in favor of residents who were awarded significant damages after proving that a neighboring business caused nuisance conditions. Bowers at 149-51. Part of the evidence upon which the plaintiffs relied in Bowers was that the business defendant "made changes in the grading of Lots 1 and 2 to accommodate the truck staging operation. These changes have caused water to run off the lots onto the Bowers' property." Id. at 143.

In accordance with the principles articulated in the Bowers opinion, Collett pled facts sufficient to support a claim of nuisance, and the trial court erred in ruling otherwise. Nuisance claims may be brought against non-business residential neighbors pursuant to the same legal principles explained in the Bowers opinion. See e.g., Miller v. Pace, 84 Va. Cir. 500, 503, 2012 Va. Cir. LEXIS 53, **7 (Fairfax County 2012) (quoting Bowers). See also Waltman v. King William County School Board, 81 Va. Cir. 381, 2010 Va. Cir. LEXIS 129 (Norfolk City 2010) (granting injunctive relief against a school board in a case involving polluted storm water run-off, and citing, *inter alia*, Nicholls v. Central Va. Power Co., 143 Va. 405, 413-14 (1925)).

Collett's Second Amended Consolidated Complaint is replete with allegations that support a valid cause of action to seek relief from nuisance conditions. 2nd Am. Compl. ¶¶10-11, 13-14, 16, 21; JA 130-34. Accordingly, the Court should reverse and remand with instructions to permit Collett to proceed with her nuisance claims against the Neighbors.

3. Negligence

Pursuant to Rule 3:18(b), an "allegation of negligence...is sufficient without specifying the particulars of the negligence." Throughout her pleading, Collett asserted that the Neighbors were negligent and caused her damages. 2nd Am. Compl. ¶¶1, 9, 27-29; JA 127-29, 137. Accordingly, the trial court erred in sustaining the demurrers.

Although not required to do so, Collett pled detailed facts in support of her claim of negligence. As a general matter, a "plaintiff who seeks to establish actionable negligence must plead the existence of a legal duty, violation of that duty, and proximate causation which results in injury." Delk v. Columbia/HCA Health Care Corp., 259 Va. 125, 132 (2000) (internal citations omitted).

Pursuant to Rule 1:4(k), a plaintiff may "state as many separate claims...as he has regardless of consistency and whether based on legal or equitable grounds." This includes the ability to pursue both negligence and

negligence *per se* claims in the same litigation. See e.g., Kaltman v. All American Pest Control, Inc., 281 Va. 483, 489-98 (2011) (reversing a trial court judgment that sustained demurrers to negligence and negligence *per se* claims).

As Collett asserted in ¶9 (JA 129-30) of her lawsuit, "defendants are in violation of both common law duties and specific duties and responsibilities imposed by ordinances that exist to protect the public." Elaborating, Collett alleged as follows:

> As explained by the Supreme Court in Kurpiel v. Hicks, 284 Va. 347 (2012), the manner in which landowners handle their water run-off must be "reasonable". (Id., 284 Va. at 355). Here, the manner in which the defendants' property has been developed, maintained and altered has been unreasonable, careless and reckless, and has caused Collett to sustain serious and ongoing damages in violation of law. Accordingly, she is entitled to relief. Id., 284 Va. at 356.

2nd Am. Compl. ¶10; JA 130.

> Despite having direct knowledge that the polluted water run-off is damaging to Collett and her property, the defendants have failed and refused to make reasonable efforts to correct the problems. 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 at all.

2nd Am. Compl. ¶11; JA 130-31.

> In violation of the common law duty of reasonableness relating to handling and controlling water run-off, the defendants have allowed and continue to allow their massive quantities of polluted run-off to flow onto Collett's property in an uncontrolled manner, thus causing Collett substantial damages, financial and emotional.

2nd Am. Compl. ¶12; JA 131.

These and other allegations set forth in Collett's pleading demonstrate that she has pled the elements of a common law claim of ordinary negligence that exceeds what is required by Rule 3:18(b), and the trial court erred in ruling otherwise.

4. Negligence *per se*

In Kaltman v. All American Pest Control, Inc., 281 Va. 483 (2011), the court provided a detailed explanation of what is required to pursue a claim of negligence *per se*:

> The doctrine of negligence *per se* represents the adoption of "the requirements of a legislative enactment as the standard of conduct of a reasonable [person]." Butler v. Frieden, 208 Va. 352, 353, 158 S.E.2d 121, 122 (1967). The elements of negligence *per se* are well-established. First, the plaintiff must prove that the defendant violated a statute enacted for public safety. MacCoy v. Colony House Builders, Inc., 239 Va. 64, 69, 387 S.E.2d 760, 763, 6 Va. Law Rep. 1005 (1990); Virginia Electric & Power Co. v. Savoy Constr. Co., 224 Va. 36, 45, 294 S.E.2d 811, 817 (1982). Second, the plaintiff must belong to the class of persons for whose benefit the statute was enacted, and demonstrate that the harm that occurred

> was of the type against which the statute was designed to protect. McGuire v. Hodges, 273 Va. 199, 206, 639 S.E.2d 284, 288 (2007); Halterman v. Radisson Hotel Corp., 259 Va. 171, 176-77, 523 S.E.2d 823, 825 (2000). Third, the statutory violation must be a proximate cause of plaintiff's injury. Thomas v. Settle, 247 Va. 15, 20, 439 S.E.2d 360, 363, 10 Va. Law Rep. 702 (1994); Hack v. Nester, 241 Va. 499, 503-04, 404 S.E.2d 42, 43 (1990).

Id., 281 Va. at 496.

The first and second elements of a negligence *per se* claim are "issues of law" that are decided initially by a trial court, and are reviewed *de novo* on appeal. Id.

In her pleading, Collett cited two local ordinances in support of her claims, specifically, Norfolk Ordinance § 36-17(b), which describes property owners' drainage obligations, and § 27-2, which defines conditions considered to be nuisances in the City of Norfolk. 2nd Am. Compl. ¶11; JA 130-31.

As stated in Norfolk Ordinance § 36-17(b), 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...." It should be clear that the drainage requirements imposed by this ordinance are designed primarily to benefit and protect neighboring property owners and occupiers such as Collett. Collett pled that the Neighbors knew about the ordinance, violated it and caused her resulting damages. 2nd Am. Compl. ¶7-14; JA 129-32.

Norfolk Ordinance § 27-2 defines a nuisance as "any condition, substance, material or thing which may be 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, including, but not limited to, refuse, trash, rubbish, debris...."

In this case, Collett is both a member of the public and an individual with a particular personal interest in avoiding and seeking relief from nuisances caused by neighboring properties. In her lawsuit, she provided a detailed description of the nuisance conditions caused by the polluted water run-off that the Neighbors have caused to cascade onto her property, as well as the serious and ongoing damages. 2nd Am. Compl. ¶¶1, 6, 9-14; JA 127-32.

Following the same analysis and logic used by this Court in Kaltman in determining that the plaintiffs pled a proper cause of action of negligence *per se*, the Court should reach the same conclusion in this matter and reverse the trial court order sustaining the demurrers filed by the Neighbors.

5. Relief requested by Collett in her pleading

In accordance with Rule 1:4(k) and the facts and legal authority cited throughout her pleading, Collett requested an award of compensatory and punitive damages, as well as temporary and permanent injunctive relief. 2nd Am. Compl. ¶¶1, 27-30, prayer for relief; JA 127, 137-39.

Although the trial court did not expressly address the issue of the propriety of Collett's request for various forms of relief, the issue is addressed in this appeal in an abundance of caution. Collett respectfully asserts that at the demurrer stage of analysis, she has pled sufficient facts to justify the various forms of relief that she seeks to pursue in the trial court.

VI. CONCLUSION AND REQUEST FOR RELIEF

As the owner and occupier of property in the City of Norfolk, Collett is unarguably vested with certain rights. As recognized in voluminous authority issued by this Court, those rights include use and enjoyment of property, and freedom from unreasonable interference and pollution by neighboring property owners and occupiers. Unfortunately, Collett has been deprived of access to justice. The practical effect of the trial court's ruling is to recognize the existence of legal rights, but deny any remedy, or even the mere opportunity to pursue remedies. However, it is well-established that a "right without a remedy" is a "thing unknown to the law." Wyatt v. McDermott, 283 Va. 685, 693 (2012), citing Norfolk City v. Cooke, 68 Va. (27 Gratt.) 430, 439 (1876).

Accordingly, 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 in the trial court.

GINA M. COLLETT

By:_____
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CERTIFICATE

I, Kevin E. Martingayle, counsel of record for appellant, hereby certify that, in compliance with Rule 5:26(h):

1. Appellant is Gina M. Collett. Counsel for Appellant is:

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3. Appellant hand-filed fifteen bound copies, along with ten electronic copies on CDs, of the foregoing Opening Brief of Appellant and ten bound copies of the Joint Appendix, with ten electronic copies on CDs, with Clerk of the Supreme Court of Virginia this 20th of January, 2015, and served, via UPS Ground Transportation, three bound copies, along with one electronic copy on CD, of the same upon all counsel for Appellees.

4. The numbers of words contained in this Brief is 5,541.

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

Kevin E. Martingayle