IN THE

Supreme Court of Virginia

RECORD NO. 141297

GINA M. COLLETT,

Appellant,

v.

GARY B. CORDOVANA, *et al.*,

Appellees.

BRIEF OF APPELLEES GARY B. CORDOVANA AND MARGARET H. CORDOVANA

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STATEMENT OF THE CASE

On July 2, 2013, Appellant Gina M. Collett ("Collett") filed her initial Complaint against Gary B. Cordovana and Margaret H. Cordovana ("Cordovanas"), which alleged that the Cordovanas were liable to her under the theories of trespass, nuisance, and negligence, and for violation of Norfolk City Code section 36-17(b). JA 2. The Cordovanas demurred to the Complaint on the basis that section 36-17(b) of the Norfolk City Code, which relates to drainage of water to prevent the gathering of rats and mosquitoes, was inapplicable to her case and that she failed to state sufficient facts to support her common law claims. JA 15-20. On December 18, 2013, the Norfolk Circuit Court held a hearing at which it sustained the Cordovanas' Demurrer and provided Collett leave to amend her Complaint. JA 62-63.

By Order dated October 30, 2013, Collett's suit against the Cordovanas was consolidated with a separately filed action against Dion C. Hayle and 1273 West Ocean View, LLC. JA 47-48.

On January 15, 2014, Collett filed her First Amended Consolidated Complaint alleging the same common law claims and asserting that section 36-17(b) of the Norfolk City Code set the standard of care to be followed by all of the Appellees. JA 68, 74. The Cordovanas demurred again on the

basis that section 36-17(b) of the Norfolk City Code was inapplicable to her case and that she failed to provide sufficient facts to support her common law claims. JA 83-88. On March 18, 2013, a hearing was held on the Cordovanas' Demurrer, which the trial court sustained and Collett was again given leave to amend. JA 123. On April 1, 2014, Collett filed her Second Amended Consolidated Complaint, which re-alleged the same causes of action as the previous complaints and further added that the Appellees violated section 27-2 of the Norfolk City Code. JA 127-137. The Cordovanas demurred to the Second Amended Consolidated Complaint. JA 149-156. The Demurrer was heard on June 26, 2014, and sustained. JA 183-188. Collett was not given leave to amend. JA 189. Collett subsequently filed this appeal.

STATEMENT OF FACTS

The final order of the court below was based upon a Demurrer. Accordingly, the matter was decided purely on the pleadings. In her Second Amended Consolidated Complaint ("SACC"), Collett alleges as factual allegations that she is the owner of the property located at 1281 W. Ocean View Avenue in the City of Norfolk, Virginia. *See* SACC ¶ 2; JA 128. Government records show that the Cordovanas are the owners the property located at 1287 W. Ocean View Avenue, which is adjacent to

Collett's property. *See* SACC ¶ 2; JA 128. According to government records, Dion C. Hayle was the owner of the property located at 1273 W. Ocean View Avenue, which is adjacent to Collett's property, and that he owned the property until June 5, 2013, when he transferred it to 1273 West Ocean View, LLC. *See* SACC ¶ 4; JA 128.

As a result of either development or neglect, a portion of the rain and storm run-off from properties owned by the Appellees drains to Collett's property rather than to the street. *See* SACC ¶ 6; JA 128. Collett's counsel sent a letter to the Cordovanas demanding corrective action and, through their counsel, the Cordovanas denied legal liability to Collett. *See* SACC ¶ 7; JA 129. Defendants have not made serious efforts to drain polluted water to the street (or elsewhere) and they have asserted that they do not have a duty to make such efforts. *See* SACC ¶ 11; JA 130-31. Defendants have modified the topography of their property such that it has exacerbated the problem. *See* SACC ¶ 13; JA 131-32. Collett has water that accumulates in her yard and attracts mosquitoes and other pests. *See* SACC ¶ 14; JA 132. In March, 2010, the Cordovanas arranged for gravel to be placed in the parking lot of their property. *See* SACC ¶ 16; JA 133. In August, 2013, the Cordovanas arranged to have another load of gravel

placed in the parking lot and failed or refused to ensure run-off from the property flows to the street. *See* SACC ¶ 18; JA 133-34.

STANDARD OF REVIEW, ARGUMENT AND AUTHORITIES

A. Standard of Review

With respect to the standard of review of a demurer, this Court has previously stated:

> A demurrer admits the truth of the facts contained in the pleading to which it is addressed, as well as any facts that may be reasonably and fairly implied and inferred from those allegations. A demurrer does not, however, admit the correctness of the pleader's conclusions of law. Accordingly, we will consider the facts stated, and those reasonably and fairly implied and inferred, in the [complaint] in a light most favorable to the plaintiff, but we will review the sufficiency of the legal conclusions ascribed to those facts de novo.
> *Porter Vaughan, Inc. v. DiLorenzo*, 279 Va. 449, 455, 689 S.E.2d 656, 659 (2010).

B. The Trial Judge Properly Dismissed Collett's Second Amended Consolidated Complaint Because it Failed to State a Cause of Action for Negligence *Per Se* Under the Norfolk City Code.

1. Collett's Second Amended Consolidated Complaint Fails to State a Claim for Negligence *Per Se* Based Upon Chapter 27 of the Norfolk City Code

In her Second Amended Consolidated Complaint, Collett states that she is relying upon Chapter 27 of the Norfolk City Code, and section 27-2 in particular, as the basis of a claim for nuisance. *See* SACC ¶ 11; JA 130-31. In the Brief of Appellant, Collett also contends that this section of the Norfolk City Code supports a claim for negligence *per se*. *See* Brief of

Appellant at 23. However, this Chapter and ordinance do not support her asserted causes of action. A copy of the complete Chapter 27 was attached to the Cordovanas' Demurrer as Exhibit 2. JA 164-68.

First, there is no provision in Chapter 27 that provides for any private right of action or civil remedy for a violation of any of its provisions. Collett in her Brief does not cite any provision from Chapter 27 establishing that such a private right of action or civil remedy exists. It is a basic principle of statutory construction "that where a statute creates a right and provides a remedy for the vindication of that right, then that remedy is exclusive unless the statute says otherwise." *School Bd. v. Giannoutsos*, 238 Va. 144, 147, 380 S.E.2d 647, 649 (1989); *see also Vansant & Gusler, Inc. v. Washington*, 245 Va. 356, 360, 429 S.E.2d 31, 33 (1993). Where there is a clear remedy provided, a private right of action cannot be implied in the statute. *See id.*

Specifically, section 27-1 makes a violation of any provision of Chapter 27 a criminal offense:

> Unless otherwise specified, any person violating any provision of this article shall be guilty of a Class 2 misdemeanor. Each day a violation continues shall be deemed a new and separate violation. In addition to any penalties imposed for each violation, a judge hearing the case shall order the person responsible for such condition to remove, restore, remediate or correct the violation or condition, and each day's default in such removal,

> restoration, remediation or correction after being so ordered shall constitute a violation of and a separate offense under this article.
> JA 165.

The criminal and administrative penalties are also addressed in sections 27-6(c)[1] and 27-8(a).[2] JA 166-67.

Chapter 27 of the Norfolk Code provides that authority to enforce all provisions of the Chapter rests with the director of public health or his designee and that any law enforcement officer, fire marshal, or any of his assistants, fire inspectors, or sworn police officers shall also have

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[1] Section 27-6(c) provides:

> Any person issued a notice of violation pursuant to this section who shall fail to comply therewith within the time specified shall be guilty of a Class 2 misdemeanor. Any person receiving two or more notices within twelve (12) months of an initial violation notice and who fails to comply with a notice issued pursuant to this section shall be guilty of a Class 1 misdemeanor.

[2] Section 27-8(a) provides:

> If a nuisance remains upon a land or premises after the expiration of the time specified in a notice of violation, the director of public health, or his designee, may issue a notice of abatement to such person identified in the notice of violation informing said person that the director of public health or his designee will cause the nuisance to be abated at the expense of such person in the time set by the director of health or his designee. An administrative fee shall be assessed for each abatement in the amount of seventy five dollars ($75.00) for amounts owed up to three hundred dollars ($300.00) and an administrative fee in the amount of one hundred and fifty dollars ($150.00) for amounts owed over three hundred dollars ($300.00). The expense of abatement and the administrative fee shall be chargeable against such person.

enforcement authority. *See* section 27-3; JA 166.[3] There is no provision that creates a private right of enforcement of Chapter 27. As Chapter 27 of Norfolk's City Code expressly provides for the remedies for a violation of any section of the Chapter, including the section relied upon by Collett; there is no basis on which to read additional remedies into the clear language of Chapter 27, including section 27-2, to create a private right of action or civil remedy.

Second, to establish a claim for negligence *per se*, Collett must show that she belongs to the class of persons for whose benefit the statute was enacted and that the harm that occurred was of the type against which the statute was designed to protect. *See Halterman v. Radisson Hotel Corp.*, 259 Va. 171, 176-177, 523 S.E.2d 823, 825 (2000); *see also Williamson v.*

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[3] Section 27-3 states:

> (a) The director of public health or his designee is hereby vested with the authority to require the abatement of any and all conditions in the city which constitute a nuisance or are detrimental to the public health, safety or welfare or the environment.
> (b) It shall be the duty of the director of public health or his designee to have made continuous sanitary inspections of all parts of the city and to cause all nuisances to be abated; and when necessary, to institute legal proceedings therefor and for the recovery of expenses incurred by the city in abating any nuisance.
> (c) Any law enforcement officer, fire marshal or any of his assistants, fire inspectors, or sworn special police officer, is authorized and shall have authority to enforce all provisions of this chapter.

Old Brogue, Inc., 232 Va. 350, 355, 350 S.E.2d 621, 624 (1986). In the Brief of the Appellant, Collett acknowledges that she must meet this requirement. *See* Brief of Appellant at 22-23. Section 27-2 limits the scope of the ordinance to public nuisances.

> For purposes of this article, a "nuisance" is defined 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, junk, garbage, containers, wire, glass, wood, ashes, animal matter, vegetable matter, human and animal wastes, and odors.
> Norfolk City Code, § 27-2; JA 165 (emphasis added)

The Virginia Supreme Court has stated: "We have described a private nuisance as 'an activity which unreasonably interferes with the use and enjoyment of another's property.' In other words, a private nuisance is one which implicates or interferes with a right or interest that is unique to an individual, such as an interest in land." *Virginia Beach v. Murphy*, 239 Va. 353, 355, 389 S.E.2d 462, 463 (1990) (internal citations omitted). In contrast, a public nuisance is one that injures citizens generally. *See Virginia Beach,* 239 Va. at 356, 389 S.E.2d at 463. Collett has not alleged any injury to the public. Rather, she has only alleged in the Second Amended Consolidated Complaint that rainwater flows from the neighboring properties onto her own and interferes with her exclusive use

of her own land. *See* SACC ¶ 6, 14, 19, 28; JA 128-29, 132, 134, 137. Therefore, Collett has failed to allege any facts that she has any interest that is protected by Chapter 27, including section 27-2.

Although Collett has not stated any facts in the Second Amended Consolidated Complaint to show that has been exposed to or sustained damage from a public nuisance, she suggests in her Brief that she is a member of the public and has an interest in seeking relief from nuisances. *See* Brief of Appellant at 24. However, the focus of whether an alleged nuisance is a public or private one is whether the nuisance that is complained of is one that affects the rights of an individual or the public. The Second Amended Consolidated Complaint only alleges interference with use of her own property. There is no allegation of a nuisance that affects the general public or the property interest of any person other than Collett.

Further, Collett is claiming in her Brief that a violation of the Norfolk City Code regarding nuisances creates a claim for negligence *per se*. Collett has conflated two distinct causes of action and offered no legal support for the proposition that creating a nuisance is tantamount to negligence.

2. Collett's Second Amended Consolidated Complaint Fails to State a Claim for Negligence *Per Se* Based Upon Section 36-17 of the Norfolk City Code

In her Brief, Collett cites Norfolk City Code § 36-17(b) as a basis for her claim of negligence *per se*. *See* Brief of Appellant at 23. Under the rule of statutory construction *in pari materia*, statutes that are not inconsistent with each other and relate to the same subject matter are to be construed together, regardless of whether they contain references to each other. *See Prillaman v. Commonwealth*, 199 Va. 401, 405-406, 100 S.E.2d 4, 7 (1957).

The ordinance relied upon by Collett is a subsection of Chapter 36 of the Norfolk City Code and Chapter 36 is entitled "Rat and Mosquito Control." A copy of the complete Chapter was attached to the Cordovanas' Demurrer as Exhibit 1. JA 158-63. Section 36-17(b) cannot be read in isolation but should be read and interpreted in its context of eliminating conditions on a property that may attract rats and mosquitoes.

As noted *supra*, to a claim for negligence *per se*, Collett must show that she belongs to the class of persons for whose benefit the statute was enacted and that the harm that occurred was of the type against which the statute was designed to protect. *See Halterman*, 259 Va. at 176-177, 523 S.E.2d at 825. Collett cannot rely on section 36-17(b) as a basis for

recovery or for an injunction as she is not among of the class of persons that the statute is designed to protect and is not alleging any damages or seeking an injunction based upon the type of harm the ordinance was designed to address. Reading section 36-17(b) in the context of the entire Chapter demonstrates that it is not directed at protecting neighboring properties from the effects of heavy rainfall, but rather is solely intended to eliminate conditions that attract and allow breeding of rats, mosquitoes, and flies. Collett's allegation in paragraph 14 of the Second Amended Consolidated Complaint (JA 132) that she, at times, has mosquitoes in her yard does not bring her within the class per persons protected by the ordinance as she still has not alleged any damages related to rats and/or mosquitoes emanating from water collecting on the Cordovanas' property. Collett is basing her claim on the opposite problem, that is, that water is flowing off of the Cordovanas' property and onto hers. This is not a case about standing water on the Cordovanas' property, it is about the flow of surface water following rainfall.

The purpose of section 36-17(b) is reflected in the fact that its enforcement is vested with the director of public health. JA 162. Further, the purpose of section 36-17(b) is also reflected in the fact that it immediately follows the section prohibiting collections of water in which

mosquitoes may breed. JA 161-162. As Collett is not alleging in the Second Amended Consolidated Complaint that she suffered damage from rats and mosquitoes coming from the Appellees' properties, she is neither a member of the class persons that the statute was designed to protect and has not suffered a harm that the Chapter was designed to address.

In her Brief, Collett states that the drainage requirements imposed by this ordinance are designed primarily to protect neighboring property owners and occupiers. *See* Brief of Appellant at 23. To the extent she suggests that the ordinance is intended to protect her from rain water flowing from a neighboring property, Collett is failing to follow the well established rules of statutory construction and the requirement to read the ordinance in its context. Rather than simply pulling a few words out the ordinance, it must be interpreted in the context of the full Chapter regarding the control of rats and mosquitoes and protecting the public from the deleterious health effects that can occur from such pests.

As with the Norfolk City Code provisions relating to public nuisances, discussed *supra*, the Rat and Mosquito Control ordinance does not provide for any private right of action or civil remedy. As stated *supra*, it is a basic principle of statutory construction "that where a statute creates a right and provides a remedy for the vindication of that right, then that remedy is

exclusive unless the statute says otherwise." *School Bd.*, 238 Va. at 147, 380 S.E.2d at 649; *see also Vansant & Gusler, Inc.*, 245 Va. at 360, 429 S.E.2d at 33. Where there is a clear remedy provided, a private right of action cannot be implied in the statute. *See id.*

Section 36-1 makes a violation of any provision of Chapter 36 a criminal offense:

> Unless otherwise provided, any person violating any provision of this chapter shall be guilty of a Class 1 misdemeanor. Each day a violation continues shall be deemed a new and separate violation. In addition to any penalties imposed for each violation, a judge hearing the case shall order the person responsible for the violation or condition to remove, restore, remediate or correct the violation or condition, and each day's default in such removal, restoration, remediation or correction shall constitute a violation of and a separate offense under this chapter.
> JA 158.

Section 36-3 states that "[t]he director of public health or his designee is authorized and shall have authority to enforce all provisions of this chapter." JA 158. This enforcement authority is recognized in section 36-17(b), which states in full:

> 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. JA 162.

As Chapter 36 of Norfolk's City Code expressly provides for the remedies for a violation of any section of the Chapter, including the section relied upon by Collett; there is no basis to read additional remedies into the clear language of the ordinance to create a private right of action or civil remedy.

C. The Trial Judge Properly Dismissed Collett's Second Amended Consolidated Complaint Because it Failed to State a Cause of Action for Negligence.

As the Virginia Supreme Court has explained, surface water is 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, 111-12 (1984) (quoting *Howlett v. South Norfolk*, 193 Va. 562, 568, 69 S.E.2d 346, 348 (1952)). Virginia follows a modified common law rule regarding 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*, 226 Va. at 589, 311 S.E.2d at 112 (internal citations omitted); *see also Kurpiel v. Hicks*, 284 Va. 347, 354, 731 S.E.2d 921, 925 (2012); *McCauley v. Phillips*, 216 Va. 450, 453-54, 219 S.E.2d 854 858 (1975); *Mason v. Lamb*, 189 Va. 348, 354-55, 53 S.E.2d 7, 10 (1949); *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 this case, Collett alleges that rain and storm run-off drains from Appellees' properties toward her land. 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. The only actions alleged as to the Cordovanas is that they placed stone on the driveway and graded it. Even taking this allegation as true, it fails to establish any negligence on the part of the Cordovanas.

The Second Amended Consolidated Complaint also misstates the Cordovanas' duty in this case. Collett takes the position that merely allowing storm water to flow onto the lands of another constitutes negligence. *See* SACC ¶ 9, 12, JA 129-31. Relying on *Kurpiel*, Collett

alleges that the issue is whether "the manner in which landowners handle their water run-off must be 'reasonable.'" SACC ¶ 10; JA 130. 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. This standard is inconsistent with the modified common law rule further supports that trial court's sustaining of the Cordovanas' Demurrer.

Moreover, the trial court properly sustained the Cordovanas' Demurrer to the Second Amended Consolidated Complaint where Collett attempted to use section 36-17(b) to establish the standard of care as it relates to her claim for negligence. The Virginia Supreme Court has explicitly stated that "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). As stated *supra*, Collett cannot rely on section 36-17(b) as she is not among the class of persons that the statute is designed to protect and is not alleging any damages or seeking an injunction based upon the type of harm the ordinance was designed to address.

Further, while common law does not forbid the discharge or run-off of rain water from one property to another, Collett's Second Amended Complaint does seek to impose such a prohibition. The ordinance, if given the meaning asserted by Collett, would impermissibly change common law for all persons living in the City of Norfolk. A statute or ordinance may not change common law unless the legislative body enacting it expressly states such an intent. *See First Am. Title Ins. Co. v. W. Sur. Co.*, 283 Va. 389, 398, 722 S.E.2d 637, 640-41 (2012); *see also Boyd v. Commonwealth*, 236 Va. 346, 374 S.E.2d 301 (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).

D. The Trial Judge Properly Dismissed Collett's Second Amended Consolidated Complaint Because it Failed to State a Cause of Action for Nuisance.

As stated *supra*, to the extent the Second Amended Consolidated Complaint relies upon the Norfolk ordinance to state a claim for nuisance it must fail. Otherwise, Collett's claim for nuisance remains subject to the modified common law rule regarding surface water – surface water is a common enemy and a landowner may fight it off as best he can so long as he does so reasonably and in good faith. Further, a property owner may, in

the development of his property, grade it and not be liable for the discharge of additional surface water as a result thereof. *See Mullins*, 226 Va. at 589, 311 S.E.2d at 112.

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 no more than the Cordovanas graded their property.

The current matter is similar to that of *Mason v. Lamb*, *supra*, where a plaintiff brought suit against an adjoining owner after he filled in a low area in the parking lot. After the parking lot was filled, the surface of the lot was one foot higher than that of the adjacent lots. *See Mason*, 189 Va. at 353, 53 S.E.2d at 9. The filling and grading of the lot caused additional storm water run off to flow onto the plaintiff's property and cause damage. The Court concluded that the defendant was not liable for filling and grading his property, noting that it was "the unavoidable consequence of the exercise by the defendant of his legal right to improve his property in the usual and customary way." *Mason*, 189 Va. at 356-57, 53 S.E.2d at 11.

E. The Trial Judge Properly Dismissed Collett's Second Amended Consolidated Complaint Because it Failed to State a Cause of Action for Trespass.

As with her nuisance claim, Collett's attempt to state a claim for trespass fails as she has not stated facts that get her past the modified common law rule regarding surface water. 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.

Moreover, the Second Amended Consolidated Complaint attempts to hold the Cordovanas to a higher standard that is provided for under the modified common law rule. For instance, in her Brief, Collett cites to Paragraph 18 of the Second Amended Consolidated Complaint as support for her position that she has stated claim for trespass. *See* Brief of Appellant at 18. Paragraph 18 is premised upon an allegation that the Cordovanas failed to drain the property to the street. JA 133-34. This allegation is clearly based on the mistaken belief that section 36-17(b) created an affirmative duty to do so. She further asserts that that she stated a claim for trespass through paragraph 11 which is based on a claim of violation of the Norfolk ordinances. *See* Brief of Appellant at 18. As

explained *supra*, the provisions relying upon by Collett in her Second Amended Consolidated Complaint do not apply to her case.

Finally, Collett cites heavily to *Kurpiel v. Hicks*, *supra*, However, unlike Collett, the plaintiffs in the *Kurpiel* case stated detailed, specific facts in support of their claim of trespass:

> 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 Preservative 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 vegetative cover"; (9) did not use proper drainage controls; and (10) "failed to control sediment loads and siltation running onto the Kurpiel[s'] property."
> *Kurpiel v. Hicks*, 284 Va. at 356, 731 S.E.2d at 926.

F. The Second Amended Consolidated Complaint Fails to Allege Sufficient Facts to Support her Request 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 with 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). Here, Collett has not offered facts to show that she will suffer irreparable harm without a preliminary injunction or that she could prevail on the merits.

In order to adequately 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, as here, fails to alleged these elements. *See id.* In her Brief, Collett does not allege any facts that support these elements. Therefore, the trial court properly granted the Demurrer on this issue.

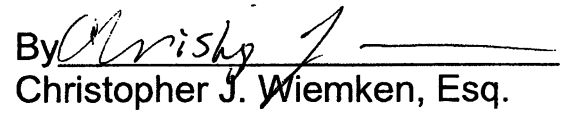
G. The Second Amended Consolidated Complaint Fails to Allege Sufficient Facts to Support her Request for Injunctive Relief

Because Collett has failed to state sufficient facts to support any common law action, Collett is not entitled to recover punitive damages.

CONCLUSION

For the reasons stated, this Court should affirm the order of the trial court sustaining the Cordovanas' Demurrer and dismissing the case with prejudice.

Respectfully submitted,

By 
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CERTIFICATE OF SERVICE

I hereby certify that in compliance with Rule 5:26(h), one electronic version and fifteen printed copies of the foregoing Brief of Appellee was, this 18th day of February, 2015, hand-filed with the Clerk of the Supreme Court of Virginia, at the Supreme Court of Virginia, Supreme Court Building, 100 North Ninth Street, Richmond, Virginia 23219.

I hereby certify that one electronic version and three printed copies of the foregoing Brief of Appellee was, this 18th day of February, 2015, mailed first-class, postage prepaid to:

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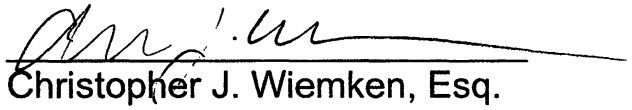

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