In the

Supreme Court of Virginia

At Richmond

Record No. 151799

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

Appellants,

– v. –

UNITED LAND CORPORATION OF AMERICA, et al.,

Appellees.

BRIEF OF APPELLEE HOLLYMEAD CORNER, LLC

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TO: THE HONORABLE CHIEF JUSTICE AND JUSTICES OF THE SUPREME COURT OF VIRGINIA:

Hollymead Corner, LLC, by counsel, respectfully submits the following brief requesting that the Court affirm the decision of the circuit court. This appeal is taken from the Circuit Court for the County of Albemarle, the Hon. Paul M. Peatross, presiding.

STATEMENT OF THE CASE AND MATERIAL PROCEEDINGS BELOW

The Forest Lakes Homeowners Association, Inc. and Hollymead Citizens Association, Inc. (the "Plaintiffs" or the "HOAs") filed an Amended Complaint on April 5, 2012. The Amended Complaint named eighteen defendants, all of whom owned parcels in the Hollymead Town Center ("HTC"), based on the alleged discharge of silt and sedimentation from each of their properties that damaged Lake Hollymead, a man-made lake jointly owned by the HOAs. JA 28-39. The Plaintiffs asserted two causes of action: common law trespass and nuisance. JA 59-62.

All but one of the defendants filed pleas in bar, arguing that because the alleged damage to Lake Hollymead began as far back as 2003, the Plaintiffs' claims were time-barred. *See* Plea in Bar, Aug. 24, 2012 (Hollymead Corner, LLC's plea in bar). On September 17, 2013, the Honorable Jay T. Swett, presided over an evidentiary hearing on the

defendants' respective pleas in bar. JA 127-393. Prior to ruling on the pleas, Judge Swett recused himself from the case.

On May 12, 2014, the Honorable Paul M. Peatross was designated to preside over the case. JA 78. On November 26, 2014, the circuit court held a status conference at which the defendants requested a new *ore tenus* hearing so that the court could rule on the pleas in bar with the benefit of live testimony. JA 89-90. Over the Plaintiffs' objections, the circuit court agreed that hearing evidence was necessary rather than ruling on the pleas in bar based on the evidence previously heard by Judge Swett.[1] JA 93. Also over the Plaintiffs' objections, the circuit court stayed all discovery and any additional briefing, deciding instead to rely on the previously filed briefs. JA 97.

Following the status conference, but before entry of the order thereto, the Plaintiffs filed a motion for partial summary judgment. *See* Pl.'s Mot. for Partial Summ. J., Feb. 27, 2015. In support of their motion, the Plaintiffs argued that the allegations in their Amended Complaint constituted a continuing trespass under the *Restatement (Second) of Torts* ("*Restatement*") and, as such, "there are no statutes of limitation" to apply.

[1] Given this ruling, it is unclear why the Plaintiffs rely on evidence heard by Judge Swett. *See* Op. Br at 3-5, 12-13 (citing transcript of hearing before Judge Swett).

Pl.'s Memo. in Supp. for Partial Summ. J., Feb. 27, 2015, at 1. The Plaintiffs did not notice their motion for hearing. On March 16, 2015, the circuit court entered an order in accord with its rulings at the status conference. JA 79-80.

On August 4, 2015, the parties presented evidence on the pleas in bar (the "August Hearing"). Both the Plaintiffs and the circuit court specifically stated that the hearing was limited to the pleas in bar, and not the Plaintiffs' motion for partial summary judgment. JA 591, 738. Even so, the Plaintiffs incorporated their theory of continuing trespass into their defense of the pleas in bar. JA 591.

After the Defendants' concluded presenting evidence, the Plaintiffs moved to strike. JA 590. Counsel for the Plaintiffs stated their amended complaint proceeded on "two theories of trespass": "trespass in nuisance," which counsel alleged was the intermittent discharge of sediment; and the continuing trespass theory under the *Restatement* that was the subject of their motion for partial summary judgment. JA 590-91. Under both theories, the Plaintiffs argued, their claims were not time barred because the discharges were intermittent and gave rise to a new claim with each "storm event," and because the "[t]here's never a statute [of limitations]" with a continuing trespass. JA 602, 604, 607.

The circuit court denied the motion to strike. JA 633. After two of the Plaintiffs' expert witnesses were excluded by the circuit court due to the Plaintiff's failure to identify them in discovery, JA 641-42, the Plaintiff introduced the testimony of one witness. JA 643. Following argument of counsel, the circuit court granted the defendants pleas in bar. JA 117, 739. The circuit court entered its final order granting the pleas in bar on August 31, 2015. JA 117-25.

STATEMENT OF FACTS

HTC is a commercial development located off Route 29 in Albemarle County, Virginia. The development is adjacent to tributaries of Powell Creek and Lake Hollymead, bodies of water south from and downstream of HTC. JA 805. Prior to HTC's construction, which began in 2003, Lake Hollymead served as a sediment basin for the construction of the Hollymead residential subdivision. JA 480, 776. Lake Hollymead was then converted into a lake. JA 470. As the land upstream from Lake Hollymead was developed, multiple parcels of land, including but not limited to those in HTC, drained into the watershed that flowed downstream into Lake Hollymead. JA 503-04.

To limit the flow of sediment into Lake Hollymead, Albemarle County (the "County") constructed three stormwater retention basins that are at

issue in this case. The basins were originally built during the construction of HTC to control sediment flowing from the construction. JA 512. The basins were then converted to "permanent storm water management." *Id.* The structures include pipes that receive water, the basin itself that holds the water while silt and sediment are removed, and outlets that take the water downstream. JA 513. Katurah Roell, who oversaw the approval process and construction of the basins for the County, described how the basins function:

> The purpose of [the basins] is to hold a large volume of water so that during a period of rain, when erosion happens as a normal course across the surface or out in the steam channel, it collects into a body of water. At that point it's slowly let out and while it does, it holds back that water which allows the bulk or heavier items to settle out, and then . . . smaller particles then flow out.

JA 567-68.

Mark Graham, the County's Director of Community Development who is responsible for overseeing the County's land development regulations, testified that the basins are "basically a settling device. The water goes in there [and] loses its velocity," allowing the particles to settle in the basin. JA 522. Mr. Roell stated that the basins are designed to collect only 60% of sediment runoff, with the remaining 40% flowing downstream. JA 568. According to Mr. Graham, Virginia's Department of Conservation and

Recreation approved this retention rate as compliant with state regulations. JA 476.

The flow of water into and out of the basins is continuous. According to Mr. Graham, "there's always some silt and sediment that flows through the basin" because water continuously flows into the basin from both HTC, other upstream sources, and natural rainfall. JA 503-04, 514, 521-22, 568. "[O]nce there's particulate matter suspended in the water," Mr. Graham stated, "it's very, very difficult to remove it all of that sediment [and] [s]ome small part, some large part of it will continue downstream." JA 524.

Several witnesses stated that the water flowing out of the basins and into Lake Hollymead always contains some level of sediment or turbidity. JA 537, 568, 570, 573. According to Mr. Roell, the amount of sediment varied depending on the volume of water flowing into the basins. JA 570. The Plaintiffs' witness, Kenneth Swain, conceded on cross-examination that there is always some level of silt and sediment flowing through the sediment basins and into Lake Hollymead and Powell Creek. JA 703. As the circuit court noted at the August hearing, the "sediment is never cleared from the basin." JA 719.

Residents of the HOAs began complaining about the silt and sedimentation in Lake Hollymead prior to the construction of HTC in 2003.

JA 564-65. As early as 2003, residents were regularly complaining about silt and sedimentation flowing from the HTC development. JA 566, 771. Indeed, the County knew that construction of HTC would result in such discharges and notified the HOAs when construction began. JA 497, 775.

AUTHORITIES AND ARGUMENT

I. The circuit court correctly found that because the alleged nuisance was permanent, the Plaintiffs only had one cause of action

a. Standard of Review

The Plaintiff contends the circuit court erred in granting the pleas in bar because each discharge from the stormwater retention basins is a “new and separate damage” giving rise to a separate cause of action each time. Op. Br. at 11, 14. This is a mixed question of law and fact that the Court reviews de novo. *See Fair Housing Bd. v. Windsor Plaza Condo. Ass’n*, 289 Va. 34, 58-59 (2014). Because the circuit court decided the pleas in bar based on evidence heard *ore tenus*, its findings of fact are “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 Indus., Inc. v. Melendez*, 260 Va. 578, 595 (2000).

b. Argument

The dispute under the Plaintiffs' first assignment of error is not principally related to the accrual of their causes of action.[2] That is, the Plaintiffs do not dispute that a cause of action for trespass and nuisance arose when they were first damaged, in 2003. *See* Op. Br. at 13. Rather, the Plaintiffs argue that because the nuisance in this case is the intermittent discharge of sediment following rainfall, each discharge gives to a new claim and they are entitled to recover damages caused during the five-year period prior to filing suit. Op. Br. 17-18.

In general, the "policy of the law is to avoid multiplicity of actions and, if practicable, without injustice, to afford compensation in one action for all damages." *Southern Ry. Co. v. White*, 128 Va. 551, 566 (1920). With respect to nuisances, however, the "general rule" is that "repeated actions may be brought as long as the nuisance continues." *Virginia Hot Springs Co. v. McCray*, 106 Va. 461, 463 (1907). This rule, however, has an exception:

> [W]here a nuisance is permanent, the consequences of which, in the normal course of things, will continue indefinitely, there is but a single action therefor, and the entire damage suffered, both past and future, must be recovered in that action, and the

[2] This is in contrast to the Plaintiffs' argument on their second assignment of error.

> right to recover will be barred unless it is brought within the prescribed number of years from the time the action accrued.

Southern Ry. Co. v. McMenamin, 113 Va. 121, 131 (1912) (citing *Virginia Hot Springs*).

In *Virginia Hot Springs*, the defendant owned a resort, several buildings of which discharged sewage into a nearby stream. 106 Va. at 462-63. The plaintiff sued for the loss of the use of the water downstream and the defendant pled the statute of limitations, arguing that the use of the sewers was permanent and continuous. *Id.* at 463. Surveying foreign jurisdictions and treatises, the Court held that the relevant inquiry was whether "the injury [was] of a permanent character, resulting from a permanent structure." *Id.* at 471. "[I]f the nuisance is permanent and the injury constantly and regularly recurs, then the whole damage may be recovered at once." *Id.* at 467 (internal quotation marks omitted). Stated differently,

> Where the injury complained of is permanent[,] [t]he plaintiff is required to recover in one suit the entire damages, present and prospective, caused by the defendant's act. Injuries caused by permanent structures infringing upon the plaintiff's rights in his land, such as . . . <u>permanent pollutions of water</u>, fall into this class.

Id. at 470 (internal quotation marks omitted) (emphasis added).

In contrast, the Court stated, if the "injury or trespass is only temporary in character," the plaintiff may maintain successive actions for the damage that has already been caused. *Id.* at 466-67. Applying these principles to the sewage system at issue, the Court held that both the nuisance and the injury therefrom were permanent and, therefore, that the plaintiff had only one cause of action. *See also Magruder v. Virginia-Carolina Chem. Co.*, 120 Va. 352 (1917) (addressing discharge of pollutants from a mine to a downstream property owner and holding it was a permanent nuisance); *Worley v. Mathieson Alkali Works*, 119 Va. 862 (1916) (addressing constant discharge of manufacturer's waste and holding it was a permanent nuisance).

The Court has extended its understanding of "permanent nuisance" to certain, yet intermittent, damage arising from a permanent cause. In *White*, the defendant constructed a culvert that obstructed the natural flow of a river and, during freshets, resulted in the flooding of the plaintiff's property. 128 Va. at 553-56. Reviewing prior case law, the 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 <u>same principle of liability is appropriate to all cases where the nuisance is permanent and a constant and continuous agency of injury</u>.

Id. at 569 (emphasis added). Turning to the facts at issue, the Court held that the plaintiff's damages from the overflowing culvert would "occur with certainty though at uncertain intervals. . . . It is an established permanent nuisance, the consequences of which in the normal course of things will continue indefinitely." *Id.* at 569; *see McMenamin*, 113 Va. at 127, 131-32 (holding that intermittent blowing of smoke "whenever the wind blows in the direction" of the plaintiff's property was properly subject to permanent nuisance jury instruction).

Applying these principles to the Plaintiffs' claims in this case,[3] the alleged "nuisance is permanent and a constant and continuous agency of injury." *White*, 128 Va. at 569. The testimony from both the Plaintiffs and Defendants was that "the injury is of a permanent character, resulting from a permanent structure." *Virginia Hot Springs*, 106 Va. at 471. First, the cause and nature of the nuisance itself is permanent: the stormwater basins are permanent structures, unmodified since their construction, that constitute a permanent part of stormwater management for the County. JA 512-13, 535.

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[3] The Court has applied this permanent/temporary dichotomy to both nuisance and trespass cases. *See Norfolk and W. Ry. Co. v. Allen*, 118 Va. 428, 435-36 (1916) (applying principles to nuisance claim); *Hampton Roads Sanitation District v. McDonnell*, 234 Va. 235, 239-40 (1987) (applying *Norfolk* to trespass claim). Accordingly, the same analysis applies to the Plaintiffs' trespass and nuisance claims.

In addition, the evidence showed that the basins are "a constant and continuous agency of injury." *White*, 128 Va. 569. As multiple witnesses stated, the flow of water into and out of the basins is continuous and varies only in volume depending on rainfall and other factors. JA 536, 568. In addition, the evidence showed that there is always some level of sediment or turbidity in the water, also varying in amount depending on rainfall and other factors. JA 460-61, 514, 524, 570.

Like the overflow of the culvert in *White*, then, the discharge of sediment into Lake Hollymead "occur[s] with certainty though at uncertain intervals." *White*, 128 Va. at 569. In "the normal course of things," the discharge of silt and sedimentation from the basins will "continue indefinitely." *Id.*; *Worley*, 119 Va. at 866 (holding the nuisance of a plant discharging waste to be permanent because "[a]s long as it operated, so . . . will the nuisance complained of be constant, continuous and injurious to the plaintiff."). Accordingly, the alleged nuisance is a permanent one for which there is only cause of action. *Virginia Hot Springs*, 106 Va. at 463.

As the Court stated in *McMenamin*, it is "not essential to the defense of the statute of limitations that the damage complained of should exist <u>to the same extent</u> during the period of five years." *McMenamin*, 113 Va. at 132. The evidence makes clear that the extent of the alleged damage

varies: with no rainfall, the discharge into Lake Hollymead has the sediment and turbidity naturally found in water, plus any that may flow out from the collection of sediment sitting at the bottom of the basin, JA 514, 523-24, 719, 728; after a short, light rain, the sediment discharged presumably will be increased; and after a heavy, prolonged rainfall, the discharge will be noticeably muddy and murky. JA 668-72.

The function of the basins in this case makes it impossible to identify one cause of action as distinct from another, as would be required under the Plaintiffs' position. The Plaintiffs' contend that "each new discharge" gives rise to a new cause of action because it "caus[es] further discrete damage." Op. Br. at 17. But the discharge from the basins is not a discrete, identifiable event; instead, the basins are always discharging water into Lake Hollymead and that water always contains some level of sediment. There is no basis under these circumstances that could allow this Court or the circuit court to differentiate between discharges which constitute a nuisance and discharges that do not. Indeed, the Plaintiffs conceded in response to interrogatories that there is no distinct occurrence of a discharge. JA 761.

This fact is what distinguishes this case from *Hampton Roads Sanitation Dist. v. McDonnell*, 234 Va. 235 (1987), on which the Plaintiffs

principally rely. Op. Br. at 14-16. Like this case, *Hampton Roads* involved a permanent structure, a bypass valve and pump station through which flowed wastewater and sewage. *Id.* at 237. The structure, by design, discharged sewage through the bypass valve and onto the plaintiff's land under certain conditions, i.e., when the pump station reached "three times the normal quantity." *Id.*

Unlike this case, however, "each discharge" in *Hampton Roads* was an identifiable event that occurred only when the sewage flowed through the bypass valve, which happened on nine specific occasions. *Id.* at 239, 241. Neither the "wrongful act" nor the resulting damage were continuous; instead, discrete events caused quantifiable damage on specific occasions. *Id.* As a result, the Court held that "each discharge inflicted a new injury for which [the plaintiff] had a separate cause of action." *Id.*; *see Kiser v. A.W. Chesterton Co.*, 285 Va. 12, 23 n.4 (2013) (summarizing *Hampton Roads* and stating that "if there are <u>separate occurrences</u> of wrongful conduct <u>causing new injuries</u>, separate causes of action may arise") (emphasis added). Here, in contrast, both the alleged wrongful act (the basins discharging into Lake Hollymead) and the resulting damage (the inflow of sediment into Lake Hollymead) are permanent, continuous, albeit at intervals, and certain. *See White*, 128 Va. at 569.

In *First Virginia Banks, Inc. v. BP Exploration & Oil, Inc.*, 206 F.3d 404 (4th Cir. 2000), the Fourth Circuit distinguished *Hampton Roads* on grounds that apply here. There, the defendant was responsible for the migration of petroleum hydrocarbons beneath its gas station into the groundwater beneath the plaintiff's property. *Id.* at 406. In response to the plaintiff's argument that *Hampton Roads* controlled, the court stated:

> [The plaintiff] overlooks the fact that the migration of petroleum hydrocarbons onto its land did not occur in distinct episodes, as in Hampton Roads. Rather, the migration has occurred continuously throughout the decade. In that regard, this case is indistinguishable from *Churchill Apartments Assocs. v. City of Richmond*, 36 Va. Cir. 204 (1995), in which the Circuit Court of Virginia held that, in the case of an injury caused by the continuing migration of methane gas, the cause of action accrued when methane first migrated onto the plaintiff's land. *See id.* at 207.

Id. at 406-07. The court held, therefore, that only one cause of action arose. *Id.* at 407.

Here too, the discharge of sediment into Lake Hollymead "did not occur in distinct episodes," but rather has "occurred continuously" since the creation of the basins. *Id.* at 407; JA 761. As such, the nuisance is permanent and subject to the rule set forth in *White*: the Plaintiffs do not have multiple causes of action for damages.

For these reasons, the circuit court properly granted the pleas in bar.

II. This Court cannot and should not grant the Plaintiffs the relief requested in their second assignment of error

In their second assignment of error, the Plaintiffs ask the Court to adopt the *Restatement* doctrine of continuing trespass and hold that the statute of limitations does not begin to run until the silt and sedimentation are removed.

a. The Plaintiffs waived their second assignment of error

The Plaintiffs' second assignment of error states:

> The trial court erred <u>in refusing to rule</u> 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.

Op. Br. at 8 (emphasis added). A party's argument on appeal is waived if the party failed to present the circuit court with the opportunity to rule on the issue. *Scialdone v. Commonwealth*, 279 Va. 422, 437 (2010). Moreover, "[a]n assignment of error that does not address the findings or rulings in the trial court . . . is not sufficient." Rule 5:17(c)(1)(iii); *Heinrich Schepers GMBH & Co., KG v. Whitaker*, 280 Va. 507, 514 (2010) (holding that when as assignment "does not reflect the circuit court's ruling," it "is barred by Rule 5:17(c)").

The circuit court did not "refus[e] to rule" on the Plaintiffs' motion for summary judgment: it was never asked to do so. Although the Plaintiffs filed and briefed their motion, they did not notice it for hearing. At the August Hearing, the Plaintiffs argued the legal issue contained in their motion for partial summary judgment – i.e., that under the *Restatement*, the facts established a continuing trespass and "the statute of limitations does not run." JA 602-04. But the Plaintiffs made the argument only to defend against the pleas in bar and did not request the relief of partial summary judgment. In fact, the circuit court instructed the parties at that hearing that it was only hearing the pleas in bar that day, JA 738, and the Plaintiffs specifically told the circuit court they were not asking for that relief:

> [T]he second theory of trespass is more well developed in the Motion for Summary Judgment filed with you. I'm not asking for summary judgment today. That's down the road. But I do ask that you look at the memorandum in support in that motion because it covers the restatement second trespass issue.

JA 591 (emphasis added); *see also* JA 738 (counsel noting that the defendants had not presented argument on the motion for partial summary judgment because the court was not hearing the motion). The court's final order reflected this and only addressed the pleas in bar. *See* JA 117.

By failing to ask the circuit court to rule on their motion for partial summary judgment, the Plaintiffs failed to give the circuit court the

opportunity to rectify what they now assert as error. *Scialdone*, 279 Va. at 437. "In analyzing whether a litigant has satisfied the requirements of Rule 5:25, this Court has consistently focused on whether the trial court had the opportunity to rule intelligently on the issue." *Id.* If the circuit court does not have the opportunity to address an issue, "there is no ruling by the trial court on the issue, and thus no basis for review or action by this Court on appeal." *Id.*

The holding in *Nusbaum v. Berlin*, 273 Va. 385 (2007), controls here. There, the appellant assigned error to the circuit court's violation of his due process rights in a contempt proceeding. 273 Va. at 401-02. The appellant "articulated the particulars" of his legal argument to the circuit court on two separate occasions. *Scialdone*, 279 Va. at 441 (summarizing *Nusbaum*). But instead of asking the circuit court to grant relief, the appellant "nevertheless specifically told the trial court that he was not asking the court to reconsider its ruling based on those objections." *Id.* (citing *Nusbaum*, 273 Va. at 396-97). Because of his affirmative disavowal, the appellant "never allowed the circuit court to rectify the effect of what he now asserts as error." *Nusbaum*, 273 Va. at 406.

The same happened here. The Plaintiffs articulated their argument on the *Restatement* twice: first in their motion for partial summary judgment

and brief in support, and then at the plea in bar hearing when they raised the arguments in defense of the pleas in bar. But the Plaintiffs never asked the court to grant them partial summary judgment, and their "affirmative disavowal of any request for a ruling on [their motion for partial summary judgment] deprived the trial court of the 'opportunity to rule intelligently'" on their motion. *Scialdone*, 279 Va. at 442 (quoting *Nusbaum*, 273 Va. at 406). The Plaintiffs cannot seek reversal of a ruling that was not made and was never sought.[4]

b. The Plaintiffs argument is barred by judicial estoppel

The Plaintiffs' argument in their second assignment of error is that the trespass at issue in this case is a continuing trespass: the wrongful conduct continues as long as the silt and sedimentation remain on their property. Op. Br. at 18. Until the sedimentation is removed, the Plaintiffs argue, the trespass continues. *Id.* at 24. In contrast, the Plaintiffs' argument under their first assignment of error is that "each discharge of sediment" was a

[4] The Plaintiffs contend their written objection on the final order preserved their second assignment of error. Raising an issue for the first time in written objections on a final order does not present the circuit court an opportunity to rule intelligently on the issue. This is particularly the case when the Plaintiffs' written objections directly contradict their previous statement at the hearing that they were not requesting a ruling on their motion. Moreover, the written objection on the final order attacks the circuit court's "refusal to hear" their motion, in contrast to their assignment of error's focus on the "refusal to rule." *Compare* JA 118 *with* Op. Br. at 8.

"new, actionable trespass," *id.* at 15-16, and that, like in *Hampton Roads*, the wrongful conduct "occur[ed] only at intervals." *Id.* at 14.

The Plaintiff cannot take these contradictory positions relative to the "same . . . state of facts." *Lofton Ridge, LLC v. Norfolk S. Ry.*, 268 Va. 377, 381-82 (2004) (explaining how the "doctrine of judicial estoppel may bar a party from taking inconsistent positions within a single action"). In *Berry v. Klinger*, 225 Va. 201, 207 (1983), the Court ruled that a litigant could not argue that language was unambiguous and then take the opposite position subsequently in the same litigation. "[A] litigant will not be permitted to assume successively, inconsistent and mutually contradictory positions." *Id.* Here, the Plaintiffs simultaneously contend that the same conduct – the discharge of sediment from the basins – is both a single continuous trespass and successive intermittent ones. The law does not allow them to be so nimble.

c. The Court should reject the Plaintiffs' request to upend Virginia's law on accrual of actions

Even if the Plaintiffs have properly preserved their assignment of error, the Court should reject it. The Plaintiffs maintain that, under the *Restatement*, the silt and sedimentation deposits in Lake Hollymead constitute continuing trespass. But the Plaintiffs do not simply argue that the trespass remained on their property. *See Xspedius Mgmt. Co. v.*

Stephan, 269 Va. 421, 423-24 (2005) (addressing continuing trespass of a fiber optic line underground on plaintiff's property). Rather, they maintain that the statute of limitations does not begin to run until "the source of such trespass ceases." Op. Br. at 24. It is unclear whether the Plaintiffs believe the limitations period begins when the discharges cease, or when the sediment is removed. *Compare id.* ("as long as a source continues such deposits") *with id.* at 29 (suggesting the trespass continues "until such sediments are physically removed").

At the outset, this position is not even endorsed by the sections of the *Restatement* cited by the Plaintiffs in their assignment of error. Sections 158 and 161 endorse the concept already recognized in Virginia that a trespass is committed by the entry of or failure to remove a thing from the land of another. *See See Restatement (Second) Torts §§ 158, 161; Xspedius*, 269 Va. at 423-24.; *G.L. Webster v. Steelman*, 172 Va. 342, 352-53 (1939) (addressing the entry of food waste onto the property of the plaintiff). Nowhere, however, do sections 158 and 161 endorse the principle that a right of action does not accrue until the trespass is removed. *Cf.* Code § 8.01-230 (statute of limitations begins to run when right of action accrues). The Plaintiffs' invocation of the *Restatement*, therefore, is fruitless.

The Plaintiffs' position is also incompatible with existing Virginia law. Virginia has "long applied" the common law principle that the statute of limitations attaches when an injury is suffered as a result of a wrongful act. *Kiser*, 285 Va. at 21-22. This principle is codified in Code § 8.01-230 ("In every action for 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 property."). As this Court has repeatedly held, altering this accrual rule requires an act of the legislature. *See Locke v. Johns-Manville Corp.*, 221 Va. 951, 959 (1981); *Virginia Military Institute v. King,* 217 Va. 751, 760 (1977). The Plaintiffs' request for a new accrual rule in the case of a continuing trespass – that the statute of limitation should run from the removal of the source of the trespass – is one for the General Assembly.

Moreover, adopting the Plaintiffs' theory would call into question this Court's jurisprudence on continuing trespass. This Court has repeatedly recognized that a court may grant injunctive relief in the event of a continuing trespass. *See, e.g.*, *Levisa Coal Co. v. Consolidation Coal Co.*, 276 Va. 44, 61 (2008) (citing cases). Under the Plaintiffs theory, however, the plaintiffs in these cases would have no right of action to seek that relief until the trespass was removed. In *Fancher v. Fagella*, 274 Va. 549 (2007),

for example, the plaintiff's right of action for continuing trespass would not accrue until the invasive root system was removed. *Id.* at 556 (finding allegations of existing root system sufficient to constitute a continuing trespass); *see Seventeen, Inc. v. Pilot Life Ins. Co.*, 215 Va. 74, 78-79 (1974) (finding allegations of surface water discharge sufficient to constitute a continuing trespass). The Court should reject the Plaintiff's invitation to rewrite Virginia law on continuing trespass and the accrual of actions.

CONCLUSION

The Plaintiffs filed this claim nearly ten years after learning of their alleged damage. To resurrect their claims, the Plaintiffs request an expansion of Virginia's law on permanent nuisance that is unjustified by the facts at issue. This extension, moreover, would create limitless liability and litigation. The circuit court properly rejected the invitation and its ruling should be affirmed.

Respectfully Submitted,

HOLLYMEAD CORNER, LLC

By: *<u>/s/ John P. O'Herron</u>*

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CERTIFICATE OF SERVICE AND COMPLIANCE WITH RULE 5:26

I, John P. O'Herron, hereby certify, pursuant to Rule 5:26(h), that on August 12, 2016, the foregoing Brief of Appellee was filed electronically via the VACES system with the Supreme Court of Virginia and that ten copies of the same were hand delivered to the clerk's office. This same date, a copy of the Brief of Appellee was sent via email to all counsel of record, at the email addresses below:

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