In The

Supreme Court of Virginia

RECORD NO. 151779

FOREST LAKE COMMUNITY ASSOCIATION, INC. and HOLLYMEAD CITIZENS ASSOCIATION, INC.,

Appellants,

v.

UNITED LAND CORPORATION OF AMERICA; C.W. HURT CONTRACTORS, LLC (NOW CEVA CONTRACTORS); ROUTE 29 LLC; NYC LAND TRUST; ONE NINTH LAND TRUST; HM ACQUISITION GROUP, LLC; SIXTY FOUR 616 LAND TRUST; S-V ASSOCIATES LLC; POST OFFICE LAND TRUST; HOLLYMEAD AREA C OWNERS ASSOCIATION, INC.; PEQUA LLC; TIKI LLC; ROSEWOOD VILLAGE OF HOLLYMEAD, LLC; HOLLYMEAD CORNER, LLC; HTC HOTEL LLC; and BOB EVANS FARMS, INC.,

Appellees.

BRIEF OF APPELLEES UNITED LAND CORPORATION OF AMERICA, ROUTE 29, LLC, NYC LAND TRUST, ONE-NINTH LAND TRUST, SIXTY FOUR 616 LAND TRUST, and S-V ASSOCIATES LLC

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STATEMENT OF THE NATURE OF THE CASE AND THE MATERIAL PROCEEDINGS IN THE TRIAL COURT

Forest Lakes Community Association, Inc. and Hollymead Citizens Association, Inc. (collectively "Forest Lakes") filed a lengthy multi-count Amended Complaint against a number of current and former owners of land and different developers. Forest Lakes alleged basically that the construction of different parcels of the shopping center collectively known as the Hollymead Town Center ("HTC") across Route 29 from the Forest Lakes Community in Albemarle County, Virginia resulted in silt and sediment contamination of the community's lake. As relevant to the issues on appeal, Forest Lakes alleged causes of action for common law trespass (Count I) and nuisance (Count II).

The Defendants filed demurrers and special pleas to the Amended Complaint. The Honorable Judge Jay Swett (retired) sat by designation. Judge Swett denied the demurrers and scheduled a hearing on the special pleas filed by the Defendants. Memoranda were filed before and after the hearing on the special pleas. Judge Swett heard evidence at a hearing on September 17, 2013, and then subsequently withdrew from the case without ruling on the special pleas.[1]

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[1] Forest Lakes included the transcript from the hearing before Judge Swett, and cites to it numerous times in its Opening Brief. However, that hearing is

The Honorable Judge Paul M. Peatross (retired) then handled the case and held a status conference; a hearing on a motion not related to the special pleas; and an evidentiary hearing on the special pleas on August 4, 2015. After hearing the testimony from five witnesses and receiving into evidence fifty exhibits, Judge Peatross, sitting as both the fact-finder and judge[2], found that the Defendants had sustained their burden in proving that the trespass and nuisance claims were barred by the statute of limitations based upon long-standing law of the Commonwealth of Virginia. Specifically, after counsel argued the intermittent vs. continuous facts presented before him and the law on permanent vs. intermittent trespass/nuisance, Judge Peatross stated:

> I really studied closely and listened carefully to the Plea in Bar on the continuing flow versus intermittent flow, and I find that the defendants have sustained their burden, and I'm going to sustain the Pleas in Bar.

(Joint Appendix, p. 739)

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irrelevant to the ruling of Judge Peatross from which Forest Lakes appeals. Judge Peatross held his own hearing and heard his own evidence. While Judge Peatross mentioned he had read "some of the transcript" (Joint Appendix, p. 411), there is no indication that his ruling was based on anything other than the evidence presented before him. Therefore, references to the hearing before Judge Swett is inappropriate and should not be considered by this Court.

[2] There was no request for a jury to hear the facts; therefore, Judge Peatross was sitting as the fact-finder. Hawthorne v. VanMarter, 279 Va. 566, 578, 692 S.E.2d 226, 234 (2010)

A final order was entered on August 31, 2015, and Forest Lakes noted a limited, specific objection to that final order which related only to their second assignment of error, not their first assignment. (Joint Appendix pages 117-118).

This Court granted the Petition for Appeal on June 6, 2016. Forest Lakes filed their Opening Brief on July 18, 2016.

STATEMENT OF FACTS

HTC is a commercial development consisting of stores, shops and restaurants located on the west side of Route 29 in Albemarle County, Virginia. Construction began in 2003. On the east side of Route 29 is a subdivision of homes making up Forest Lakes. The flow of water in the area is from west to east traveling through Powell Creek, under Route 29, to Lake Hollymead, the lake in the Forest Lakes' subdivision.

Forest Lakes alleged in their First Amended Complaint ("FAC") that construction of HTC began in 2003. (FAC ¶ 34, Joint Appendix p. 15). Forest Lakes further alleged that silt and sediment from HTC began flowing through Powell Creek into Lake Hollymead from the HTC development in November, 2003. (FAC ¶ 54, Joint Appendix p. 20).

The testimony and the documents submitted to Judge Peatross established a number of facts that really were not in dispute for the purposes of the special pleas.

a. Lake Hollymead was originally created as a settlement basin as part of the construction of Hollymead subdivision and had significant sedimentation prior to the beginning of construction of HTC. (Joint Appendix Pages 480-483)

b. The residents of Forest Lakes started complaining about increase sediment flowing into Lake Hollymead soon after development began at HTC in 2003 (Id., Pages 435-436);

c. The residents of Forest Lakes and members of the County staff held a meeting on November 13, 2003, to address the residents' concerns and the limitation on the technology in trapping silt and sediment from development. (Id., Page 448; and Trial Exhibit 10, Joint Appendix Pages 744-745);

d. The sediment basins that HTC uses were built to the County imposed standard of 60% sediment retention rate, allowing 40% to escape. (Joint Appendix Pages 449, 460, 475-477, 507, 517-518, 568);

e. The sediment basins were in compliance with County regulations. (Id., Page 496, 499);

f. That residents of Forest Lakes discussed in late 2004, early 2005, the need to take legal action because of the sediment from HTC. (Id., Page 509);

g. The sediment control basins constructed at HTC, which include the basins themselves as well as the pipes and outlet control structures, are permanent facilities which will exist as long as the HTC development exists. (Id., Pages 512-513, 534-535);

h. There is always water with silt and settlement that flows through the permanent basins to Powell's Creek and then to Lake Hollymead. (Id., Pages 514, 524, 536, 539-541, 570, 703). This is completely inconsistent and contrary to the "facts" alleged by Forest Lakes in their Opening Brief.;

i. The settlement basins serving HTC were built and put to use in the Fall of 2004 (basin 1) (Id., Page 534); and in the fall of 2003, summer of 2004 (basins 2 and 3)(Id., Pages 550-551, 554-555).

j. Photographs of Lake Hollymead in August, 2004, June, 2005, August, 2005 and October, 2005, show it receiving substantial silt and sedimentation, including the formation of a mud bank at the entrance to the Lake from Powell Creek (Id., Pages 587-589; Trial Exhibits 33-37, Joint Appendix 780-803);

Forest Lakes filed the original Complaint in this matter on July 15, 2011, eight years after construction began at HTC and more than seven years after the construction of the permanent sediment control basins at HTC.

As to the alleged "conceded" facts in Forest Lakes' Opening Brief, many were not so conceded. For example, the Defendants did not concede that in non-storm events that there was only "clear" water coming from the settlement basins. (Opening Brief, Page 4). This is exactly opposite to the testimony of all of the witnesses who addressed this issue, as identified in Paragraph h. above. Moreover, Forest Lakes' expert did not "conclusively" confirm that sediment only flowed during storm events (Opening Petition, Page 6, n.1). Swain himself admitted that there is always sediment in flowing waters (Joint Appendix, Page 703). This makes sense, as there is no water purification system for the outflow from the basins (Id., Page 537). However, it does not make a difference as set forth below.

ARGUMENT

A. Summary

Forest Lakes noted a specific objection to the final order entered by Judge Peatross. (Joint Appendix, pages 117-118). That objection

specifically referred to the summary judgment motion it had filed (but was never noticed for argument) and the Trial Court's rejection of its argument on the Restatement (Second) of Torts. The objection by its terms specifically did not include any reference to the factual findings of Judge Peatross or his ruling on the common law of Virginia. Accordingly, Assignment of Error 1 should not be considered by this Court.

In any event, the testimony and evidence submitted to Judge Peatross established that the structures on the HTC property are permanent and have since their construction in accordance with County regulations continuously caused silt and sediment to flow into Lake Hollymead, which was a man-made lake intended to be a settlement basin for the subdivision. Forest Lakes consistently misstates the evidence from the hearing in its Opening Brief (and in oral argument at the Petition hearing) in a desperate attempt to overturn the dismissal of their case. Judge Peatross, sitting as a fact-finder and judge, ruled that the defendants carried their burden on the special pleas. This ruling was entirely consistent with hundreds of years of law of this Commonwealth relating to nuisances and trespass causes of action and should not lightly be overturned.

As to Forest Lakes' second assignment of error, they would have this Court overturn century-old precedent; adopt new law in the Commonwealth which would conflict with existing statutes enacted by the General Assembly; and rule, in effect, that there is never a statute of limitations in cases of nuisance and trespass. This novel request should be rejected and this Court should affirm the Trial Court's order dismissing the claims.

B. Standard of Review

> A plea in bar asserts a single issue, which, if proved, creates a bar to a plaintiff's recovery. *Schmidt v. Household Fin. Corp., II*, 276 Va. 108, 116, 661 S.E.2d 834, 838 (2008); *Baker v. Poolservice Co*., 272 Va. 677, 688, 636 S.E.2d 360, 366 (2006); *Cooper Indus., Inc. v. Melendez*, 260 Va. 578, 594, 537 S.E.2d 580, 590 (2000). The party asserting a plea in bar bears the burden of proof on the issue presented. *Baker*, 272 Va. at 688, 636 S.E.2d at 367; *Cooper Indus*., 260 Va. at 594, 537 S.E.2d at 590; *Tomlin v. McKenzie*, 251 Va. 478, 480, 468 S.E.2d 882, 884 (1996).
>
> The issue raised by a plea in bar may be submitted to the circuit court for decision based on a discrete body of facts identified by the parties through their pleadings, or developed through the presentation of evidence supporting or opposing the plea. *Kroger Co. v. Appalachian Power Co*., 244 Va. 560, 562, 422 S.E.2d 757, 758, 9 Va. Law Rep. 547 (1992); *see Schmidt*, 276 Va. at 112, 661 S.E.2d at 836; *Niese v. City of Alexandria*, 264 Va. 230, 233, 564 S.E.2d 127, 129 (2002). If the parties present evidence on the plea ore tenus, the circuit court's factual findings are accorded the weight of a jury finding and will not be disturbed on appeal unless they are plainly wrong or without evidentiary support. *Jennings v. Kay Jennings Family Ltd. P'ship*, 275 Va. 594, 600, 659 S.E.2d 283, 287 (2008); *Cooper Indus*., 260 Va. at 595, 537 S.E.2d at 590.

> If the facts underlying the plea in bar are contested, a party may demand that a jury decide the factual issues raised by the plea. *See* Code § 8.01-336(B); *Bethel Inv. Co. v. City of Hampton*, 272 Va. 765, 770, 636 S.E.2d 466, 470 (2006); *Upper Occoquan [**234] Sewage Auth. v. Blake Constr. Co., Inc.*, 266 Va. 582, 585-86, 587 S.E.2d 721, 723 (2003); *Kroger*, 244 Va. at 562, 422 S.E.2d at 758. Conversely, if the facts are disputed and no demand for a jury is made, the "whole matter of law and fact" may be decided by the court. *See* Code § 8.01-336(B).

Hawthorne v. VanMarter, 279 Va. 566, 577-788, 692 S.E.2d 226, 233-34 (2010).

C. Assignment of Error 1 Should not be Considered by this Court

In its lengthy and specific objection to the final order of the Trial Court Forest Lakes argues that there was error in not adopting the Restatement (Second) of Torts argument advanced in their summary judgment motion. Specifically, the objection concluded:

> …ask that the decision be reversed and remanded for an appropriate application of the Restatement Second position under the facts of the case.

(Joint Appendix p. 118).

Under Rule 5:25 of the Rules of the Virginia Supreme Court, a specific objection to the ruling of the Trial Court was necessary in order to preserve an issue for appeal to this Court. As Forest Lakes did not object to the Court's findings of fact and conclusions of law as to the common law

of Virginia, their Assignment of Error 1 should not be considered by this Court.

D. The Trial Court's Ruling on the Special Pleas was Correct Under Long Standing Precedent of this Court

Should this Court consider Assignment of Error 1, the Trial Court's findings of fact and conclusions of law should be affirmed. Under Virginia law, trespasses and nuisances are classified as either "permanent" or "temporary." Norfolk & Western Railway Company v. Allen, 118 Va. 428, 434-35, 87 S.E. 558, 560 (1916). The permanent/temporary distinction is particularly important in the instant case because it affects when the applicable limitations period(s) began to run. See generally Va. Code § 8.01-243(B) ("Every action for injury to property . . . shall be brought within five years after the cause of action accrues."). If the trespass and nuisance alleged by Plaintiffs are permanent, then the limitations period began to run when the sediment control structures, including the basins, pipes, culverts and the like, were constructed in late 2003, 2004. In the alternative, if the trespass and nuisance alleged by Plaintiffs are temporary, then there is a separate limitations period for each individual discharge of silt or sediment from the HTC site. See, e.g., Hampton Roads Sanitation Dist. v. McDonnell, 234 Va. 235, 239, 360 S.E.2d 841, 843-44 (1987).

It is clear in this case that the allegedly "offending" structures, built to comply with County Code and consistent with the standards, were permanent structures. There was no evidence to the contrary. It is also clear that the silt and sediment about which Forest Lakes complains have been flowing through those permanent structures continuously since they were put into use. Therefore, Forest Lakes had five years – no later than 2009 – to file suit. They waited until 2011, even though they knew about the alleged problems since 2003 and had contemplated legal action in 2005.

In Virginia Hot Springs Company v. McCray, the defendant purchased land and built a number of improvements including a sewer system. 106 Va. 461, 462, 56 S.E. 216, 217 (1907). The plaintiff alleged that discharge from the sewer system entered a stream flowing across the plaintiff's property and rendered the stream's waters unsuitable for use. Id. at 462-63, 56 S.E. at 217. This Court classified this nuisance as permanent and continuous and held that the plaintiff's claims were time-barred because they were not asserted within five years of the sewer system being put into use. Id. at 473-74, 56 S.E. at 221.

Similarly, in Worley v. Mathieson Alkali Works, the operation of a factory owned by the defendant produced a waste product, which the

parties referred to as "muck." 119 Va. 862, 864, 89 S.E. 880, 881 (1916). The defendant used an electric motor to pump the muck into a dam so that the solid portion of the muck would not enter a nearby river. Id. at 864-65, 89 S.E. at 881. However, whenever the electric motor stopped working the defendant had to switch to a back-up electric motor. Id. The process of switching to the back-up electric motor took between fifteen and thirty minutes, during which time the solid portion of the muck was discharged into the nearby river. Id. at 865, 89 S.E. at 881. The plaintiff, a downstream property owner, filed suit to recover damages caused by these discharges. Id. at 863, 89 S.E. at 880. Noting that the nuisance would be "constant, continuous, and injurious" for as long as the defendant's factory was operated, this Court held that the plaintiff's claims were time-barred because he failed to file suit within five years of the defendant's plant being put into operation. Id. at 866, 89 S.E. at 881.

Likewise, in Churchill Apartments Associates v. City of Richmond, the plaintiff alleged that methane gas (generated by decomposing waste material) migrated onto its property due to the defendant's operation of a landfill on an adjacent property. 36 Va. Cir. 204, 204 (Richmond Cir. Ct. 1995). The court found this migration of methane gas to be a "continuing

trespass" and that the applicable limitations period began to run when the methane gas first migrated onto the plaintiff's property. Id. at 207.

Forest Lakes, in part, tries to argue that because they believe the evidence showed that sediment and silt only flowed during "rain events", that this made the alleged nuisance not "continuous" but "intermittent". First, this is not a factually correct statement of the evidence presented to Judge Peatross.[3] Moreover, if this was the deciding fact upon which the Judge's ruling was based, his finding is amply supported by the evidence and should not be overturned on appeal. Jennings v. Kay Jennings Family Ltd. P'ship, 275 Va. 594, 600, 659 S.E.2d 283, 287 (2008). As noted above, Judge Peatross clearly indicated that he had paid close attention to the evidence on this issue and found in favor of the Defendants.

However, it really makes no difference. The fact that it will rain in the future is a given – it is a certainty. Forest Lakes was well aware that any time it rained more silt and sediment flowed into its lake. Even if there are different quantities of silt and sediment when it rains, this Court has held that this does not prevent a structure from being a permanent nuisance:

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[3] In fact, not only did the Defendants' witnesses who addressed this issue testify that some amount of silt and sediment flowed continuously, but Plaintiffs' own expert agreed. (See transcript citations in Paragraph h., Page 5 above.)

> It is next said that the five year statute of limitation applies, and in support of this proposition we are cited to many Virginia cases including Virginia Hot Springs Co. v. McCray, 106 Va. 461, 56 S.E. 216, 10 L.R.A.(N.S.) 465, 10 Am. Cas. 179; Southern Railway Company v. McMenamin, 113 Va. 121, 73 S.E. 980; Southern Railway Company v. White, 128 Va. 551, 104 S.E. 865; City of Portsmouth v. Weiss, 145 Va. 94, 133 S.E. 781; and Wright v. City of Richmond, 146 Va. 835, 132 S.E. 707, which hold that **obstructions which, with certainty, will cause floods, although at uncertain intervals, constitute permanent nuisances, and that the statute begins to run as to them from the time that their inadequacy is first definitely ascertained.** With this proposition we have no quarrel.

Ellison Floral Co. v. Chesapeake & O.R. Co., 149 Va. 809, 812, 141 S.E. 834, 835 (1928)(emphasis added).[4]

Forest Lakes' Petition relies heavily on Hampton Roads Sanitation District v. McDonnell, in which the plaintiff filed suit against the defendant for discharging sewage and other pollutants onto his property. 234 Va. 235, 236, 360 S.E.2d 841, 842 (1987). Finding that the discharge of sewage occurred at intervals and was "not continuous," this Court held that the plaintiff's claims for injuries sustained within the five-year period immediately preceding initiation of the lawsuit were not time-barred. Id. 234 Va. at 239, 360 S.E.2d at 844. However, in McDonnell, the offending

[4] In Elison Floral, the Court determined that the nuisance was not permanent because the structure was created 20 years prior to the first flooding, and then caused flooding three years thereafter. This is certainly not the situation in the present case as the silt and sedimentation has continued since construction in 2003/2004.

discharge only occurred when a bypass valve was opened when the flow exceeded three times the normal and natural flow.[5]

Like the trespasses and nuisances in McCray, Worley, and Churchill Apartments, the trespass and nuisance alleged by Plaintiffs in the instant case are permanent and continuous in nature, whether based on rainfall or not. The erosion and settlement control facilities were constructed in 2003/2004, and clearly, from the photographs in 2004 and 2005 and the testimony of the witnesses, permitted silt discharge into Lake Hollymead. There are no plans to modify the existing erosion and sediment control plans, which comply with County requirements and which have been in place since development began on the HTC. Therefore, any siltation and

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[5] In G.L. Webster Company, Inc. v. Steelman, this Court distinguished McCray and Worley from McDonnell as follows:

> In [McCray and Worley] it was shown that damages resulted from the erection of permanent structures, the use of which produced the injury complained of immediately after the structures were first operated, the consequences of which continued in the normal course of such operations, and might have been expected to continue indefinitely. It was held that claims for damages therefore were barred unless action was brought within the number of years prescribed by the statute of limitations, because the causes of damages were permanent in their character, and the cause of action therefore accrued when the damage originated.

172 Va. 342, 363, 1 S.E.2d 305, 314 (1939).

sedimentation of Lake Hollymead from HTC is expected to continue as long as HTC exists.

As the trespass and nuisance alleged by Forest Lakes are permanent, the five-year limitations period for Forest Lakes' claims began to run at least in 2004 when these erosion control facilities, which are permanent like a dam, were in place. Forest Lakes did not file this lawsuit until July 2011. Accordingly, Forest Lakes' trespass and nuisance claims are time-barred by the applicable statute of limitations and Judge Peatross' findings and ruling on the Special Pleas were correct. The ruling should be affirmed.

E. The Novel Theory Advanced by Forest Lakes Should not be Recognized in Virginia.

Recognizing that the long standing law of Virginia doomed their case because the structures are clearly permanent and have caused damages for more than five years, Forest Lakes advanced in a supplemental memorandum on the Special Pleas (and separately in its Summary Judgment motion which was not ruled upon), that Virginia should adopt their version of the Restatement (Second) Torts, § 158. In effect, Forest Lakes argue that because the silt and sediment is still in Lake Hollymead, that the trespass is continuous and only stops, for statute of limitation purposes, until the silt and sediment is removed.

This novel theory is at odds with over a century of precedent in this Court. For example, the holdings in McCray and Worley would have to be, in effect, overruled. In all of the trespass and nuisance cases addressed by this Court, it has never suggested that until the "offending" material is removed there is no statute of limitations. Instead, this Court has consistently ruled that if the trespass is continuous the statute begins to run from the date of the initial wrongful act and if it is not continuous the plaintiff may bring an action only for those damages occurring within five years of filing suit. Under Forest Lakes' theory, these long-standing statements of the law would be incorrect.

The main problem with this theory, however, is that it would nullify in these cases the statute of limitations enacted by the General Assembly. There would never be a statute of limitations for a trespass or a nuisance. Under Forest Lakes' theory, it could sit idly by for hundreds of years and then file suit against the developers or owners of land.

However, Va. Code Ann. § 8.01-243 prescribes a 5-year statute of limitations for injury to property and § 8.01-230 states that the limitation period begins "to run from the date the injury is sustained in the case of …damage to property…."

As recognized by the United States Court of Appeals for the Fourth Circuit:

> Virginia courts have long applied the rule that, for purposes of the statute of limitations, there is but a single, indivisible cause of action for all injuries sustained, whether or not all of the damage is immediately apparent. A common articulation of the rule states that
>
> > … where an injury, though slight, is sustained in consequence of the wrongful or negligent act of another and the law affords a remedy therefor the statute of limitations attaches at once. It is not material that all of the damages resulting from the act should have been sustained at that time and the running of the statute is not postponed by the fact that the actual or substantial damages do not occur until a later date.
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> Caudill v. Wise Rambler, Inc., 210 Va. 11, 168 S.E.2d 257 (1969), citing Richmond Redevelopment and Housing Authority v. Laburnum Construction Corp., 195 Va. 827, 80 S.E.2d 574 (1954). See also Louisville and Nashville Railroad v. Saltzer, 151 Va. 165, 144 S.E. 456, 457 (1928) ("Whenever any injury, however slight it may be, is complete at the time the [act or omission] is completed, the cause of action then accrues.").

Joyce v. A.C. & S., Inc., 785 F.2d 1200, 1204 (4th Cir. Va. 1986).

Yet Forest Lakes would have this Court adopt a completely opposite conclusion. Even if the injury starts now a plaintiff would have to the end of time to file suit for a "continuing trespass." Every person or entity who ever

constructed any facility above the fall line of Lake Hollymead would be subject to suit forever, no matter when they performed the construction. Moreover, even if the defendants are somehow found responsible for silt damage dating back to 2003 up to the date of trial, the defendants would still be at risk in the future to additional law suits in perpetuity for the "continuing" silt flowing off their property.

This Court has recognized the purposes and intent of statutes of limitations. In Lavery v. Automation Management Consultants, Inc., 234 Va. 145, 360 S.E.2d 336 (1987), this Court was dealing with an argument that § 8.01-40 of the Code of Virginia created a statute of limitations for certain claims. This Court rejected this argument, noting:

> We reject Lavery's contention that Code § 8.01-40(B) sets forth the statute of limitations that applies to actions brought based on 40(A). First, the provision relied on by Lavery as the applicable statute of limitations does not operate like one. Lavery's view of the statute would permit a suit to be brought more than 100 years after the wrong occurs. For example, if the picture of a newborn baby were used for advertising or trade purposes without the permission of the baby's parents, and if that child lived to be 90 years old, by Lavery's analysis a suit would be timely if brought within 20 years of the person's death. This would be 110 years after the wrongful conduct.
>
> Yet a true statute of limitations "reduces to a fixed interval the time between the accrual of the right and the commencement of the action. In short, a true statute of limitations prescribes a time period within which an action must be brought upon claims or rights to be enforced." 51 Am. Jur.2d *Limitations of Actions* § 13 (1970). Code § 8.01-40(B) does not provide a

> fixed interval between accrual of the right and commencement of the action. On the contrary, it provides a variable period between accrual of the right and commencement of the action.
>
> The extraordinary time interval that could elapse before the suit must be filed is another indication that 40(B) is not a traditional statute of limitations because it flies in the face of the policy considerations that undergird the use of statutes of limitations. A statute of limitations is designed to compel the exercise of a right to sue within a reasonable time; to suppress fraudulent and stale claims; to prevent surprise; to guard against lost evidence; to keep facts from becoming obscure; and to prevent witnesses from disappearing. *See Street* v. *Consumers Min. Corp.*, 185 Va. 561, 575, 39 S.E.2d 271, 277 (1946). If Lavery's argument regarding 40(B) is correct, every one of the foregoing purposes of a true statute of limitations will be undermined.

Id., 234 Va. at 147-48, 360 S.E.2d at 338.

Forest Lakes' argument would also defeat these purposes. It is clear that Forest Lakes knew about the silt and sediment issue since 2003. They discussed taking legal action in 2005. If the Forest Lakes' rule was the law, they could wait for hundreds of years while the lake filled further with sediment and silt and then sue for the vast additional cost of removing the silt, unfazed by the passage of time, loss of witnesses and evidence. "Statutes of limitation serve the public good. Consequently, it quite reasonably seeks to restrict rather than expand the number of entities authorized to bring suit on the basis of stale claims." Burns, et al., etc. v. Board of Supervisors, 227 Va. 354, 360, 315 S.E.2d 856, 860 (1984).

Forest Lakes' theory cannot be the law of Virginia. The Trial Court's dismissal of the case should be affirmed.

CONCLUSION

For the reasons set forth above United Land Corporation of America, Route 29, LLC, NYC Land Trust, One-Ninth Land Trust, Sixty Four 616 Land Trust and S-V Associates, LLC, request that the Trial Court's finding on the Special Pleas be affirmed and that the case remained dismissed with prejudice.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 26th day of July, 2016, in compliance with Rule 5:26(h), one electronic copy of the foregoing Brief of Appellees was filed, via VACES, and ten bound copies were hand-filed with the Clerk of the Supreme Court of Virginia. On this same day, one electronic copy of the same was served, via email, upon the following:

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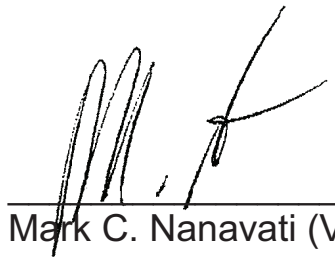

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