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.

BRIEF OF APPELLEE BOB EVANS FARMS, INC.

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

On July 15, 2011, Forest Lakes Community Association, Inc. and Hollymead Citizens Association, Inc. (collectively "Forest Lakes") filed a Complaint and thereafter an Amended Complaint against current and former owners of land that was developed into a shopping center known as Hollymead Town Center ("HTC"). Forest Lakes claims that during the development of the shopping center, the developers and owners of the shopping center land allowed sediment and silt to flow from the property under Route 29 and into Lake Hollymead within the Forest Lakes subdivision. Forest Lakes alleged the Defendants were liable for the silt based on common law trespass (Count I) and nuisance (Count II).

The Defendants filed special pleas based upon applicable statute of limitation for each of the counts in the Amended Complaint. The Special Pleas were initially heard by Judge T. Swett (Ret.) at a hearing in Albemarle Circuit Court on September 17, 2013. However, after the evidentiary hearing, Judge Swett realized that he had a conflict of interest and recused himself without ruling on the Special Plea. He did not make any findings of fact nor did he rule upon the issue.

Thereafter, Judge Paul M. Peatross (Ret.) was appointed to the matter and at the request of the parties, agreed to conduct a second evidentiary hearing so that he could observe the witnesses and better examine the evidence, much of which consisted of witnesses pointing to large maps and photographs, things which would not be understood through a review of the transcript from the hearing before Judge Swett.

On August 4, 2015, Judge Peatross heard testimony from five (5) witnesses and reviewed fifty-five (55) exhibits. Thereafter, Judge Peatross sustained the Special Pleas of the Defendants and ruled that the Plaintiffs' claims were barred by the applicable statute of limitations. Specifically, he ruled that the Defendants have "sustained their burden" (Joint Appendix, Page 739) based upon the evidence presented. The Order sustaining the Special Pleas and dismissing the case was entered on August 31, 2015. Forest Lakes noted only one objection on that Order, not two as they have created assignments of error for in their appeal (Joint Appendix, Pages 117-118).

STATEMENT OF FACTS

Construction of the shopping center at issue began in 2003. The shopping center is located on the west side of Route 29 in Albemarle County, Virginia, a few miles north of Charlottesville. Forest Lakes subdivision is located on the east side of Route 29.

Forest Lakes alleged that silt and sediment from the construction site began flowing from the development, through Powell Creek and into Lake Hollymead in November of 2003 (Joint Appendix, Page 20).

As a result of the sediment and silt flow into the Lake Hollymead, certain residents of Forest Lakes and members of the Albemarle County staff held a meeting to address the residents' concerns. (Joint Appendix, Page 448, Trial Exhibit 10, Joint Appendix, Pages 744-745).

Three sediment basins were installed on the site of the shopping center. Basin 1 was installed and put into use in the Fall of 2004. (Joint Appendix, Page 534). Basin 2 was installed and put into use in the Fall of 2003. (Id., Pages 550-551). Basin 3 was installed and put into use in the Summer of 2004. (Id., Pages 554-555). The three (3) basins are permanent structures used for sediment control. (Id., Pages 512-513; 534-535).

In addition to the permanent nature of the sediment control basins, there is a continuous flow of silt and sediment from the shopping center through the basins, into Powell Creek and into Lake Hollymead. (Id., Pages 514, 524, 536, 539-541, 570, 703). As such, the claim in Appellants' Opening brief that the parties "agreed" that "the retention basins would discharge clear or spring water at times," (Opening Brief of Appellants, Page 4) is not only misleading, it is false. Indeed, Forest Lakes own expert, admitted that there is always sediment in the continuous water flow from the site to Lake Hollymead. (Joint Appendix, Page 703).

ARGUMENT AND AUTHORITIES

Assignment of Error #1. THE FIRST ASSIGNMENT OF ERROR MUST FAIL BECAUSE (1) THE PLAINTIFFS' FAILED TO OBJECT TO THE RULING OF THE TRIAL COURT, AND (2) THE EVIDENCE, VIEWED IN THE LIGHT MOST FAVORABLE TO THE APPELLEES, CLEARLY ESTABLISHED THAT THE NUISANCE AND TRESPASS WAS BOTH PERMANENT AND CONTINUOUS FROM 2004 AND THE PLAINTIFFS MISSED THE FIVE YEAR STATUTE OF LIMITATIONS BY SITTING UPON THEIR RIGHTS UNTIL 2011.

STANDARD OF REVIEW

Having listened to the witnesses and observed their demeanor and having reviewed the exhibits and the testimony related thereto, the ruling by Judge Peatross on the Special Plea is "entitled to the weight accorded a jury verdict, and these findings should not be disturbed unless they are

plainly wrong or without evidence to support them." Cooper Industries v. Melendez, 260 Va. 578, 594, 537 S.E. 580, 590 (2000) (citations omitted).

A. Plaintiff completely failed to object to the ruling of the Trial Judge both at the hearing and also when the Final Order was entered.

As set forth in the Statement of Facts, *supra*, Plaintiffs made no objection on the record to the ruling by Judge Peatross at the hearing. Likewise, when given the opportunity to add a specific objection to the Final Order, Plaintiffs failed to note any objection to the decision by the Court based upon the evidence presented at the hearing.

The contemporaneous objection rule is specific: "No ruling of the trial court,…, will be considered as a basis for reversal unless an objection was stated with reasonable certainty at the time of the ruling, except for good cause shown or to enable this Court to attain the ends of justice. (Rule 5:25 of the Rules of the Supreme court of Virginia). To allow otherwise would allow the Plaintiff to object for the first time in the Supreme Court. Varner v. White, 149 Va. 177, 140 S.E. 128 (1927). The Plaintiffs have neither alleged nor can they demonstrate good cause shown nor any reason necessary to attain the ends of justice.

Having failed to properly preserve their objection giving rise to their Assignment of Error No. 1, the issue should not now be considered by this Court.

B. The Trial Court's ruling should not be overturned as there was ample evidence produced that the nuisance and trespass were both continuous and permanent and thus the five (5) year statute of limitations accrued in 2004 while suit was not filed until 2011.

In the instant case, the Plaintiffs complain that silt and sediment has damaged Lake Hollymead as a result of the alteration of the shopping center site. As such, this is injury to property and Virginia Code §8.01-243(B) applies and suit must be filed within five (5) years after the cause of action accrues.

The accrual of the cause of action depends upon the nature of the nuisance or trespass causing the property damage. If the nuisance or trespass is permanent or continuous, then the cause of action begins to run when the system begins to operate. Virginia Hot Springs Company v. McCray, 106 Va. 461, 462, 56 S.E. 216, 217 (1907) (holding that Plaintiff's claims were time barred because sewage discharge across property was permanent and continuous). Worley v. Mathieson Alkali Works, 119 Va. 862, 864, 89 S.E. 880, 881 (1916) (holding that Plaintiff's claims were time

barred because he failed to file suit within five (5) years of the Defendant's plant being put into operation).

In the instant case, the basins were put into use in 2003/2004. They are large concrete structures that are permanent. There is a permanent and constant flow of water through the system due to springs that are directed to flow through the basins. That continuous flow of water always contains some sediment. Thus, the damage to Lake Hollymead began in 2003/2004 and has continued without pause, interruption or stoppage since that time. As suit was not filed until 2011, the Trial Court correctly applied the facts to the law and then sustained the Special Plea.

Assignment of Error #2. THIS COURT SHOULD NOT ADOPT THE PROPOSED FRAMEWORK FOR THE ACCRUAL OF THE CAUSE OF ACTION BECAUSE TO DO SO WOULD RESULT IN AN INFINATE STATUTE OF LIMITATIONS, OVERTURN HUNDRED OF YEARS OF COMMON LAW AND REVIVE ALL PREVIOUSLY BARRED CASES WHERE THE OFFENDING MATERIAL CURRENTLY REMAINS ON A TRESPASSEE'S PROPERTY.

Virginia has long adhered to maintaining strict limitations periods to assure prompt litigation of claims. Locke v. Johns-Manville Corp., 221 Va. 951, 275 S.E.2d 900 (1981) (Limitation periods are designed to require prompt assertion of an accrued right of action). An action accrue "from the date the injury is sustained in the care of injury to person or property[.]" Virginia Code §8.01-230 (1977). It does not matter that the damages are

not all sustained at that point. Caudill v. Wise Rambler, Inc., 210 Va. 11, 168 S.E. 257 (1969) (citations omitted).

Here, Forest Lakes would abandon that framework and have this Court adopt a rule that allows the cause of action to remain enforceable for so long as the silt and sediment remain in the pond. Thus, 300 years from now, under Plaintiffs' proposed limitations scheme, Forest Lakes could file suit against each and every owner subsequent of record of land within the shopping center development during that 300 years, their heirs, successors and assigns. At that point, witnesses are long gone, documents are likely no longer available and facts have become obscure, the exact scenario this Court warned against in Street v. Consumers Min. Corp., 185 Va. 561, 575, 39 S.E.2d 271, 277 (1946) (holding the policy considerations of limitations periods are designed to avoid just that scenario.)

Moreover, to change the rules of the game is contrary to the legislative's control of the issue. Adopting the proposed continuous nuisance limitations framework would create a retroactive change to the legislative Limitations of Actions statutory framework. Indeed, the Legislature specifically addressed retroactive rejuvenation of expired claims:

> If, after a right of action is barred by a statute of limitations, the statute shall be repealed, the bar of the statute as to such right or remedy shall not be deemed removed by such repeal.

Virginia Code §8.01-234 (1977)(emphasis added). No doubt the Legislature did not want to create a plethora of "zombie" causes of action that would arise from the statute of limitations grave yard. Neither should this Court by adopting the Plaintiffs' proposed scheme. Adopting Plaintiffs' proposed scheme would allow current landowners to reach back to each owner of upstream land, all the way back to the original King's Grants, for the removal of silt and sediment deposited over time and remaining on the property. That would create complete chaos in real estate law and ownership.

CONCLUSION

For the reasons set forth above, Bob Evans Farms, Inc. requests that the Trial Court's finding within the Special Plea that the Plaintiffs' claims are time barred, be affirmed and therefore, dismissed with prejudice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of August, 2016, in compliance, I sent by electronic mail a true and exact copy of the foregoing to:

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And that ten (10) copies of the Brief of Appellee were hand filed with the Clerk of the Supreme Court on behalf of Bob Evans Farms, Inc.; and one electronic copy was filed via VACES.

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