IN THE

Supreme Court of Virginia

RECORD NO. 151779

FOREST LAKES
COMMUNITY ASSOCIATION, INC., *et al*.

Appellants,

v.

UNITED LAND CORPORATION
OF AMERICA, *et al*.,

Appellees.

OPENING BRIEF OF APPELLANTS

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STATEMENT OF THE CASE, MATERIAL PROCEEDINGS AND FACTS

This case is a civil action for property damages. Appellants Forest Lakes Community Association, Inc. and Hollymead Citizens Association, Inc. ("HOAs") asserted that intermittent, storm water generated silt and sediments were discharged to HOA property from a large commercial development conducted by the collective Appellee Developers ("Developers") at the Hollymead Town Center ("HTC"). First Amended Complaint, App. 29 - 31. Trespassing sediments entered and filled in large portions of Lake Hollymead, a HOA privately owned downstream Lake. After attempts to get relief from the local government failed, the HOAs filed suit against the Developers and owners of the HTC development on July 15, 2011. Complaint, App. 29 - 65.

After the sitting Judge C. Higgins recused herself, App. 77, the Hon. Jay Swett (retired) sat by designation. App. 78. Developers/ Appellees filed demurrers and pleas in bar. App. 66 - 76. All demurrers were denied by Judge Swett, who then scheduled an evidentiary hearing on Developers/ Appellee's pleas in bar, all related to a statute of limitations defense. Hearing on the plea in bar were heard on September 17, 2013. First hearings, App. 127 - 393. Judge Swett then recused himself without

ruling.

The Hon. Judge Paul M. Peatross (retired) took over (App. 84) and requested that the pleas in bar be argued again, which occurred on August 4, 2015. Second hearing, App. 402-702. In the interim, Appellant HOAs filed a motion for summary judgment asserting a continuing trespass under the *Restatement Second*, Torts. Judge Peatross rendered a bench opinion holding that "Defendants had met their burden" as to the pleas in bar. The trial court granted the pleas in bar and dismissed the case holding that there was no continuing trespass under the *Restatement*, opining that such was "the Supreme Court's call." App. 117 - 125.

The Appellant HOAs claim trespass of silts and sediments to their private lake, Lake Hollymead, caused by the intermittent, storm water generated discharges of such silt and sediments from the storm water retention facilities at the HTC development. First Amended Complaint ("FAC"), App. 59 - 60, ¶¶ 108-111. Appellant HOAs alleged that HTC storm water retention basins collected storm water driven soil and sediment from the HTC site and then periodically discharged such sediments into Powell Creek, which ultimately entered Lake Hollymead. FAC ¶ 91, App. 55. Lake Hollymead is a private lake jointly owned by the

HOAs as a common area. FAC ¶ 3, App. 29-30. HTC Development began in 2003 with the denuding and clearing of the entire 200 acre site. FAC 34, App. 16-17, photo App. 742.

Both the parties and the Courts agreed that most facts were not in dispute. Transcript, App. 140, 398, 415, 421 - 426. As both trial judges noted, Appellee/Developers admitted that sediments began to enter Lake Hollymead from the HTC development in the fall of 2003, App. 416, and was conceded by the Appellant HOAs' in their complaint. FAC ¶ 46, App. 44.

To control the massive area of highly erosive soils, Appellees/ Developers constructed multiple sediment retention basins, ultimately leaving three large sediment retention basins to collect all storm water runoff from the denuded property. App. 174 - 75. There is no dispute that these retention basins collected silt and sediment washed into them during storm water events, and then periodically discharged the unsettled contents into Powell Creek, which flowed directly into Lake Hollymead. App. 416, Passim. There was no dispute that the retention basins were designed to hold storm water to settle out sediments, and that unsettled sediments not retained in the basin discharged to Powell Creek and Lake

Hollymead.

There was no dispute that the retention basins had finite capacity, and discharged sediment runoff from the HTC site, along with diverted spring and stream water. App. 246, 251. The parties agreed that the retention basins would discharge “clear” spring or stream water at times, but during storm events, would discharge the additional sediments captured by the basins. App. 237 - 39 (sediment varies with storms); App. 247 (sediment varies with rainfall); App. 253 - 54 (amount of discharge varies with storms); App. 392 (silt and sediment varies with rainfall events), and sediments deposited in Lake Hollymead as storm events occur, App. 393. Same App. 419 (only sediment load to Lake Hollymead was retention basin discharges).

No evidence opposed the HOAs’ allegations that soils at HTC were highly erodible, contained high amounts of clay material, and that the established retention basins would retain no more than 60% of the silt and sediment delivered to them. App. 568, with 40% or more of the captured silt and sediment discharged to Powell Creek and Lake Hollymead. App. 417, 460 - 461, 568.

Developers’ maintained that the retention basins also received

collected spring water drainage, or intermittent stream water drainage, and thus discharged "continuously." App. 165, 184, 222. Both trial courts exposed such opinions as faulty by Court's direct examination, revealing that retention discharges, if any, during non-storm events were a continuous flow of clear water, not collected sediments. App. 584-85. All testimony, from both Appellant and Appellee experts, was that the retention basins discharged muddy silt and sediments during storm events, but once the storm event passed, the basins discharged, if at all, clear water. App. 222 (continuous flow is stream water); App. 236 - 37 (discharge clear most of time, only varies with storm).

As noted, Developers conceded that the retention basin discharges of sediment were (1) driven by intermittent storm water events; and (2) only discharge the sediments trespassing to Lake Hollymead during such storm events. Developers' expert admitted HTC retention basin sediment discharges filled in large areas of Lake Hollymead. App. 458, 460, 461. Indeed, Developers' plea in bar depended upon conceding that HTC had caused sediment damage to Lake Hollymead more than five years before suit was filed.

There is no dispute that the retention basins were designed for the purpose of capturing sediment runoff from the HTC site during storm water events, App. 459 - 461, or that HTC retention basins then discharged storm water sediments into Powell Creek leading to Lake Hollymead, App. 568, with the frequency and amount of such discharges dependent upon actual storm water events.

Undisputed HOA expert testimony confirmed that the retention basins discharged clear water with no impact on Powell Creek or Lake Hollymead except during storm events, when sediments were discharged solely from the retention basins to Lake Hollymead.[1] There is no dispute that Lake Hollymead was severely filled as a result of sediment discharges to Powell Creek, which found their way into Lake Hollymead, and HOA expert Swain opined that more sediments would come [from the basins]. App. 697. These depositions of sediment remain in Lake Hollymead today.

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[1]/ HOA expert Ken Swain testified at both hearings to this effect. At the August 2015 hearing expert Swain presented evidence of separate surveys of Powell Creek and Lake Hollymead during storm and non-storm events in 2011, conclusively confirming sediment into Lake Hollymead from the Developers' retention basins only during significant storm water events, finding the stream and lake clear during non-storm events and muddy during storm events, with all controls above the retention basins running clear. App. 662 - 673, admitted over objection, App. 683.

Developers presented evidence to show that the retention basins were "permanent." App. 513. All experts, however, conceded that whether the retention basins were permanent or not, sediment discharges entering Lake Hollymead occurred only during storm water events.

The HOA presented evidence that sediments continued to enter Lake Hollymead after 2003 on an intermittent basis from Development storm water discharges; and it was conceded by all that such sediment deposits remained in Lake Hollymead, had not been removed, and were ongoing with storm events, causing a new deposit of sediment with each storm water discharge event. App. 666 - 686.

The trial court did not render any specific findings or holdings on any of the elements of trespass, did not distinguish existing case law or rule specifically on the HOAs' motion for summary judgment. App. 738 - 739.

ASSIGNMENTS OF ERROR

1. The Trial Court erred in holding that Appellee Developers had met their burden to support Developers' pleas in bar on a five year statute of limitation to bring an action for storm water event generated discharges of silt and sediments from defendants' storm water retention basins, holding that all trespass damages from such sediment basin discharges must be brought within five years of the first damage to Lake Hollymead, a private lake jointly owned by the two Homeowner Association appellants to this action, and denying all claims for further damages from later, repeated intermittent storm water discharges. Error 1, Order at 1, Objection noted, endorsement, page 2 of

order.

2. The Trial Court erred in refusing to rule on the Homeowner Associations' Motion for Summary Judgment on the continuing nature of damage to the property of another from unremoved deposits of silt and sediment as stated in the Restatement Second Torts, Sections 158 and 161, on grounds that the Restatement Second provisions asserted by Appellants HOA had not yet been adopted by the Supreme Court of Virginia, and thus would not be considered by the trial court. Error 2, Order at 1, Objection noted, endorsement, page 2 to order.

STANDARD OF REVIEW

The standard of appellate review for a Plea in Bar is that a plea in bar is directed to the pleadings as plead, and must have as its ultimate conclusion that the claim must be dismissed for lack of law or critical facts to support the claim. The trial court does not accept all pleadings as true, nor does it accept all inferences therefrom unless the only evidence before the court is the "pleadings." *Niese v. City of Alexandria*, 264 Va. 230, 233, 564 S.E.2d 127, 129 (2002).

A plea in bar is an evidentiary proceeding. The non-moving party cannot rest on the pleadings if the moving party presents evidence that the claims, allegations or conclusions are not supported or are false. If such evidence is presented, the non-moving party must rebut such evidence in sufficient manner to convince the court that not only does a claim exist as a

matter of law, but such claim is sufficiently factually supported.

The leading case describing the standard of review for a plea in bar is *Cooper Industries v. Melendez*, 260 Va. 578, 537 S.E.2d 580 (2000). *Cooper* cites the established principal that a plea in bar reduces the litigation to a single issue which, if proven, bars the right of recovery. *Cooper* at 260 Va. at 594-595, 537 S.E.2d at 590. When the trial court hears the evidence *ore tenus*, its findings are entitled to the weight accorded a jury verdict, and such findings should not be disturbed by an appellate court unless they are plainly wrong or without evidence to support them. *Bottoms v. Bottoms*, 249 Va. 410, 414, 457 S.E.2d 102, 104-05 (1995). However, the standard of review for mixed questions of fact and law decided by plea is review *de novo*. *Jennings v. Kay Jennings Family Ltd. P'ship*, 275 Va. 594, 600, 659 S.E.2d 283, 287 S.E.2d (2008).

The standard of review for the HOA's motion for summary judgment motion requires that the trial court accept as true those inferences from the facts that are most favorable to the nonmoving party, unless the inferences are forced, strained, or contrary to reason. *Fultz v. Delhaize America, Inc.,* 278 Va. 84, 88, 677 S.E.2d 272, 274 (2009). If the evidence is conflicting on a material point or if reasonable persons may draw different conclusions

from the evidence, summary judgment is not appropriate. *See Jenkins v. Pyles*, 269 Va. 383, 388, 611 S.E.2d 404, 407 (2005). Here, however, the trial court declined to consider the HOAs' motion for summary judgment on continuing trespass because the trial court held that there was no such cause of action embraced by this Court. The issue now becomes whether this Court believes that the identified provisions of the *Restatement Second* should be adopted and the case remanded for consideration of the facts by the trial court in light of the *Restatement Second* provisions.

AUTHORITIES AND ARGUMENT

Summary of Argument

This case raises an important issue of private property protection from discharges of storm water retention basins. Such basins, as a result of increased regulation of storm water erosion, are now found throughout the Commonwealth in new developments. Most function as intended, capturing eroded sediments for later removal and preventing excessive sediment deposition upon downstream owners. Where such basins are undersized or not maintained, however, heavy amounts of sediments can be collected and deposited directly upon downstream property owners. In such cases, it is important that downstream land owners retain the rights to

protect their property from such discharges, at least as alleged here, for the previous five year window of discharges. An even larger issue arises, however, when such sediments are deposited and remain on the land of another even after the traditional five year limitations period has passed, effectively creating an easement onto the land of another for such deposited materials. This Court is asked to consider the remedy for such situations as outlined in the Restatement Second, as now widely adopted, which provides landowners with the legal right to address such deposits on their land over a longer period of time while the source of the original trespass still continues.

I. **The discharge of sediment pollutants from sediment retention basins during intermittent and occasional stormwater events which cause repeated and intermittent new and/or increased damages to private property constitutes a new and separate damage claim each time such sediment discharge occurs and trespasses on the property of another. Error 1.**

The discharges of sediment pollutants from the Developers' storm water retention basins were completely dependent upon natural storm events. Between each storm water event, the basins discharged, if at all, only collected natural spring or stream water which would have found its way to Powell Creek by their normal unaltered course before site

development. Such natural discharges of spring or stream water are not at issue here, as no discharge of such collected natural water could form a cause of action and, more directly, by all evidence, such past natural flows had caused little or no sedimentation of Lake Hollymead before the site development.

It is not disputed that the "physical invasion" of Lake Hollymead with silt and sediment came directly from the storm water driven discharges of sediments from the HTC project. This was affirmed by the direct observations and testimony of HOA expert Ken Swain, who personally observed Powell Creek during repeated periods of non-storm events, during which time the creek was clear, versus storm events, when the creek was very turbid. App. 350, 352, 357, 666 - 686. Expert investigations proved that there was no significant input of sediments into Powell Creek from above the Developers' site. App. 352, 666 - 686. It was the unchallenged opinion of Plaintiffs' expert Ken Swain that most of the material deposited in Lake Hollymead between 2004 and 2011 came from the HTC development. App. 355. Developers own witnesses so stated. App. 460 - 61, 476, 507, 522 - 23.

The Developers' attempt to redefine the intermittent nature of storm

water retention basin discharges where the basins also collected groundwater or intermittent stream water, failed to address the fundamental concept of storm water discharge events. It was the discharges of additional, not pre-existing, if any, sediment that caused damages to the Appellant HOAs.

Judge Swett, in his questioning of expert Swain, affirmed that (1) the amount of sediments in the Lake increased substantially from 2007 (App. 388); (2) that the amount of silt and sediment can be expected to increase in the future (App. 389); (3) that the core samples from the lake taken by the expert reflected a layer of sediment exclusively from the HTC development (App. 390 - 91): and (4) that the amount of sediments deposited varies depending on rainfall and storm events (App. 392 - 93).

This Court has decided cases involving the periodic nature of trespass events associated with storm water runoff and, in each case, found such discharge events to constitute intermittent trespasses not controlled by one continuous statute of limitations event, and which would have permitted the Plaintiff to recover for at least the five year period prior to suit.

The seminal case is *Hampton Roads Sanitation District v.*

McDonnell, 234 Va. 235, 360 S.E.2d 841 (1987). In *McDonnell,* combined sewer and storm water overflows were discharged to private property when storm water events exceeded the capacity of the Hampton Roads Sanitation Districts' ("HRSD") collection facilities to handle such storm events. The HRSD collection facilities were "permanent," decades old collection systems, but were designed to release "storm water" generated overflows though sewer line overflow points which line capacity was exceeded:

> Under normal conditions, the flow from the City's system passes into and through the pump station. When the flow reaches approximately three times the normal quantity, however, the pump station cannot accommodate the wastewater. In such a situation, a bypass valve opens, diverting the overflow from the pump station and discharging the wastewater upon McDonnell's property."

Id., 234 Va. at 237, 360 S.E.2d at 842.

Like in *McDonnell*, Appellee/Developers here assert a statute of limitations defense, i.e., that all claims are barred because the HOAs waited more than five years to file suit. *McDonnell* rejected that claim, holding that "when wrongful acts are not continuous but occur only at intervals, each occurrence inflicts a new injury and gives rise to a new and separate cause of action." *Id*., 234 Va. at 239, 360 S.E.2d. 843-44. In such

situations, the right of recovery is "limited by the statute to the damage sustained during the five years immediately preceding the institution of the suit." *Id*, citing *Norfolk & W.R. Co. v. Allen*, 118 Va. 428, 433, 87 S.E.2d 558-59 (1916), *aff'g on rehearing*.

McDonnell factors remain on point here. First, the HRSD collection system, being concrete and steel installed years before, was far more a "permanent" feature than the sediment retention basins in this case. Further, *McDonnell* teaches that the permanence of the source of the damages is not necessarily decisive as to continuing or intermittent trespasses. As in *McDonnell*, the sediment basin discharges here were intermittent, did not occur without interruption and were totally dependent on storm water rainfall events. In *McDonnell*, the "nature" of the trespass material, raw sewage, was the same each time, just as the discharge of sediments here; thus, the same type of discharge was not conclusive. Trespass actions based on intermittent discharges from storm water erosion control retention basins are simply a different "permanent" facility that is the source of intermittent discharge trespasses. There is nothing to distinguish the present retention basin storm water overflows from those at HRSD, and like HRSD, each discharge of sediment from the HTC retention

basins was new, actionable trespass, and HOA Appellants should have been permitted to seek damages for five years prior to the filing of their trespass claims.

Without distinguishing existing precedent, the trial court's basis for its' opinion is not clear in the record, but the basic holding that Appellant HOAs were not entitled to claims for damages five years prior to filing was inconsistent and contrary with the precedent cases of this Court and wrongly denied the Appellee HOAs the right to recover their property damages.

For over 100 hundred years, this Court has held that any decision involving a statue of limitations for trespass involves three basic elements: (1) was the source of the trespass a permanent condition such that Plaintiff was fully on notice of the activity; (2) were the trespass events intermittent such that a new trespass occurred each time from a separate discharge or trespass; and (3) did all the damages that could be expected occur within the stated period. *Va. Hot Springs Co. v. McCray*, 106 Va. 461, 465-469, 56 S.E. 216, 217-219 (1907). This basic analytical approach, with the exception of a few railroad cases (which are deemed permanent by case law) or dam or culvert cases involving questions of impounded waters

(deemed a permanent condition), has been followed in all cases of intermittent discharges of storm water materials whether involving trespass or inverse condemnation claims, including *McDonnell* (storm water discharges); *Kitchen v. City of Newport News*, 275 Va. 378, 388, 657 S.E.2d 132, 137-38 (2008) (inverse condemnation from storm water system discharges to private property). This Court has also held valid inverse condemnation claims to be valid for storm water events due to negligent maintenance, years after construction of the source. *See, Livingston v. Va. Dep't. of Transp.,* 284 Va. 140, 152, 726 S.E.2d 264, 271 (2012) (failure to maintain drainage way).

In this case, at least two of the essential elements of trespass statute of limitations are not met. The discharges of trespassing sediments were storm water generated and thus infrequent, not continuous, and each new discharge deposited new amounts of sediment in the Lake, causing further discrete damage both physically and in the amount of material that would have to be removed. By the very nature of the events and sediment deposits, all the damage that could be caused was not complete as long as more sediment discharges and deposits continued.

For these reasons, at the very least, Plaintiff should be permitted to

seek redress for all trespasses occurring during the five year period before suit was filed on July 15, 2011, and presented adequate evidence of such claims to survive all demurrers and present sufficient evidence to survive a plea in bar and have their case heard by a jury.

II. The deposition of sediments from the HTC site into Lake Hollymead, where such sediments remain in place and not removed, constitutes a continuing damage as stated by the Restatement Second, Sections 158 and 161, and the HOAs damages and the applicable statute of limitations should run continuously until such time as the trespassing materials are physically removed from the HOA property. Error 2.

The trial court declined to recognize any cause for a "continuing" trespass, either under the *Restatement Second* or existing Virginia case law. Appellant HOAs assert that the concept of a continuing trespass, as outlined in the *Restatement Second,* where trespassing materials are placed on the property of another, remain there and are not removed, this Court should permit recovery of damages and an action for trespass for the entire period of trespassing events, and not limit recovery to any portion of such claim.

Appellant HOAs have deeded property rights to ownership of Lake Hollymead. Lake Hollymead is not, was not intended, and was never designated as a "secondary" retention basin for the Developers' discharges

of sediment. Such sediment discharges and deposits into the HOA lake have now filled in huge areas of the Lake, and remain deposited in the Lake today. At the same time, new sediments, and new damages, are added to the Lake every time there is a new storm water event occurs at the Developers' site which are not contained or satisfactorily treated to remove such sediments. These sediment deposits, past and present, are a continuing trespass; they remain in place, and remain a physical intrusion on HOA property rights.

Releases of sediment upon the lands of another are trespass. *Kurpiel v. Hicks*, 284 Va. 347, 355-56, 731 S.E.2d 921, 926 (2012) (unauthorized entry to Kurpiel land from the Hicks' actions directing and causing storm water, including sediment and silt, to flow from the Hicks' property onto the Kurpiels' property).

The concept that a continuing trespass occurs when a physical invasion of the property of another remains in place is not foreign to this Court's protection of property rights. In a very analogous case, this Court has also recognized a continuing duty to use one's property in a manner so as to not cause injury to another. In *Fancher v. Fagella*, 274 Va. 549, 556, 650 S.E.2d 519, 522 (2007), this Court held that the physical intrusion of

tree roots onto the property of another constituted a "continuing nuisance." "The facts pleaded, if proved by Francher, would constitute a continuing trespass, resulting in actual harm to his property." *Id.* Although it appeared that a statute of limitations issue was not argued in *Fancher*, the Court's decision makes clear that as long as the offended tree roots invaded and remained on the Plaintiff's property, there was a trespass and continued damage.

These duties were recently summarized in a dissenting opinion on the scope of a duty owned by one land owner to another involving public roadways:

> We have recognized several situations in which a landowner or possessor of land has a duty to protect against injury to property on adjacent land. However, in each case, the condition at issue physically intruded upon the adjoining parcel that was harmed. *See e.g., Fancher v. Fagella*, 274 Va. 549, 555-56, 650 S.E.2d 519, 522 (2007) (holding that landowners owe a duty to protect against actual or imminent harm to property caused by encroaching branches or roots); *Third Buckingham Community, Inc. v. Anderson*, 178 Va. 478, 486, 17 S.E.2d 433, 436 (1941) (holding that an "owner of land cannot collect . . . water into an artificial channel or volume and pour it upon the land of another, to his injury") (internal quotation marks omitted); *Akers v. Mathieson Alkali Works*, 151 Va. 1, 17-18, 144 S.E. 492, 495 (1928) (holding that a landowner has a duty to prevent injurious substances from escaping from its premises and damaging the property of another); *Collins v. George*, 102 Va. 509, 516, 46 S.E. 684, 686 (1904) (holding that "persons in the lawful use of fire" owe a

> duty of ordinary care to prevent it from spreading and injuring the property of others).

RGR, LLC v. Settle, 288 Va. 260, 301, 764 S.E.2d 8, 33 (2014) Note 4.

The duty of one landowner to another surely includes the duty not to deposit trespassing materials onto the land of another. The *Restatement Second* directly addresses the factual situation in this case:

> One is subject to liability to another for trespass, irrespective of whether he thereby causes harm to any legally protected interest of the other, if he intentionally:
> (a) enters the land in the possession of the other, or causes a thing or a third person to do so, or
> (b) remains on the land, or
> (c) fails to remove from the land a thing that he is under a duty to remove.

Restatement Second, Torts § 158, *American Law Institute*, p. 277 (1965). Note the statement in paragraph b "remains on the land" is stated in the alternative "or", not the conjunctive "and."

In the comments section to the *Restatement Second*, several important explanations are noted. Paragraph "b" of the comments states that the "meaning of 'enters land'" includes "not only coming upon land but also *remaining on it*, and, in addition, to include the presence upon the land of a third person or thing which the actor has caused to be or to remain there." Comment b, *Restatement Second*, Torts, § 158.

Directly on point is the *Restatement's* comment (I), which describes

"[c]ausing entry of a thing:"

> The actor, without himself entering the land, may invade another's interest in its exclusive possession by throwing, propelling, or placing a thing either on or beneath the surface of the land . . . in the absence of the possessor's consent or other privilege . . . it is an actionable trespass to throw rubbish on another's land, even though he himself uses it as a dump heap . . . In order that there may be a trespass under the rule stated in this section, it is not necessary that the foreign matter should be thrown directly and immediately upon the other's land. It is enough that an act is done with knowledge that it will to a substantial certainty result in the entry of foreign matter. Thus, one who plies sand close to his boundary that by force of gravity alone it slides down onto his neighbor's land, or *who builds an embankment that during ordinary rainfalls, the dirt from it is washed upon adjacent lands,* becomes a trespasser on the other's land (*emphasis added)*.

Other state courts have considered this or similar situations, all concluding a continuous trespass. *Docheff v. City of Bloomfield*, 623 P.2d 69, 71 (Colo. App. 1980) addressed a similar case involving periodic discharges of storm water from a storm water collection system maintained by the City. Finding that the City system allowed "more than normal" amounts of storm water to discharge to Plaintiff's property during the spring and summer months, Colorado found that "[a] landowner who sets in motion a force which, in the usual course of events, will damage property of another is guilty of trespass on such property (citing Restatement Second § 158)." The Court further held that the discharge of water under

the circumstances here constituted a "continuing trespass." Id.

Many cases hold the same. *See, e.g.*, *Dial v. City of O'Fallon*, 81 Ill. 2d 548, 44 Ill. Dec. 248, 411 N.E.2d 217, 219-221 (1980) (sewage overflow, City liable as one is liable for an intentional trespass if he casts an object upon another's property, and it is done with the knowledge that it will, to a substantial certainty, result in the entry of the foreign object); *Marlowe v. Lehigh Township*, 64 Pa. Commw. 587, 441 A.2d 497, 501 (1982) (Township constructed a storm drain system on Plaintiff's property after purchasing an easement but the system failed to function as planned and Plaintiff's property was repeatedly flooded during storm events, trespass liability was found); *Union Pacific R. Co. v. Vale Oregon Irr. District,* 253 F. Supp. 251 (D. Or. 1966); *Russell Corp. v. Sullivan*, 790 So. 2d 940 (Ala. 2001) (indirect trespass occurs where trespasser releases foreign polluting materials beyond boundaries of trespasser's property knowing to substantial certainty that is will invade the property); *Park's Highway Enterprises, LLC v. CEM Leasing, Inc.*, 995 P. 2d 657, 664 (Alaska 2000) (trespass will exist if there is a direct causal link between the conduct of the actor and invasion of foreign matter upon possessor's land).

Appellee Developers' attempts to designate the basin discharges in

this case as continuous and not intermittent because the basins also discharge captured spring water is without merit in this case. There are no pollutants in spring water that could form a cause of action; it is the storm water events that bring the sediments off the land, through the basins, into Powell Creek and then into Lake Hollymead that form the trespass. Further, under the *Restatement Second Torts* and case law, it is the fact that the trespassing sediments remain *unremoved* from Lake Hollymead that make this case one of continuing trespass which remains until such sediments are removed, and no statute of limitations should begin until at least the source of such trespasses ceases; otherwise, more damage continues to occur.

The HOAs do not assert that the statute of limitations for a trespass depositing materials on the land of another should run forever. As both case law and the Restatement indicate, such statute should run as long as the trespass continues, meaning that as long a source continues such deposits, the statute should not begin until such deposits stop. This is completely consistent with this Court's original elements decided in *Hot Springs* in 1907, as all the damage that could be caused has not occurred until the trespass deposits stop.

This issue is addressed directly in the *Restatement Second,* Torts in trespass for the failure to remove - for the continued presence - of materials on land placed thereby by the defendant:

> (1) A trespass may be committed by the continued presence on the land of a structure, chattel, or other thing which the actor has tortiously placed there, whether or not the actor has the ability to remove it.
>
> (2) A trespass may be committed by the continued presence on the land of a structure, chattel, or other thing which the actor's predecessor in legal interest therein has tortiously placed there, if the actor, having acquired his legal interest in the thing with knowledge of such tortious conduct or having thereafter learned of it, fails to remove the thing.

Restatement Second, Torts § 161, *American Law Institute*, p. 289 (1965).

Restatement Second, Torts, § 161 deals with situations in which things are tortiously placed on land. The comments to Section 161, subsection (1) stated above, comment "b" directly address a "continuing trespass:"

> *Continuing trespass*. The Actor's failure to remove from land in the possession of another a structure, chattel or other thing that he has tortiously erected or placed on the land constitutes a continuing trespass for the entire time during which the thing is wrongfully on the land and, except for where comment "d" applies (acquiring an easement), confers on the possessor of the land an option to maintain a succession of actions based on the theory of continuing trespass or to treat the continuance of the thing on the land as an aggravation of the original trespass (and recover in a single action for future invasions).

Restatement Second, Torts § 161, subsection 1, comment "b," *American Law Institute*, p. 290 (1965).

An unprivileged remaining on another's land is a continuing trespass for so long as the Defendant wrongfully remains. *Restatement Second,* Torts, § 158, comment m:

> Continuing trespass. An unprivileged remaining on land in another's possession is a continuing trespass for the entire time during which the actor wrongfully remains. Such a continuing trespass is to be distinguished from a series of separate trespasses on land, as where A habitually crosses B's field without a privilege to do so.

Restatement Second, Torts § 158, comment "m," *American Law Institute*, p. 280 (1965).

The complete complex of the *Restatement Second,* Torts was addressed by the Supreme Court of Colorado in answering certified questions from the United States Court of Appeals in *Hoery v. US*, 64 P.3d 214 (Colo. 2003). *Hoery* involved claims of continuing trespass and nuisance from the release of toxic pollutants into the groundwater under Plaintiff's property. The United States had stopped all operations at the chemical site, but the releases of pollutant remained under Plaintiff's ground. The Colorado Supreme Court rejected the statute of limitations defense that the source of the pollutants had ended years before. Citing the *Restatement Second,* Torts, Section 158, the Court held that (1) a

landowner that sets in motion a force damaging the property of another is guilty of trespass (*Id*. at 217); (2) it is enough that the act is done with knowledge to substantial certainty that the entry of foreign matter will occur (*Id*. at 218); and (3) that causes of action for both nuisance and trespass were available. As to continuing trespass, the Court held:

> The typical trespass or nuisance is complete when it is committed; the cause of action accrues, and the statute of limitations begins to run at that time. But in cases, for example, when the defendant erects a structure or places something on or underneath the plaintiff's land, the defendants' invasion continues if he fails to stop the invasion and to remove the harmful condition. In such a case, there is a continuing tort so long as the offending object remains and continues to cause the plaintiff harm (citing Prosser and Keeton on the Law of Torts § 13 (5th Ed. 1984).
>
> In the context of trespass, an actor's failure to remove a thing tortiously placed on another's land is considered a "continuing trespass" for the entire time during which the thing is wrongfully on the land. Restatement (Second) Torts § 161, cmt. b. Until the thing tortiously placed on the land, or underneath the land, is removed, then liability for trespass remains. See, 75 Amer. Jur. 2d Trespass § 26 (2002).
>
> The same is true for nuisance. If the defendant causes the creation of a physical condition that is of itself harmful, even after the activity that created it has ceased, a person who carried on the activity that created the condition is subject to continuing liability for the physical condition. Restatement (Second) of Torts § 834 cmt. e.
>
> For continuing intrusions - either by way of trespass or nuisance - each repetition or continuance amounts to another

> wrong, giving rise to a new cause of action (citations omitted). The practical significance of the continuing tort concept is that for statute of limitation purposes, the claim does not begin to accrue until the tortious conduct has ceased. . . .

Hoery, 64 P.3d at 218.

Referencing a prior case, the Colorado Supreme Court elaborated further:

> The plaintiff's claim was not barred by the statute of limitations because "the continuing of a trespass or nuisance from day to day is considered in law a several trespass on each day. In other words, for statute of limitations purposes, a claim would only accrue once the defendant had abated the nuisance and removed the cause of damage.

Hoery, 64 P.3d at 219.

The Court went further to distinguish "permanent trespass and nuisance cases," which have only been applied in "unique factual situations" such as irrigation ditches and railway lines, finding same to be permanent as a matter of law, for which Virginia case law is in accord.

One final, but important point remains. In a prophetic decision rendered by this Court involving recurring trespass events from water pumping even at a Railroad Operation, in which the Court found that reoccurring discharges each constituted a new cause of action, this Court also observed, citing to treatises, that "[i]n all cases of doubt respecting the permanency of the injury the courts are inclined to favor the right to bring

successive actions. Otherwise, the effect would be to give the defendant, because of his wrongful act, the right to continue the wrong; a right equivalent to an easement. A right to land cannot be thus acquired." *Norfolk & W. R. Co. v. Allen,* 118 Va. 428, 437-438, 87 S.E. 558, 561 (1916).

Here, the Appellee Developers have simply used Lake Hollymead as a secondary retention pond for their failed on site retention basins. They have done so knowingly and repeatedly and they now assert that this Court should grant them an unrestricted easement upon the HOA property for not only all of the sediments deposited in the past, but the right to continue to do so into the future. As angrily described by the HOA representatives themselves "a permanent, unlimited license to pollute, degrade and trespass on our downstream property."

CONCLUSION

The Appellee Developers have trespassed on the HOA property, have caused extensive damage and such trespassing materials remain today on the HOA property and will continue to so remain until such sediments are physically removed. The nature of such discharges is that they are intermittent and recurring, and all the damage that can be caused

has not been caused as the trespass of sediments continue. The HOA is certainly entitled to recover for damages during the five year period before July 2011 under existing law, and should rightfully be able to seek removal and damages for all the deposited sediments in the HOA Lake from the beginning of such deposits as long as such sediments remain in place, and are continuing to be deposited.

Respectfully submitted,

Forest Lakes Community Association, Inc. and Hollymead Citizens Association, Inc.

By counsel

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CERTIFICATE OF SERVICE

I hereby certify that I caused an electronic version of the Brief of Appellant and the Appendix to be served by email to the following counsel of record: Mark C. Nanavati and Ken Hardt at Sinnot Nuckols & Logan at email mnanavati@snllaw.com and khardt@snllaw.com; John Zunka and Richard Minor at Zunka, Minor & Carter, Ltd., at email jzunka@zmcilaw.com and rmilnor@zmcilaw.com; Terry Lynn, Esq., at Law Offices of Terry Lynn PLLC, at email terry@terrylynnlaw.com; and Peter Caramanis, Esq., at Royer, Caramanis & McDonough PLC, at email pcaramanis@rcmplc.com; and Henry Spalding, III, Thompson McMullin, P.C., at email hspalding@t-mlaw.com; and Kevin Mottley, The Mottley Law Firm PLC, at email kevinmottley@mottleylawfirm.com; and H. Robert Yates, III, LeClair Ryan, at email ryates@leclairryan.com; and by filing same electronically with the Clerk of this Court by VACES Guidelines and User's Manual, and by filing 10 printed copies of the brief with the Clerk of this Court, all this 18th day of July 2016.

*David S. Bailey /s/*_____
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