In the

Supreme Court of Virginia

At Richmond

Record No.: 151779

FOREST LAKES 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 APPELLEE ROSEWOOD VILLAGE OF HOLLYMEAD, LLC

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES AND CITATIONS……..…… iii

I. PRELIMINARY STATEMENT……..……. 1

II. RESPONSE TO HOAS' ASSIGNMENTS OF ERROR …… 1

III. NATURE OF THE CASE AND MATERIAL PROCEEDINGS IN THE CIRCUIT COURT……..... 2

A. Nature of the Case ...…..…….……..... 2

B. Proceedings in the Albemarle County Circuit Court …… 3

IV. STATEMENT OF FACTS …..……..……...….. 6

V. PRINCIPLES OF LAW, ARGUMENT AND AUTHORITIES…..... 8

1. Standard of Review...…..……..... 8

2. In Virginia, the Statute of Limitations for Property Damages Caused by a Trespass or Permanent Nuisance is Five Years …….…… 9

3. The Rate of the Materials Flowing out of the Permanent Basins is Irrelevant……..……. 17

4. The Case of Hampton Roads Sanitation District v. McDonnell Involved Intentional Activation of a Bypass Valve by Human Means……..… 20

5. Restatement (Second) of Torts §§158 and 161 Conflict with Code of Virginia §§8.01-230, 8.01-243 and Hundreds of Years of Virginia Precedent……..……. 21

6. The Motion for Summary Judgment Was Not Scheduled For Hearing and the Court Did Not Refuse To Rule On the Same 23

7. HOAs' Reliance On the September 2013 Hearing Before Judge Swett Is Misplaced..... 26

VI. CONCLUSION..... 27

Certificate 28

TABLE OF AUTHORITIES AND CITATIONS

CASES **Page**

Bank v. Trigg Co.,
106 Va. 327; 342, 56 S.E. 158 (1907)…… 25

Hampton Roads Sanitation District v. McDonnell,
234 Va. 235; 360 S.E.2d 841 (1987)……..……... 20

H.M. Wright v. City of Richmond,
146 Va. 835; 132 S.E. 707 (1926)……19, 21

Ivy Construction Company v. Booth,
226 Va. 299; 309 S.E.2d 300 (1983)…….……9

Lucas v. Woody,
287 Va. 354; 756 S.E. 2d 447 (2014) …….. 8

Magruder v. Virginia-Carolina Chemical Company,
120 Va. 352; 91 S.E.121 (1917)…….……..14,16, 21

McKinney v. Trustees of Emory & Henry College, Inc.,
117 Va. 763; 86 S.E. 115 (1915)……..15,16, 21

Nicholas v. Harnsberger,
180 Va. 203; 22 S.E. 2d 23 (1942)……...26

Norfolk County Water Company v. Etheridge,
120 Va. 379; 91 S.E. 133 (1917) ……..18, 21

Norfolk & Western Railway Company v. Allen,
118 Va. 428; 87 S.E. 558 (1916) ……..……14, 21

Omohundro v. Arlington County,
194 Va. 773; 75 S.E. 2d 496 (1953)..…….. 24, 25, 26

Puckett v. Commonwealth,
134 Va. 574, 579; 113 S.E. 853 (1922)……..…….....26

Rochelle v. Rochelle,
225 Va. 387; 302 S.E.2d 59 (1983) …..…….…….…… 9

Southern Railway Company v. McMenamin,
113 Va. 121; 73 S.E. 980 (1912) ……..…11, 12, 13, 14, 15, 16, 18, 21

Southern Railway Company v. White,
128 Va. 551; 104 S.E. 865 (1920) …….…….. 17, 18, 19, 20, 21

St. George v. Pariser,
253 Va. 329; 484 S.E.2d 888, 890 (1997)……...11

Virginia Hot Springs Company v. McCray,
106 Va. 461; 56 S.E. 216 (1907) ……..……14, 15,16, 21

Wash v. Holland,
166 Va. 45; 183 S.E. 236 (1936).....…….……26

Worley v. Matheison Alkali Works,
119 Va. 862; 89 S.E. 880 (1916) ……13, 14, 15, 16, 18, 21

STATUTES

Code of Virginia § 8.01-230…..……..……11, 18

Code of Virginia § 8.01-243…..……..……11, 19, 22

TREATISES

Restatement (Second) of Torts §158 ……..… 2, 21, 22, 24

Restatement (Second) of Torts §161 ……..2, 21, 24

RULES

Supreme Court Rule 5:1……..…….26

Supreme Court Rule 5:28……..…….…….1

COMES NOW, Defendant-Appellee Rosewood Village of Hollymead, LLC (hereinafter "Rosewood"), and files this brief pursuant to Rule 5:28 of the Rules of the Supreme Court of Virginia. For the reasons set forth below, this Honorable Supreme Court should affirm the Circuit Court of Albemarle County's August 31, 2015 Final Order dismissing the Forest Lakes Homeowners Association, Inc. and Hollymead Citizens Association, Inc's. (Hereinafter referred to as "HOAs") suit which was filed outside of the applicable statute of limitations.

I.
PRELIMINARY STATEMENT

The issue addressed by the Albemarle County Circuit Court was whether the HOAs' lawsuit for trespass and nuisance was filed within the applicable statute of limitations. After a full day of argument and testimony, the Honorable Paul M. Peatross, Judge Designate, in following Virginia law, found that the defendants (Hereinafter collectively referred to as "HTC defendants.") had met their burden in establishing the HOAs' complaint was barred by the applicable statute of limitations.

II.
RESPONSE TO HOAS' ASSIGNMENTS OF ERROR

Rosewood hereby responds to HOAs' assignments of error as follows:

As for the first assignment of error, the Albemarle County Circuit Court properly found that the damages alleged by the HOAs resulted from a permanent nuisance for which there was a five-year statute of limitations. (Joint Appendix Pgs. 117-118.)

As for the second assignment of error, the Final Order clearly states that the Albemarle County Circuit Court found that the HOAs' argument based upon the Restatement (Second) of Torts §§ 158 and 161 as set forth in the memorandum including the Motion for Summary Judgment and Memorandum in Support did not set forth the law of Virginia. As such, any claim that the trial court failed to rule on the HOAs' Motion for Summary Judgment is discounted by the very language of the final order. In that regard, the Albemarle Circuit Court properly found that Virginia has a five-year statute of limitations for trespass and permanent nuisance actions and has not adopted the Restatement (Second) of Torts §§. (Joint Appendix Pgs. 117-118.)

III.

NATURE OF THE CASE AND MATERIAL PROCEEDINGS IN THE CIRCUIT COURT

A. Nature of the Case

This case involved the legal determination of whether the five-year statute of limitations applied to a property damage claim arising out of the

flow of silt and sediments from permanent basins into a neighborhood lake.

B. Proceedings in the Albemarle County Circuit Court

The HOAs' original complaint filed on July 15, 2011, named nineteen parties purportedly involved in the development of the Hollymead Town Center on Route 29 in Albemarle County, Virginia. Factually, the complaint alleged that since 2003, silt and sediment had flowed from the Hollymead Town Center into Lake Hollymead. (Joint Appendix Pgs. 1-25.)

On April 5, 2012, the HOAs filed an amended complaint naming eighteen different parties involved in the development of the Hollymead Town Center. (Joint Appendix Pgs. 26-65.) The amended complaint was based on the alternative causes of action for trespass and nuisance. Factually, the amended complaint alleged that uncontrolled silt from the Hollymead Town Center caused discoloration to Lake Hollymead starting in or about November of 2003. HOAs' amended complaint sought the recovery of damages to address the removal of silt and sedimentation from Lake Hollymead. In addition to compensatory damages, the first amended complaint included a request for punitive damages. (Joint Appendix Pgs. 26-65.) The thirty-nine page amended complaint focused on the county approval of the Hollymead Town Center's erosion and sediment plans and

the HOAs' complaints to the county starting in at least 2005. The amended complaint acknowledged that the sediment basins were not effective in immediately filtering out the clay sediment particles. Notably absent from the complaint were any dates to support intermittent conditions. Rather the entire complaint focused on the claimed inadequacy of the plans and the sediment basins approved by the county. (Joint Appendix Pgs. 26-65.)

In response to the complaint, Rosewood filed a demurrer and a plea in bar. (R. 107-109 and R. 149-152.) By an agreed order, the HOAs' request for punitive damages against Rosewood was dismissed with prejudice. (R. 264-269.) On February 14, 2013, the Honorable Jay T. Swett, retired judge overruled Rosewood's Demurrer. (R. 807-810A.) By an order dated September 10, 2013, The Honorable Jay T. Swett limited discovery to the issues pertinent to the plea in bar and dismissed the punitive damage claims as to all defendants. (R. 807-810A.) On September 17, 2013, an *Ore Tenus* hearing was held for the Plea in Bar relating to the five-year statute of limitations, in front of the Honorable Jay T. Swett. For undisclosed reasons, Judge Swett did not issue a ruling.

With the case still pending and no order provided as to the Pleas in Bar, on May 6, 2014 the Honorable Cheryl V. Higgins, entered an order of recusal. (Joint Appendix Pg. 77.) On May 12, 2014 an order was entered

designating The Honorable Paul M. Peatross, Jr. as Judge. (Joint Appendix Pg. 78.)

On November 26, 2014 Judge Peatross held a status conference. The HTC defendants collectively asked for a new *Ore Tenus* hearing. The HOAs objected to a new *Ore Tenus* hearing suggesting a decision on the pleas in bar could be based on the prior transcript and memorandum. Judge Peatross granted the HTC defendants' request and scheduled a new *Ore Tenus* hearing for August 4, 2014. In granting this new hearing date, the court stayed discovery as well as any additional briefing. (Joint Appendix Pgs. 79-104.)

Despite the directives from Judge Peatross, the HOAs filed a Motion for Partial Summary Judgment and a supporting memorandum on March 2, 2016. At no time was the HOAs' Motion for Summary Judgment scheduled for hearing. In fact, the HTC defendants did not file oppositions to this Motion as it was never noticed for hearing.

Pursuant to the order entered on March 16, 2015 an *Ore Tenus* hearing for the Pleas in Bar was presented in front of the Honorable Paul M. Peatross on August 4, 2015. After an eight-hour hearing, wherein the HTC defendants put on four witnesses and admitted thirty-nine exhibits and

the HOAs presented one witness and admitted thirteen exhibits, the Honorable Paul M. Peatross issued his ruling. In issuing his ruling from the bench, Judge Peatross noted that he had read the briefs, tried to educate himself on the issues, listened to the evidence closely and asked questions on things that concerned him. He went on to state the following:

> So on the Restatement of Torts Second, I think it's the Supreme Court's place to determine that law, not my law, so I don't find a continuing trespass with no statute of limitations. So I'm going to sustain the Plea in Bar in terms of there's no continuing trespass with no statute of limitations. I do not accept that. I think that's the Supreme Court's call. 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 Pg. 739.)

On August 31, 2015, the Albemarle County Circuit Court entered a Final Order sustaining the Pleas in Bar based on the five-year statute of limitations and dismissing the action with prejudice. (Joint Appendix Pgs. 717-718.)

IV.

STATEMENT OF FACTS

Lake Hollymead was initially constructed as a sediment basin for a multi-family planned community known as Hollymead. Since construction of this lake, silt and sediment from the natural erosion of Powell Creek has

flowed under the Route 29 corridor through a large culvert built in the 1950s into Lake Hollymead. The testimony was that prior to the construction of the Hollymead Town Center, Lake Hollymead already had a "significant" sediment load. (Joint Appendix Pgs. 480-488, 503-504.)

The planning for development of the Hollymead Town Center, a large commercial and residential real estate development located along Route 29 in Albemarle County, Virginia started in the early 2000s. Like the Hollymead residential community and Lake Hollymead, the Hollymead Town Center is located in the Powell Creek watershed. (Joint Appendix Pgs. 26-65 and 468-472.)

After an extensive planning period, development of the Hollymead Town Center started in 2003. As part of the initial construction effort, the county required the construction of permanent basins to handle the surface and stormwater. In conformity with the county requirements, three basins were constructed. (Joint Appendix Pgs. 512-514.) Silt and sediment from the Hollymead Town Center flowed through these permanent basins, through the culvert under Route 29 into Lake Hollymead beginning in 2003. In 2003, the HOAs complained to the County of Albemarle regarding the silt and sediment going into Lake Hollymead from the Hollymead Town Center. (Joint Appendix Pgs. 435-436.) In response to those complaints, the HOAs

were told that the Hollymead Town Center basins would only capture sixty percent (60%) of the silt and sediment and forty percent (40%) would flow downstream through the Powell Creek watershed into Lake Hollymead. (Joint Appendix, Pgs. 26-65, 448-450, 460, 475-477, 507, 517-518, 568 & 744.)

Despite visible damages and complaints of silt and sediment coming from the Hollymead Town Center, the HOAs waited over seven years, until 2011 to file a suit seeking recovery for property damages. (Joint Appendix Pgs. 1-25 and 448-450.)

V.

PRINCIPLES OF LAW, ARGUMENT AND AUTHORITIES

1. Standard of Review

The case at hand was submitted for decision at an *Ore Tenus* hearing. Although HOAs' brief would suggest otherwise, the facts presented were undisputed.

Where the facts are undisputed, as in the present case, the applicability of the statute of limitations is a purely legal question of statutory construction which is reviewed under a *de novo* standard. Lucas v. Woody, 287 Va. 354; 756 S.E.2d 447 (2014).

When the trial court hears the evidence *Ore Tenus*, its findings are entitled to the weight accorded to a jury and will not be disturbed on appeal unless they are plainly wrong or without evidence to support it. Ivy Constr. Co. v. Booth, 226 Va. 299, 301; 309 S.E.2d 300, 301 (1983) (per curiam) (citing Rochelle v. Rochelle, 225 Va. 387, 393; 302 S.E.2d 59, 63 (1983)).[1]

2. In Virginia, The Statute of Limitations for Property Damages Caused by a Trespass or Permanent Nuisance is Five Years

The undisputed evidence presented at the *Ore Tenus* hearing on August 4, 2015 established the permanent sediment basins for the Hollymead Town Center had been constructed in 2003 and 2004 to handle surface and stormwater run-off. Since construction of the basins in 2003 and continuing to the present, silt and sediment has flowed through the basins into the Powell Creek watershed, through a permanent culvert under Route 29 and into Lake Hollymead. Since construction of the basins, Lake Hollymead has received considerable amounts of silt and sediment from

[1] The Order entered by the Circuit Court on August 31, 2015 was after an August 4, 2015 *Ore Tenus* hearing held on the Appellees' Special Pleas based upon the statute of limitations. Although HOAs have referenced a standard of review for a Motion for Summary Judgment, the HOAs never noticed a Motion for Summary Judgment for hearing, and conceded they were not asking for summary judgment on August 4, 2015. (Joint Appendix Pg. 190.)

the Hollymead Town Center. (Joint Appendix, Pgs. 26-65, 448-450, 550-551 & 744.)

The testimony offered at the August 4, 2015 hearing established that the storm water management systems and more particularly, the basins constructed for the Hollymead Town Center were designed and built to capture sixty percent (60%) of the silt and sediment and allow forty percent (40%) of all silt and sediment to flow through the pipes, the culverts and through Powell Creek into Lake Hollymead. (Joint Appendix Pgs. 448-450, 550-551, 568 & 744.)

The basins operate as designed and handle surface and rain water that flows onto the Hollymead Town Center's site from hundreds of acres of land in the Powell Creek watershed. Irrespective of rain events, there is a constant flow of water which contains varying amounts of silt and sediment that goes through the basins, the piping systems, and culverts and into the Powell Creek watershed, including Lake Hollymead.[2] (Joint Appendix Pgs. 514, 523-524, 568 and 703.)

Despite knowing the basins were operating as designed and would always allow silt and sediment to flow into Lake Hollymead, the HOAs sat

[2] The HOAs expert Kenneth Swain, as well as Mark Graham and Katurah Roell testified that all flowing water contains some silt and sediment. (August 4, 2015 hearing Joint Appendix Pgs. 514, 568, 703.)

on their rights and did not file suit within the applicable five-year statute of limitations. There was nothing preventing the HOAs from filing suit, they even discussed seeking legal relief in 2005. (Joint Appendix Pg. 509.)

Pursuant to Code of Virginia §8.01-243, there is a five-year statute of limitations for property damage claims. Pursuant to Code of Virginia §8.01-230, in every action for property damages in which a limitation period is prescribed, the right of action shall be deemed to accrue and the prescribed limitation period shall begin to run from the date of the damage to the property. The clock thus begins running whenever "any injury, however slight, is caused by the negligent act" regardless of whether additional injury occurs later as a result of the same act. St. George v. Pariser, 253 Va. 329; 484 S.E.2d 888, 890 (1997). The evidence at the August 4, 2015 hearing established Lake Hollymead had received considerable amounts of silt and sediment from the Hollymead Town Center beginning in 2003 and the HOAs were complaining of the Hollymead Town Center causing damages to Lake Hollymead in 2003.

The Albemarle County Circuit Court's finding that the trespass and nuisance actions were barred by the statute of limitations was consistent with rulings of this Supreme Court. In Southern Railway Co. v. McMenamin, 113 Va. 121; 73 S.E. 980 (1912), this Supreme Court

reversed the Circuit Court's judgment for the plaintiff homeowners in a trespass and nuisance action based on the railway's operation of a coal chute near the McMenamins' property. The evidence showed there were continuous damages to McMenamin's property from the time the coal chute was erected up through the date the suit was filed, which was a period of more than five years. This Supreme Court noted that where a nuisance is permanent, the consequences of which, in the normal course of things, will continue indefinitely, there is but a single action therefore, and the entire damage suffered, both past and future, must be recovered in that action, and the right to recover will be barred unless it is brought within the prescribed number of years from the time the cause of action accrued.

In issuing the McMenamin ruling, this Supreme Court found that the injuries to the property did not have to be continuous in the same manner and substantially to the same extent during the entire period of the construction. More particularly, the damages did not need to exist to the same extent during the period of five years.

The evidence presented at the subject *Ore Tenus* hearing, established that the HOAs' damages accrued in 2003 when the sediment basins were put into operation and the damage to the lake was evident. With this evidence, the Circuit Court properly found that the HOAs failed to

file their action within the applicable statute of limitations, and dismissed the nuisance and trespass counts with prejudice. The evidence at the August 4, 2015 hearing established the basins would always allow silt and sediment to flow through to Lake Hollymead. Although the amount of silt and sediment flowing into Lake Hollymead varied, the authority from this Supreme Court provided that in trespass and nuisance cases, the damages do not have to be the same extent during the five years. With this precedent to follow, the Albemarle County Circuit Court found the HOAs' suit to be untimely.

The same logic was applied by this Supreme Court in the case of Worley v. Mathieson Alkali Works, 119 Va. 862; 89 S.E. 880 (1916). In Worley, the defendant owned and operated a plant in Saltville, Virginia. The plant was completed and put into operation in June 1895 to manufacture soda ash, caustic soda, or concentrated lye, and bicarbonate, or ordinary cooking soda. Worley sued for damages caused by pollution of the North Fork of the Holston River. Mathieson filed a plea in bar based on the statute of limitations, asserting Worley's claim should have been brought within five years of the plant's opening. In affirming the trial court's proper application of the statute of limitations, this Supreme Court stated:

> Undoubtedly, repeated actions may, as a general rule, be brought to recover for nuisances as long as the nuisance continues; but where there is a permanent nuisance, the consequences of which, in the normal course of things, will continue indefinitely, there can be but a single action therefore, and the entire damage suffered, both past and future, must be recovered in that action, and the right to recover will be barred unless it is brought within the prescribed number of years from the time the cause of action accrued. Va. Hot Springs Co. v. McCray, 106 Va. 461, 56. S.E. 216, 10 L. R. A. (N. S.) 465, 10 Ann. Cas. 179; Southern Ry. Co. v. McMenamin, 113 Va. 121, 73 S.E. 980; N. & W. Ry. Co. v. Allen, 118 Va. 428, 87 S.E. 558.
>
> It is clear from the evidence in the present case that the damage alleged to have been sustained by the plaintiff has resulted from a cause permanent in its character. It is manifest that the plant, when first constructed, was intended to be permanent, and it has been so treated and used ever since. As long as it is operated, so long will the nuisance complained of be constant, continuous and injurious to the plaintiff. In the light of the authorities cited, this is plainly the case of a permanent nuisance, the consequences of which, in the normal course of things, will continue indefinitely. Therefore, the plaintiff should have brought his action for the entire damage, past and future, and should have brought it within five years from the time the cause of action accrued, which was in 1895 when the defendant first put its plant into operation. Having failed to do this, the plaintiff's claim is clearly barred by the statute of limitations. Worley, *supra et.* 865-866.

The same result was reached in the case of Magruder v. Virginia-Carolina Chemical Company, 120 Va. 352; 91 S.E. 121 (1917). In this case, Magruder owned 808 acres of land lying on the North Anna River. Magruder complained that the chemical company's operation of certain iron

and pyrite mines polluted the North Anna River and Magruder's farm, killing fish, trees, and other vegetation; and reducing the value of the land. The suit alleged that the pollution was a permanent nuisance, and asked for damages and an injunction. The chemical company filed a demurrer, and asserted the statute of limitations as a defense. The Louisa County Circuit Court dismissed the action based on the five-year statute of limitations. This Supreme Court affirmed that decision, and in doing so, stated the following:

> The trial court was of opinion that the cause of action was barred by the five years' limitation, and decreed accordingly. From the correctness of that conclusion, there can be no escape under the following decisions of this court: Va. Hot Springs Co. v. McCray, 106 Va. 461, 56 S.E. 216, 10 L. R. A., N. S., 465, 10 Ann. Cas. 179; Southern Ry. V. McMenamin, 113 Va. 121, 73 S.E. 980; McKinney v. Trustees of Emory & Henry College, 117 Va. 763, 86 S.E. 115, and Worley v. Mathieson Alkali Works, 119 Va. 892, 89 S.E. 880. These cases declare the firmly established rule of law in this jurisdiction to be, that where there is a permanent nuisance, the consequences of which, in the normal course of things, will continue indefinitely, there can be but a single action therefore, and the entire damage suffered, both past and future, must be recovered in that action; and that the right of recovery will be barred unless it is brought within the prescribed number of years from the time the cause of action accrued.
>
> The undisputed facts of this case bring it completely within the influence of the principle stated, and, in essentials, the case is indistinguishable from that of Worley v. Mathieson Alkali Works, *supra*. The causes of

> action in both cases are the same, namely, the alleged injury to property rights of plaintiffs and the destruction of fish, etc., from the pollution of the waters of non-navigable streams caused by discharging noxious refuse matter therein from the defendants' works. In both cases, the grounds of complaint are permanent, 'the consequences of which, in the normal course of things, will continue indefinitely; *** that the plant when first constructed was intended to be permanent, and has been so treated and used ever since; and that as long as it is operated so long will the nuisance complained of be constant, continuous and injurious to the plaintiff.'
>
> Upon these considerations, the ruling of the trial court in sustaining the plea of the statute of limitations and dismissing the bill was plainly right. MacGruder, Supra. @ 354-355.

In the case at hand, the sediment basins through which all silt and sediment flow from the Hollymead Town Center are permanent structures. The instrumentality of the trespass and nuisance of which the plaintiff complains has been ongoing from 2003 to the present. As in the case of Worley v. Mathieson Alkali Works, 119 Va. 862; 89 S.E. 880 (1969), it is manifest that the Hollymead Town Center and the basins when first constructed, were intended to be permanent, and the basins have been so treated and used ever since. As long as the shopping center exists the nuisance and trespass complained of by the HOAs will be constant, continuous and injurious. Therefore, the Circuit Court properly found that the HOAs should have brought this action within five years of 2003 when

the storm water basins were first put into operation. Having failed to file an action by 2008, the Circuit Court in following Virginia precedent, found that the HOAs' claims were barred by the statute of limitations.

3. The Rate of the Materials Flowing Out of the Permanent Basins is Irrelevant

Following ample Virginia precedent, the Circuit Court recognized that the frequency of the discharges or flows from the basins was not the issue. Guidance for this ruling was set forth in Southern Ry. Co. v. White, 128 Va. 551; 104 S.E. 865 (1920), wherein this Supreme Court found that a culvert which occasionally overflowed and flooded the plaintiff's property was a permanent nuisance. White owned property along a river. In 1915, the railway company built an arch, or culvert, over the river. Prior to the culvert, the railway used a bridge located at a wider point along the river. In August 1917, heavy rain caused the river to back up at the point of the culvert, flooding White's property. This Supreme Court found that the culvert was a permanent nuisance and the statute of limitations started when the culvert was built.

Finding that the plaintiff could not compel removal of the culvert and the culvert was a permanent menace, this Supreme Court found the statute of limitations started when the nuisance was completely erected. In issuing

the White decision, this Supreme Court took the time to compare the permanent nature of the railway's culvert in White to the permanent nature of the coal chute in Southern Ry. Co. v McMenamin, 113 Va. 121; 73 S.E. 980; the dam in Norfolk County Water Co. v. Etheridge, 120 Va. 379; 91 S.E. 133; and the plant in Worley v. Mathieson Alkali Works, 119 Va. 862; 89 S.E. 880. In rejecting an argument that the culvert only caused temporary overflowing, this Supreme Court stated:

> It may be argued that there is a substantial difference of fact between the cases in which waters are continuously polluted, or lands are perpetually overflowed by backwater from a dam, and a case like the one in judgment in which the overflows are recurrent and of short duration. The same principle of liability is appropriate to all cases where the nuisance is permanent and a constant and continuous agency of injury. Under the test of actual trial, the inadequacy of the culvert in the instant case was established. It is the proven efficient cause of overflows upon the land affected. Under the weather conditions on the watershed of the Hardware river, these overflows due to defendants' culvert will occur with certainty though at uncertain intervals. The liability to overflow for which defendant is responsible has introduced a new element of uncertainty, an added risk in the cultivation of the lands in question. This uncertainty of return, the chances that the crop pitched will not be harvested, are shown to have affected the market value of the plaintiffs' lands. The offending cause is the defendants' culvert. It is an established permanent nuisance, the consequences of which in the normal course of things will continue indefinitely. (Southern Railway Co v. White, *supra* at 569).

The White analysis was also relied upon by this Supreme Court in the 1926 case of H.M. Wright v. City of Richmond, 146 Va. 835; 132 S.E. 707 (1926). H.M. Wright sued the city due to an insufficient culvert that allowed flooding of his land. In addressing the permanency of the culvert and the fact that it was a permanent nuisance, this Supreme Court stated:

> The culvert which gives rise to this litigation is laid under one of the streets, built for present and future use, and we may assume is constructed with a view to its permanency, and, while the authorities are in almost hopeless confusion when they attempt to lay down rules as to what are obstructions permanent in their nature, this case we think is controlled by (Southern Railway Company v. White, 128 Va. 551, 104 S.E. 865).

Although the HOAs attempt to discount this court's decision in White, *Supra.* by claiming it is a railroad case, White did not address trains or tracks but rather a permanent structure that carried water, the same as the basins constructed for the Hollymead Town Center.

Following this precedent, the Albemarle County Circuit Court found the offending cause of the HOAs' damages to Lake Hollymead was the permanent basins, a permanent nuisance, which in the normal course of things would continue indefinitely. As the cause of action arose when the

basins were constructed and damages were evident in 2003, the HOAs' claims were barred by the five-year statute of limitations.

4. The Case of *Hampton Road Sanitation District v. McDonnell* Involved Intentional Activation of a Bypass Valve by Human Means

The HOAs have consistently relied upon this Supreme Court's decision in Hampton Roads Sanitation District v. McDonnell, 234 Va. 235; 360 S.E.2d 841 (1987). However, the discharges onto McDonell's property were the result of a human purposely activating a bypass valve on nine different occasions allowing over two million (2,000,000) gallons of wastewater to be discharged onto the McDonnell's property in less than one year. With these facts, the McDonnell case was distinguished by the Albemarle Circuit Court with Judge Peatross noting that when the discharge occurred, it was by human hand. (Joint Appendix Pg. 595). In the case at hand, the basins were constructed to operate without human intervention, and are specifically designed to allow water, silt and sediment flow through the permanent pipes and culverts into Powell Creek and Lake Hollymead. The facts in this case are more similar to the cases involving culverts such as that constructed in the case of Southern Railway Company v. White. Accordingly, the Albemarle County Circuit Court in following White and other permanent nuisance precedent, properly

sustained the plea in bar finding the HOAs had missed the statute of limitations.

5. Restatement Second of Torts §158 and 161 Conflict with Code of Virginia §8.01-230, §8.01-243 and Hundreds of Years of Virginia Precedent

In sustaining the plea in bar, the Albemarle Circuit Court properly found that there was no continuing trespass and the five-year statute of limitations applied. The Circuit Court's conclusion is supported by Code of Virginia §§8.01-230 and 8.01-243, and hundreds of years of Virginia precedent including but not limited to this Supreme Court's findings and rationale set forth in Worley v. Mathieson Alkali Works, 119 Va. 862; 89 S.E. 880 (1916); Va. Hot Springs Co. v. McCray, 106 Va. 461, 56. S.E. 216 (1907); Southern Ry. Co. v. McMenamin, 113 Va. 121, 73 S.E. 980 (1912); N. & W. Ry. Co. v. Allen, 118 Va. 428, 87 S.E. 558 (1916); Magruder v. Virginia-Carolina Chemical Company, 120 Va. 352; 91 S.E. 121 (1917); McKinney v. Trustees of Emory & Henry College, Inc., 117 Va. 763; 86 S.E. 115; Southern Ry. Co. v. White, 128 Va. 551; 104 S.E. 865 (1920); Norfolk County Water Co. v. Etheridge, 120 Va. 379; 91 S.E. 133 (1917); and H.M. Wright v. City of Richmond, 146 Va. 835; 132 S.E. 707 (1926).

There was no need for the Circuit Court to resort to the Restatement or precedent from other jurisdictions when the Supreme Court of Virginia

has specifically addressed the application of the statute of limitations to surface and storm water cases involving a permanent structure. There is no dispute in Virginia as to what constitutes a trespass and as such, the Restatement (Second) of Torts §158 is unnecessary in this jurisdiction. The Albemarle Circuit Court was presented with ample undisputed evidence that the HOAs started complaining about silt and sediment flowing into Lake Hollymead from the Hollymead Town Center starting in 2003 (Joint Appendix Pgs. 448-450, 568 & 744). There was nothing preventing the HOAs from filing a lawsuit within the five-year statute of limitations established by the Virginia legislature. The undisputed evidence at the August 4, 2015 trial established that in late 2004, early 2005 the HOAs discussed the need to take legal action to address the very issues in this lawsuit. (Joint Appendix Pg. 509.) After hearing this evidence and following ample Virginia precedent, the Circuit Court applied Code of Virginia §8.01-243 which barred the HOAs' claims as untimely.

For the Circuit Court to have accepted the HOAs' Restatement argument would have opened the floodgates of litigation against the airport, the trailer park, and everyone else who developed land in the Powell Creek watershed. Not only would the floodgates of litigation have been opened, the cases would have had no limitation in time, opening up the potential for

litigation to date back to World War II or beyond. Opening that floodgate was unnecessary as this Court and the Virginia legislature have established a five-year statute of limitations for property damage cases arising out of a trespass or permanent nuisance. Accordingly, there is no justification for a review of this Circuit Court decision.

6. The Motion For Summary Judgment Was Not Scheduled For Hearing And The Court Did Not Refuse To Rule On The Same

The HOAs' second assignment of error asserts the Albemarle County Circuit Court erred in refusing to rule on the HOAs' Motion For Summary Judgment. This assignment of error ignores the following procedural facts:

- The HOAs' Motion for Summary Judgment was never scheduled for hearing. (Notably absent from the record is any Notice scheduling the HOAs' Motion for Summary Judgment.)
- The HOAs' made an affirmative representation to the court that they were not asking the court for summary judgment. (Joint Appendix Pg. 190.)

As there was no summary judgement scheduled, the HOAs cannot complain that the court erred in refusing to rule on the same.

Although the Motion for Summary Judgment was not on the court's schedule and was not noticed for hearing or briefed by the defendants, the HOAs presented arguments from the Motion for Summary Judgment in the Motion to Strike and the closing argument of August 4, 2015. (Joint Appendix Pgs. 591, 603-608, 734-735.) Because the HOAs' Motion for Summary Judgment restatement arguments were made as part of the motion to strike and in closing argument, the final order reflects that "the Plaintiffs argument based upon the Restatement (Second) of Torts §§ 158 and 161, as set forth in their memoranda, including their Motion for Summary Judgment and Memorandum in Support, does not correctly set forth the law of Virginia; … (Joint Appendix Pgs. 117-119.)

This Supreme Court can consider only the evidence presented in the record. Omohundro v. Arlington County, 194 Va. 773; 75 S.E. 2d 496 (1953). Nowhere in the record is there an objection stated by the HOAs that the Albemarle County Circuit Court refused to rule on the Motion for Summary Judgment. As stated above, the HOAs told the court that they were not asking for summary judgment as "That's down the road." (Joint Appendix Pg. 591.) As the record is devoid of any evidence to support a claim that the Motion for Summary Judgment was noticed and the

Albemarle County Circuit Court refused to rule on the same, this second assignment of error should not be noticed by this court.

In Omohundro v. Arlington County, 194 Va. 773; 75 S.E. 2d 496 (1953) the appellant alleged that the trial court erred in permitting Officer Fuschman to testify, because he was not properly qualified to give certain testing. As there was no objection made to the specific testing, this court stated the following:

> The record does not show that any objection was made to the use of the "Drunk-O-Meter" machine as such, or as to its reliability when operated by a competent person. In the trial court, as we have stated, the defendant objected to the evidence relating to the "Drunk-O-Meter" test on the grounds that Fuschman was not qualified either to operate the said machine or to give an opinion as to results obtained from its operation. In his brief, he continues to lay much stress on the contention that Fuschman was allowed to render an opinion as to the results of the test made by the machine. The stipulation of facts does not show that Fuschman either analyzed the results of the test or expressed any opinion with reference thereto. It merely shows that Fuschman testified only as to his observation of the physical condition of the defendant and as to the number of the reading which he obtained from the "Drunk-O-Meter" test. He did not, as an expert or layman, undertake to interpret or analyze what the reading ".21" meant, nor express any opinion in that respect.
>
> We can consider only the evidence presented in the record. Questions raised in the brief about evidence not shown in the record cannot be considered by us. The purpose of exceptions in the court below and assignments of error in this court is to point out the specific error committed by the trial court. Counsel should be required to "lay his finger on the error." Bank v. Trigg Co., 106 Va. 327, 342, 56 S.E. 158. "Only errors so assigned

> will be noticed by this Court." Rule of Court 5:1, § 4. Puckett v. Commonwealth, 134 Va. 574, 579, 113 S.E. 853; Wash v. Holland, 166 Va. 45, 50, 183 S.E. 236; Nicholas v. Harnsberger, 180 Va. 203, 208, 22 S.E.2d 23.

Omohundro, *Supra.* @777-778. This ruling is consistent with the requirements of Virginia Supreme Court Rule 5:25 which provides that objections be stated with reasonable certainty. As support for the second assignment of error, HOAs reference the Final Order entered by the Albemarle County Circuit Court. (Joint Appendix 717-718.) However, the objection noted on page 2 of the order complains that the court failed to hear the Motion for Summary Judgment, not that the court failed to rule on the same. The HOAs have failed to preserve the error set forth as assignment number two. Accordingly this court should refuse to notice this assignment.

7. HOAs' Reliance On The September 2013 Hearing Before Judge Swett Is Misplaced.

At no time during the August 4, 2015 hearing was the September 2013 transcript introduced as an exhibit. Furthermore, none of the testimony from the September 2013 hearing was incorporated or read into the record for the August 4, 2015 hearing. As such, the HOAs references and reliance on testimony from Swain at the September 2013 hearing and

references to Judge Swett's questioning are misplaced and should not be considered by this court.

VI.

CONCLUSION

As the HOAs' causes of action for trespass and nuisance accrued in 2003, the Albemarle County Circuit Court properly sustained the Plea in Bar based on the statute of limitations. Based on the foregoing, is requested that this Supreme Court deny HOAs Petition for Appeal, and affirm the Circuit Court's ruling and the judgment entered for Rosewood Village of Hollymead, LLC and the other defendants.

Respectfully submitted,

ROSEWOOD VILLAGE OF
HOLLYMEAD, LLC

By Counsel

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CERTIFICATE

I, Terry Lynn, counsel for the Appellee Rosewood Village of Hollymead, LLC, hereby certify, pursuant to Rule 5:26(h), this 4th day of August, 2016, that:

1. The Appellant is Forest Lakes Community Association, Inc. and Hollymead Citizens Association, Inc.

2. The address and telephone number of counsel for the Appellant is:

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3. The Appellee is Rosewood Village of Hollymead, LLC.

4. The address and telephone number of counsel for the Appellee is:

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5. Remaining Appellees are as follows:

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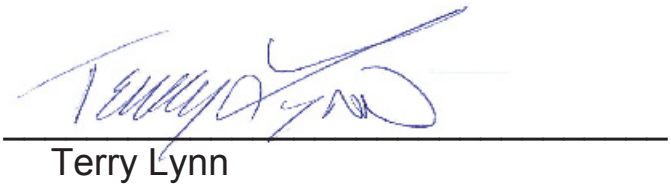
6. A true and correct electronic copy of the foregoing Brief of Appellee was served via e-mail to counsel referenced in paragraphs 2 and 5 above.

7. Ten copies of the Brief of Appellee were hand-filed with the Clerk of the Supreme Court of Virginia on behalf of Appellee, Rosewood Village of Hollymead, LLC and One electronic copy of the Brief of Appellee was filed, via VACES.



Terry Lynn