In the Supreme Court of Virginia

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Record No. 180631

JANE WASHBURN ROBINSON, TRUSTEE FOR THE JANE WASHBURN ROBINSON LIVING TRUST,

Appellant,

v.

NELS P. NORDQUIST AND JENNIFER D. NORDQUIST,

Appellees.

From the Circuit Court for the City of Alexandria

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OPENING BRIEF OF APPELLANT

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ASSIGNMENTS OF ERROR

1. The trial court erroneously granted Defendants' Plea in Bar on the basis of improper factual findings that Plaintiff's Trespass and Nuisance claims were "continuous" rather than "intermittent" and thus barred by the applicable statute of limitations despite admissions by Defendants and independent evidence that the trespass and nuisance did not occur each year during the winter months when a sprinkler system was turned off, as well as when Defendants did not use other watering methods, which are actions within the Defendants' control. [Error Preserved: Joint Appendix ("JA") at 377-378, 389, 398-400, 414-423, 426, 431-432, 435-440, 462-476; 531-549, 587-596; 213, 216; 226, 232-237; 372.]

2. The trial court erred when it denied Plaintiff's motion for leave to amend her Trespass and Nuisance claims to properly reflect the evidence adduced during discovery and reflected in attachments to Defendants' Plea Brief. [Error Preserved: JA at 462-466, 474-476; 215-216; 238; 555-556; 372.]

3. The trial court erred when it granted Defendants' Demurrer, holding that the 1960 *Deed of Bargain and Sale and Easement's* "perpetual easement" to the owner of 404 Duke Street and its successors "to keep and maintain openings on the west side of the premises: 404 Duke Street overlooking the premises 406-8 Duke Street, for the purpose of admitting light and air through said openings," was "vague," "ambiguous," and therefore, "unenforceable," which circumvented and ignored the intent of the drafters to protect the access of Plaintiff's property[1] to light and air for Plaintiff's openings. [Error Preserved: JA at 398-411, 435-436, 441-442, 449-450; 213-216; 372.]

4. The trial court erred when it held that the provision in a 1969 *Deed of Indenture* that created a "3-foot strip of land (herein called the Median)" that "<u>shall forever be and remain open and free of all buildings and structures</u> … except as aforesaid <u>the same shall be and remain open yard</u>, the right so secured hereby to be appurtenant to 404 [Duke] and enjoyed by [the owner of 404 Duke]" only protected the Median's "open yard" from a certain class of items in a narrow definition of "buildings" and "structures," but allowed all other types of obstructions to be placed within the defined Median, thus

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[1] The term "Plaintiff's property" in this Petition refers to the Trust's contiguous properties at 404 Duke Street and 303 S. Royal Street. JA at 131-132.

circumventing and ignoring the intent of the Indenture's drafters. [Error Preserved: JA at 400, 411-413; 214-216; 372.]

5. The trial court erred by refusing to issue a Rule to Show Cause and by entering an order restricting Plaintiff's access to the openings on the west side of Plaintiff's properties despite the 1960 "perpetual easement" allowing the owner of 404 Duke Street and 303 S. Royal St. (Plaintiff) access to enter the yard of 406 Duke Street "to keep and maintain openings on the west side of 404 overlooking 406-8 [Duke St.]" without any such restrictions. [Error Preserved: 6/14/2017 Order Objection [Docket #1525]; JA at 627-638, 641-642; 372.]

NATURE OF THE CASE AND MATERIAL PROCEEDINGS BELOW

Plaintiff (Appellant here) filed her Complaint on December 4, 2015, alleging claims for Declaratory Judgment, Breaches of Covenants, Private Nuisance, Intentional Trespass, and Negligence. JA at 1. The claims arise in part from Defendants' on-going, intentional, and repeated violations of an easement established by Deed of Bargain and Sale and Easement dated December 9, 1960 and a Deed of Indenture dated July 14, 1969, which affirmed and expanded the earlier easement.[2] The claims further arise in part from Defendants' inadvisable installation of a sprinkler system and other artificial means of watering immediately next to Plaintiff's western wall that eventually caused significant water intrusion and damage to Plaintiff's historic residential property despite Plaintiff's repeated warnings about the potential damage that Defendants' watering

[2] For ease of discussion, both documents jointly are called "easements."

would cause.

Defendants filed a Demurrer and Plea in Bar to the original Complaint on January 8, 2016. JA at 54; 58. These pleadings were supported by memoranda filed on February 24, 2016. JA at 64; 78. Defendants' Demurrer Memorandum argued that "[t]he easement documents are 'clear, unambiguous, and explicit' and the defendants request that this court resolve the meaning of" the easements as a matter of law. JA at 65. Among other things, the Demurrer challenged Plaintiff's interpretations of the easements (Counts I-IV), JA at 65-71, Plaintiff's Nuisance claim (Count VI), JA at 71-72, and Plaintiff's Trespass claims (Counts V and VII), JA at 72-74. Defendants' Plea in Bar sought, inter alia, to strike Plaintiff's water intrusion Trespass and Nuisance claims on the grounds that the intrusions, whether continuous or intermittent, was barred by the statute of limitations. JA at 83-87.

The Court heard arguments on Defendants' first Demurrer and Plea in Bar on March 9, 2016. During that hearing, Defendants declined to have much of their Plea in Bar heard. The Court, Chief Judge Kemler presiding, rejected all of Defendants' arguments for the Demurrer, except that it sustained the Demurrer as to a negligence claim and a claim for punitive damages. JA at 123. After Plaintiff chose not to amend her complaint at that juncture, Defendants filed an Answer on March 30, 2016, which denied any and all allegations of water intrusion caused by

Defendants' waterings. Docket #181 at ¶¶ 99, 101-106, 149, 151, 153, 155-157. Even before this Answer was filed, Defendants served sworn Interrogatory Answers that stated that "[a]n irrigation system was installed in June 2008 and has been in use since that date, though depending on the season and the advice of [Defendants'] irrigation contractor, the system was adjusted for weather and is also not pressurized or turned on at certain times of year," JA at 122 (Answer to Interrogatory #12), creating an issue of fact regarding whether the water intrusion was continuous or intermittent.

For the next ten months, the parties engaged in extensive discovery, costing each side more than $100,000. A total of 18 expert witnesses were designated by the two parties and 14 depositions were taken. Four motions had to be filed to compel discovery from Defendants, most mooted by last minute productions.

During discovery, Plaintiff learned from her damages expert that access to a sizeable portion of Defendants' yard would be needed in order to perform the exterior repair that the expert considered to be necessary. As a result, Plaintiff filed a motion for leave to file an Amended Complaint on November 2, 2016, Docket #443, in order to ensure that, if Plaintiff prevailed on her water intrusion claims, Plaintiff could obtain a complete remedy to repair the damage caused by Defendants' actions. Otherwise, only minor typographical changes were made to

the Complaint, none of which affected the liability claims raised by Plaintiff. JA at 131. Leave to file the Amended Complaint was granted on November 9, 2016.

Defendants filed their combined Demurrer and Plea in Bar to the Amended Complaint, as well as a joint memorandum in support of the pleadings, on November 30, 2016. JA at 183; 241. The Demurrer Memorandum again asserted that "[t]he easement documents are 'clear, unambiguous, and explicit' and the defendants request that this court resolve the meaning of" the easements as a matter of law. JA at 243. Defendants argued that Plaintiff misinterpreted the two easements and sought to dismiss Counts I-IV to the extent that they were not consistent with "the easement text and Virginia law." JA at 185. Among other points, Defendants argued that the "light and air" perpetual easement was limited to a three-foot median, JA at 244-246, and that the easement only barred "buildings and structures" in the median. JA at 248.[3]

The Plea in Bar to the Amended Complaint sought, among other things, to have the claims of water intrusion caused by Defendants' watering methods dismissed on statute of limitations grounds. JA at 255-258. Attached to the Memorandum were various documents that created an issue regarding whether the

[3] Nowhere in either the Demurrer or the Memorandum in Support of the Demurrer did Defendants make any argument that the term "open yard' used in the 1969 Easement was vague, ambiguous, or without dimensions, and therefore, unenforceable. JA at 183; 241.

water intrusion caused by Defendants was continuous or intermittent. JA at 266-267; 268-269; 277 (Interrogatory Answer stating that "Plaintiff did not observe any instances of water encroachment during the winter months when Defendants ceased their watering activities;" also noting no water encroachment during the period when Defendants' property was undergoing a large construction project).

At a pre-trial conference held by Chief Judge Kemler on December 16, 2016, the parties discussed the motions that still needed to be heard prior to trial. Judge Kemler acknowledged that Plaintiff had previously requested a jury to determine the Plea in Bar and thus agreed that the plea would be heard as part of the trial, not at any hearing prior to trial. JA at 230. Plaintiff reiterated the request for such a jury when she filed her Opposition to Defendants' Plea in Bar. Plaintiff's Opposition to Defendants' Plea in Bar to Amended Complaint (Docket #1113) at 2. The day before the hearing, a circuit court clerk called Plaintiff's counsel to confirm that the Plea in Bar would not be heard on January 25, 2017. JA at 231. At the hearing itself, Plaintiff's counsel specifically stated that "[w]ith respect to the plea in bar, we had a jury demand so I don't see how we can resolve a plea in bar today." JA at 378 (lines 11-13); see also, JA at 464 (lines 13-15).

During the January 25 hearing, Defendants' counsel argued several issues as part of his presentation on Defendants' Demurrer that were not within the four

corners of the Demurrer or the Memorandum in Support of the Demurrer, including but not limited to, arguing that the "open yard" provision in the 1969 easement was vague and unenforceable, JA at 448, 466, as well as asserting that Plaintiff's Complaint asserted a "continuous" trespass and nuisance and thus was barred by the statute of limitations. JA at 467. Although the court initially "sustained" the Demurrer on the basis of statute of limitations, JA at 462, the Court had to withdraw that ruling once it was pointed out that Defendants' Demurrer had not argued that basis. JA at 466-467. Instead of allowing the claims of water intrusion based upon Defendants' watering methods go to the jury, the court sustained Defendants' Plea in Bar, JA at 476, which was not supposed to be considered during the hearing, but rather before a jury.

Many of these same arguments by Defendants had been rejected by the trial court in March 2016, ten months before this hearing. The trial court explained this change in ruling by explaining that "I will admit or cop to the fact that I think that I have a better handle of the case at this point than I did ten months ago." JA at 454 (lines 11-12). The trial court's January 25, 2017 rulings were memorialized in an Order after a subsequent hearing on March 22, 2017. JA at 208-211.

Plaintiff filed a Motion for Reconsideration which sought, among other things, to have the Court reconsider its ruling on Defendants' Plea in Bar without a

jury and its legal determination without any factual evidence introduced that the trespass and nuisance were "continuous," contrary to information contained in Defendants' Answer [Docket #181] and Plea in Bar Memorandum. JA at 226.

The trial court held a hearing on the parties' competing motions for reconsideration on June 30, 2017. At that hearing, the court denied Plaintiff's motion to reconsider the Plea in Bar dismissal of the Trespass and Nuisance claims; granted Plaintiff's motion to have claims tried that had not been dismissed or addressed by rulings to date;[5] denied Plaintiff's motion for leave to amend the Trespass and Nuisance claims; and modified the rulings regarding the "open yard" provision of the 1969 Indenture. JA at 368 (9/13/2017 Order).

Plaintiff had also filed a Motion for Rule to Show Cause due to Defendants' refusal to provide Plaintiff access to the median as required under the trial court's March 22, 2017 Order. Docket # 1502. On June 14, 2017, the court postponed ruling on that motion until the reconsideration hearing. At the June 30, 2017 reconsideration hearing, without hearing any evidence, the trial court denied Plaintiff's Rule to Show Cause and asked for the parties to develop a "plan" for

[5] During the January 25, 2017 hearing and in its subsequent Order, the Court did not address the disposition of several of Plaintiff's claims that were not addressed by the Court's rulings, including previous violations of the easement by "buildings" and "structures" within the three-foot median and the damage that has been caused by Defendants' increase of soil next to Plaintiff's properties.

Plaintiff's access to the median. JA at 639-641. The court's June 30 rulings and its ruling on the "plan for access" were memorialized after a September 13, 2017 hearing on competing orders. JA at 368-370.

STATEMENT OF FACTS

Jane Washburn Robinson, the Trustee of the Jane Washburn Robinson Living Trust, has served as the restorer, custodian, and protector of the national treasure that is 404 Duke Street in Old Town Alexandria since 1988. When she purchased the property, the house had been subdivided into several apartments and looked little like its original grandeur from its construction in approximately 1809 until the 1950s. At great expense and for over 10 months until she could finally move in, Ms. Robinson, with the help of her architect, painstakingly and lovingly restored the house to its former glory. As part of this renovation, Plaintiff's Trustee finished the western portion of the basement and converted it into an extension of the kitchen. Plaintiff's Expert Report of H. N. McMahon, Architectural Historian (Attachment A) at 5.[6] By 1989, 404 Duke Street was again a showplace of Old Town and a defining structural specimen of Alexandria.

Today, 404 Duke Street remains among a handful of early Alexandria

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[6] The McMahon Report was produced to Defendants as part of Plaintiff's Expert Designations, but was not filed with the Court. It is attached to this Brief for background information regarding 404 Duke Street.

Georgian to Federal style freestanding homes characterized by monumental massing, still in a near-original style and configuration. Id. at 3. 404 Duke Street is in a league with the most prized homes of the Old and Historic Alexandria District, likened in stature in an architectural historian's findings to the Dulany House (601 Duke Street, 1783-4), the Lloyd House (220 N. Washington St., 1797), and the General Roberdeau House (418 South Lee St, 1780). Id. In 2001, to ensure that 404 Duke Street and the adjacent 303 S. Royal Street[7] would be protected for years beyond her lifetime, Ms. Robinson transferred the title to the property to the Jane Washburn Robinson Living Trust.

For over 200 years, there is no record that the basement experienced any significant water intrusion or required waterproofing. For many decades, the windows on the west side of the house allowed light and air to reach the residents and visitors to 404 Duke Street, both of which included many American luminaries. Id. at 1-2.

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[7] A 1987 *Deed of Subdivision* divided 404 Duke Street into three parcels, now the present 404 Duke St., 303 S. Royal St., and 305 S. Royal St. JA at 171-177. 303 S. Royal St. was purchased by Ms. Robinson in 1992. McMahon Report at 6; JA at 145 n. 3. The owner of 305 S. Royal St. is not a party in this action. All three properties are beneficiaries of the 1960 Easement and 1969 Indenture.

Water Intrusion

Between 1988 and 2008, there had only been modest water intrusion from the various residents of the neighboring property at 406/408 Duke Street a handful of times. JA at 145. In 2008, Defendants installed an underground watering system within approximately two feet of Plaintiff's properties. JA at 145-146. At first, the water that leaked from Defendants' underground sprinkler system only created water drainage into the basement, and no significant damage had yet occurred. JA at 147. By summer 2011, however, it became clear that this water intrusion was beginning to cause actual and extensive deterioration of the mortar between the stones in the basement foundation wall and significantly damage the finished portions of the basement. JA at 147. Plaintiff documented that such water intrusions appeared to occur only when Defendants ran their underground water sprinkler system or used above-ground watering methods, and never during the winter months when the sprinkler system and other watering methods were turned off. JA at 276-277. No water intrusion occurred otherwise, even when Alexandria experienced heavy rainfall. Id.

Despite repeated notice of this water intrusion, Defendants refused to take affirmative measures to stop this water intrusion. Id. Rather, Defendants told the Trustee that it is the Trust's burden to waterproof the house in order to keep

Defendants' water infiltration from damaging the Trust's properties. Defendants argue that Plaintiff is simply not keeping up its properties, that the Trust's properties essentially deserve to suffer damage because no affirmative waterproofing has been performed. Defendants refuse to accept any responsibility for any of the harm they have visited upon the Trust's properties.

Applicable Easements

Defendants' disregard for their legal obligations to the owner of 404 Duke Street and 303 S. Royal Street extended to their violations of the two easements that encumbered 406/408 Duke Street. In 1960, the then-owners of 406/408 Duke Street executed a Deed of Bargain and Sale and Easement that granted a "perpetual easement" to the owner of 404 Duke Street and her successors:

1) "to keep and maintain openings on the west side of the premises: 404 Duke Street overlooking the premises 406-8 Duke Street,"
2) "for the purpose of admitting light and air through said openings," and
3) "to locate ventilation outlets on and in said west side."

JA at 164-166 (quoted language at 165).

The 1960 easement was followed in 1969 by a *Deed of Indenture* which reiterated the perpetual easement set forth in the 1960 document and expressly stated that the Indenture "**affirm[ed] and enlarge[d]** the 1960 Easement as herein

provided." JA at 168 (First and Second Whereas Clauses) (emphasis added). Pursuant to the Deed of Indenture, the 1969 Easement enlarged the 1960 Perpetual Easement by adding a separate protection for a three-foot strip of land adjacent to the western wall of 404 Duke Street:

> A 3-foot strip of land (herein called the Median), the easterly portion of 406-8, adjoining the westerly boundary of 404 [Duke] shall forever be and remain open and free of all buildings and structures … except as aforesaid the same shall be and remain open yard, the right so secured hereby to be appurtenant to 404 [Duke] and enjoyed by [the owner of 404 Duke] and any and all persons who shall succeed [said owner] in the ownership of 404 [Duke].

(emphasis added). JA at 168 (Paragraph 2).

The express intent of the 1969 Deed of Indenture was to create a three-foot Median next to 404 Duke Street that was to "remain free of all buildings and structures" erected by the 406/408 Duke Street owners, as well as that this Median was to "remain open yard" to be "enjoyed" by the then-owner of 404 Duke Street and "any and all persons who shall succeed her in the ownership of 404 [Duke Street]." Id. The *Indenture* further granted to the owners of 404 Duke Street "the right, exercisable at any time and from time to time **without notice** to the owner at the time of 406-408, to erect on the Median one or more chimneys adjacent to the westerly wall of the structure now standing on 404, any chimney so built to be of such exterior proportions as may be required to serve the purpose of the erector,

but in no event to exceed three feet in depth." JA at 168-169 ¶ 3 (emphasis added).

Violations of the Easements

Since Defendants have moved into 408 Duke Street, they have erected a ten-foot arbor with lattice and both real and fake ivy a mere two feet from the kitchen window of 404 Duke Street, eliminating significant amounts of light and air to that window.[8] JA at 137-139, 148, 150, 289-292 (photographs showing arbor and kitchen window). Similarly, Defendants have planted trees and bushes as close as one foot to other windows of both 404 Duke Street and 303 S. Royal St, ostensibly for "aesthetic purposes," JA at 139-140, 150, 293 (photograph showing bushes and front window of 404 Duke St.), but Plaintiff's expert arborist has written that such a close configuration of trees and bushes is known in the industry as a "privacy screen,"[9] which has substantially screened the windows from any light coming in.

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[8] The arbor's foundation was set only two feet from 404 Duke St., and other parts violated the median, while the arbor supports are three feet from the house. This is an issue of Defendants' denial of light and air to Plaintiff's openings; Plaintiff has no interest in any view of Defendants' yard.

[9] In addition, Defendants have greatly increased the height of the soil along the western wall of 404 Duke Street. As Plaintiff's structural engineer explained, this has caused deterioration in the joists in the basement of 404 Duke Street, which were initially above ground, but are now at least 12 inches underneath the ground level of the portion of 406 Duke Street that abuts 404 Duke Street's western wall. In addition to the joists' deterioration, this increased soil level and water intrusion has caused the foundation to settle and the walls to wick up water, causing extensive damage to the entry vestibule and entry foyer of 404 Duke St.

Last, Defendants installed locked gates on all entrances formerly used by Plaintiff to enter the yard of 406 Duke Street to keep and maintain the Trust's windows and other openings, denying access to maintain those openings to contractors and Trustee herself, in violation of the 1960 Easement. JA at 141-142.

ARGUMENT

1. The Erroneous Granting of Defendants' Plea in Bar on Plaintiff's Trespass and Nuisance claims. Assignment #1.

Standard of Review - The standard of review for Assignment 1 involving questions of law regarding the sustaining of a Plea in Bar is *de novo*. Willard v. Moneta Building Supply, Inc., 262 Va. 473, 475 (2001).

Despite Plaintiff's explicit request that a jury determine any facts related to Defendants' Plea in Bar, the trial court made a factual finding that the Trespass and Nuisance claims alleged by Plaintiff were "continuous" rather than "intermittent" activities. This factual finding, couched as a determination as a matter of law, contradicted both the factual evidence attached to Defendants' Plea in Bar Memorandum itself and the previous decisions of this Court.

The Court "heard" Defendants' Plea in Bar on January 25, 2017,[10] even

[10] The Court initially heard the arguments as part of Defendants' Demurrer and Motion for Summary Judgment [JA at 450 (lines 11-13), 451:line 13 – 452:line 4; 453:line 11 – 454:line 5, 461:line 15 – 462:line 10] until Plaintiff's Counsel pointed out that the arguments regarding "continuous" trespass were not in either

though Plaintiff had been told that the plea in Bar would not be heard at the hearing. The Court did not consider all of the pleadings before the Court or even the attachments to the Plea in Bar Memorandum itself and did not have a jury hear the matter despite Plaintiff's explicit request for a jury trial on the Plea in Bar.

Procedural Due Process requires that a party have reasonable notice as to which motions and other matters will be argued during a scheduled hearing. McManama v. Plunk, 250 Va. 27, 34 (1995) ("Procedural due process guarantees that a person shall have reasonable notice and opportunity to be heard before any binding order can be made affecting the person's rights to liberty or property.") In the present case, Plaintiff was specifically told at least twice by the Court that the Defendants' Plea in Bar would not be argued on January 25, 2017 – at the pretrial hearing on December 16, 2016 and by the Court's clerk on January 24, 2017, the day before the hearing. Rather, Plaintiff was assured that the Plea in Bar would be included as part of the issues to be heard by the jury in a trial scheduled to begin five days later on January 30, 2017 and not during the hearing on January 25, 2017. Plaintiff specifically had requested a jury in her Opposition to Defendants' Plea in Bar, Docket #1113 at 2, and Counsel reiterated that request at the beginning of the January 25, 2017 hearing. JA at 378 (lines 11-13). Plaintiff's Counsel again

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arguments to what the Court believed was Defendants' Plea in Bar. JA at 476 (lines 11-17).

objected to consideration of the Plea when the trial court converted the Demurrer (which had not raised the statute of limitations argument) into a Plea in Bar. JA at 464 (lines 13-15) ("I believe Your Honor indicated that you were not [going to] consider plea in bar issues today in absence of a jury when requested.")

The Plea in Bar that the Court adjudicated on January 25, 2017 was not the Plea in Bar filed by Defendants. The Plea in Bar filed by Defendants specifically sought to have the Court consider evidence, which was attached to Defendant's Memorandum in Support of the Plea in Bar. JA at 241, 257-258, 262-288 (Exhibits 2-9). Defendants' brief argued that the Amended Complaint was ambiguous as to whether Plaintiff was asserting claims for "continuous" or "intermittent" trespass and nuisance. JA at 255-256; see also JA at 389 (lines 18-20) ("it seems to me that the Plaintiff must make an election here today that they are seeking a continuous and permanent condition.") Defendants' Memorandum attached answers to interrogatories that stated that "Plaintiff did not observe any instances of water encroachment during the winter months when Defendants ceased their watering activities." JA at 277. The Court ignored this evidence and instead created a new Plea in Bar that sought dismissal of the Trespass and Nuisance claims based only upon the Court's reading of the Amended Complaint, JA at 473, 476, an interpretation which Plaintiff also contests.

Given that Defendants' brief argued the Plea in Bar as one that should consider evidence, the Court could not ignore that very evidence and grant a plea that was based upon only the allegations in the pleading itself, especially a mere five days before the trial was scheduled. Pleas in Bar which consider evidence have different standards of review than those based solely on pleadings. See Tomlin v. McKenzie, 251 Va. 478, 480 (1996) ("The defensive plea in bar shortens the litigation by reducing it to a distinct issue of fact which, if proven, creates a bar to the plaintiff's right of recovery. The moving party carries the burden of proof on that issue of fact. Where no evidence is taken in support of the plea, the trial court, and the appellate court upon review, must rely solely upon the pleadings in resolving the issue presented.") (citations omitted). In the present case, Defendants sought to prove the Plea in Bar through evidence, which required a jury to evaluate. Va. Code § 8.01-336; Hawthorne v. VanMarter, 279 Va. 566, 577 (2010) ("[i]f the facts underlying the plea in bar are contested, a party may demand that a jury decide the factual issues raised by the plea"); Bethel Inv. Co. v. City of Hampton, 272 Va. 765, 770 (2006); Upper Occoquan Sewage Auth. v. Blake Constr. Co., Inc., 266 Va. 582, 585-86 (2003). Only if the facts are undisputed or there is no demand for a jury made, the "whole matter of law and fact" may be decided by the court. Hawthorne, 279 Va. at 578. In the present case, Plaintiff

repeatedly disputed the factual claims of the Defendants and demanded a jury to decide the plea. Docket #1113 at 2; JA at 378 (lines 11-13), 464 (lines 13-15).

Even were the standard of review for a non-evidentiary Plea in Bar applied, the trial court sustained Defendants' Plea in Bar in part without ever considering certain pleadings presented to the court by Defendants themselves. Specifically, the trial court ignored arguments in Defendants' Plea in Bar Memorandum, JA at 257-258, as well as documents attached to the memorandum, JA at 277, which clearly create a dispute as to whether the water intrusion caused by Defendant's watering methods is "continuous" or "intermittent" under Virginia law.

Defendants, taking certain words out of context, argued that the Plaintiff's use of the words "continuing" and derivatives thereof in her Amended Complaint made the trespass one that was "continuous" under Virginia law.[11] JA at 394 (lines 14-23), 397 (lines 3-5). The trial court adopted this analysis, confusing "continuous" with "continuing." JA at 397 (lines 17-23), 414 (lines 17-19), 439 (lines 15-16), 467 (lines 6-8). This contention misconstrues how this Court has

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[11] Defendants and the trial court ignored the fact that the Amended Complaint referred to the trespass as "intermittent" in the trespass count of the Complaint. JA at 160 (¶ 157). Both also ignored Plaintiff's allegations that the "continuing" trespasses and nuisances "would require Plaintiff to file a multiplicity of suits in order to protect Plaintiff's rights," an allegation of an intermittent claim. JA at 159 (Count VI Nuisance, Wherefore (iv)), 161 (Count VII Trespass, Wherefore (iv)).

defined the word "continuous" for purposes of evaluating trespass. Under the Supreme Court of Virginia's jurisprudence, "continuous" is synonymous with "uninterrupted," "unbroken," or "unending." Directly on point is the Court's series of decisions in Norfolk & W. Ry. Co. v. A.C. Allen & Sons., 118 Va. 428 (1915) ("Norfolk Railway I"), and later proceeding, 122 Va. 603 (Va. 1918) ("Norfolk Railway II"); see also Forest Lakes Cmty. Ass'n v. United Land Corp. of Am., 293 Va. 113, 124 (2017) ("a series of 'repeated actions' causing *temporary* injuries to property would run the limitation period anew with each such action . . . even when the physical structure causing the damage is itself a permanent fixture on the offender's property.").[12] The word "continuing," on the other hand, has been used to describe an "intermittent" trespass in the opinions of this Court and others.

In Norfolk Railway I, the Court considered a steam pumping station that had been installed on a creek by defendant railway upstream of plaintiff's mill. Plaintiff sued based upon water that had been pumped from the stream and had been diverted from the creek. The railway claimed that the mill's claims were

[12] One underlying consideration in the Court's analysis of the "continuous" versus "intermittent" distinction has been whether the defendant has the ability to control the source of the trespass. Compare Norfolk Railway and Hampton Roads (defendant had ability to control water intrusions) with Forest Lakes and Shin (defendant had no ability to control intrusion). In the present case, the Defendants had the ability to control the water intrusions by "winterizing" the sprinkler system and otherwise not using it or any other watering method.

barred by the statute of limitations because the action was brought more than five years after the pump was installed and defendant first started taking water from the creek. The Supreme Court of Virginia rejected this assertion, explaining that

> when a permanent structure is unlawful in and of itself, irrespective of any damages which flow from it, a cause of action accrues at once upon the erection of the unlawful structure, and the plaintiff may recover once for all; but when a structure is lawful, as when it is erected on the defendant's own premises, and is not per se injurious to the plaintiff, then the plaintiff's cause of action arises not from the erection of the structure, but only for such injury as may result from the use of the structure. In other words, a thing which is lawful is not actionable until the plaintiff has suffered injury on account of it. A single suit, under the facts of this case, could not be made to embrace future damages, for the reason that it cannot be assumed that the defendant will continue to illegally inflict injury upon the plaintiff. To indulge such a presumption might result in awarding the plaintiff damages for an injury never suffered by him.

Norfolk Railway I, 118 Va. at 432. The Supreme Court of Virginia quoted an Iowa case which clarified, "[s]o far as the dam operates to permanently overflow the land of another and take away from the owner all beneficial use of his property, the damage may be treated as original and all recovered in one action; but so far as it may cause only a periodical or occasional flooding, **the damage is continuing**, and successive recoveries can be had." 118 Va. at 435 (on rehearing) (quoting Harvey v. Mason City, & Ft. D. R. Co., 129 Iowa 465, 105 N. W. 958, 961 (1906)

(emphasis added)).[13] In a related case, this Court further explained,

> Every time [the railway] diminished the plaintiffs' supply of water to their detriment it committed a new trespass, and while the nature of its pumping station indicated that it would probably continue to trespass upon the plaintiffs' property, the latter were under no obligation to presume that it would continue to do so, without compensation, nor to undertake to minimize the results of a wrong that might terminate at any instant. They had no right to assume that the railroad company would continue to illegally inflict an injury upon them.

Norfolk Railway II, 122 Va. 603, 611. As the Court stated in Norfolk Railway I, "[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." 118 Va. at 438 (on rehearing) (quoting Sutherland on Damages (3d Ed.) vol. 4, § 1039, p. 3034). Numerous other decisions of the Supreme Court of Virginia have followed this guidance from the Norfolk Railway case, including Hampton Roads Sanitation Dist. v. McDonnell, 234 Va. 235 (1987) (intermittent discharges of sewage and other pollutants from pumping station onto landowner's property gave rise to separate causes of action accruing with each discharge rather than one cause of action accruing when first discharge occurred).

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[13] Thus, the Court (quoting the Iowa court), like Plaintiff, used the term "continuing" to refer to an injury that was periodic or occasional, but was repeated, to refer to a trespass that it held was "intermittent."

Similarly, in the present case, the Defendants' underground sprinkler system is a permanent system that in itself is lawful. Yet, when it is activated (like the pumping station in Norfolk Railway), it may cause water intrusion that ultimately damages Plaintiff's basement, foundation, and first floor. The very nature of a sprinkler system is such that it is only activated at certain times and is entirely dormant during the winter months (as is confirmed by the evidence attached to Defendants' Plea in Bar Memorandum, JA at 277). The water intrusions that damaged Plaintiff's property were not "continuous" in the sense that they were uninterrupted, unceasing, or unending, but rather were "continuing" in the sense that they have repeatedly entered Plaintiff's property at different intervals since Defendants began watering their yard. Thus, for purposes of the Virginia jurisprudence regarding trespass, these intrusions were "intermittent."

Like the dam owner in the Iowa case, Defendants' system does not cause water intrusions "permanently" but rather "cause[s] only a periodical or occasional flooding, the damage is continuing, and successive recoveries can be had." Harvey, 105 N. W. at 961. If this Court denies Plaintiff the ability to bring an action based the intrusions of water caused by Defendants, Defendants likely will ultimately totally destroy Plaintiff's basements, foundations, and other parts of the Trust's properties without recourse through their water methods under Defendants'

control without providing the Trust any remedy. This is not the law of Virginia.

The only Virginia decision that Defendants cited at hearing in support of their argument that Plaintiff had alleged a "continuous" trespass and nuisance was this Court's decision in Fancher v. Fagella, 274 Va. 549, 555-57 (2007). JA at 428-429. Fancher involved a "noxious" tree, "the roots of which intrude[d] into, and cause[d] significant, continuous and increasing structural damage to the plaintiff's property." 274 Va. at 552. Unlike the repeated water intrusion that has occurred at different intervals here, the roots were always intruding onto and causing damage to the plaintiff's property, without any break. Fancher does not involve a dispute involving the "continuous" versus "intermittent" line of trespass cases as it involved a clear "continuous" trespass. There is no mention in Fancher of any consideration regarding the "continuous" / "intermittent" analysis.

After the trial court dismissed Plaintiff's Trespass and Nuisance claims, this Court issued its opinion in Forest Lakes Cmty Ass'n v. United Land Corp. of America, 293 Va. 113 (Feb. 16, 2017). The opinion in Forest Lakes further supports Plaintiff's arguments regarding the "continuous" versus "intermittent" analysis. Specifically, the Forest Lakes trial court had conducted an evidentiary hearing to determine whether the intrusions from a sediment basin that discharged sediment into a creek which flowed into the plaintiffs' lake were "continuing" or

"intermittent." The Court in Forest Lakes conducted such an evidentiary hearing even though the Amended Complaint in that case stated that the "sediment releases and discharges [were] continuing." 293 Va. at 119. As this Court explained,

> Sitting as factfinder, the circuit court received detailed testimony and exhibits on the specific operation of the sediment basins, their physical functions, and their design efficacies. The court also considered whether any of the ongoing sediment discharge could be separated reasonably into discrete episodes. The totality of the evidence convinced the court that the permanent sediment basins discharged into Lake Hollymead on a continuous basis and that the five-year statute of limitations was not revived for any particular discharge episode.

Id. at 122. This Court in Forest Lakes indicated that a trial court must carefully consider the actual facts surrounding each type of intrusion, admonishing courts considering the "continuous" / "intermittent" determination that "[t]hough easy to restate [the distinctions between "continuing" and "intermittent"], these concepts defy any attempts at formulaic applications." 293 Va. at 125. As the Court noted, "determining the boundaries of a cause of action . . . depends so heavily on the factual context of each case." Id.[14]

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[14] In the Forest Lakes, the trial court found that the overwhelming evidence in that case supported a finding that the intrusion was "continuous." Id. at 119-121, 129-130. The evidence presented at the ore tenus hearing, even by the Plaintiff, appeared to be overwhelming regarding the "continuous" nature of the intrusion. Id. at 120 ("The County engineer responsible for administering the water-protection ordinance testified that 'there's always some silt and sediment that flows through the basin.'"); id. at 129 ("The witnesses, including the [Plaintiff's] own

In the present case, there was substantial evidence of "separate and distinct" water intrusions adduced in discovery during the year from the filing of this action until the hearing on January 25, 2017, as well as in previous actions. This evidence which overwhelmingly contradicted any assertion of a "continuous" intrusion included interrogatory answers that were attached to the Defendants' Plea in Bar that the Court purportedly sustained, JA at 277 ("Plaintiff did not observe any instances of water encroachment during the winter months when Defendants ceased their watering activities."); argument discussed at other hearings in this case, JA at 325-327 (11/9/2016 Hearing) (irrigation pipe had been repaired which may have temporarily resolved intrusion caused directly by Defendants' sprinkler system); and other discovery adduced in the case. See JA at 122 (Defendant Jennifer D. Nordquist's Answer to Interrogatory #12) (admitting that sprinkler system "is also not pressurized or turned on during certain times of year."); 334-337 (Plaintiff's Answer to Interrogatory # 1) (identifying specific dates of instances of water intrusion anywhere in Plaintiff's structures; demonstrating substantial gaps between such intrusions) Based upon the various previous

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expert, recognized that sediment discharge, at least to some degree, continuously flowed from the basins . . . because of the functional design of the basins); other facts discussed at 120-22. The Supreme Court of Virginia explained that plaintiff's "thesis" of "separate and distinct sediment incursions . . . was not supported by any detailed evidentiary showing." Id. at 121-22.

decisions of this Court, including the Forest Lakes decision, Plaintiff sought to have the trial court reconsider its "finding" that the trespass in the present case was "continuous." JA at 232-237.

The trial court, in denying Plaintiff's motion for reconsideration, relied sua sponte upon an erroneous interpretation of this Court's unpublished opinion in Shin v. Joyaux, Record No. 160559 (Va. April 6, 2017). JA at 536, 621-622. That decision, involving rainwater flowing from a roof and flooding an adjacent building, provides no support for Defendants' interpretation of "continuous" versus "intermittent" because it involved a roof and drainage system that was always present and never "turned off" like the sprinkler system in the present case.[15] In addition, the parties in Shin "relied solely on their pleadings to support their arguments during a hearing on the Special Plea" regarding the Statute of Limitations and Laches. Shin at *2. This Court in Shin, expounding on its recent decision in Forest Lakes, "recognized that the concepts of trespass and permanent nuisance defy any attempts at formulaic applications. There we stated that '[b]ecause the underlying issue - determining the boundaries of a cause of action -

[15] To the extent that the roof in Shin would only cause flooding when it rained, that is an act of God or nature. In the present case, Defendants' watering methods were fully within their own control and could be stopped at any time by their actions. Every winter they winterize their sprinkler system, ending any chance of water intrusion. Every spring, it is Defendants' choice to reactivate their system.

depends so heavily on the factual context of each case, our jurisprudence has tailored these principles to analogous fact patterns and rights of action.'" 293 Va. at 125. In contrast, the trial court in the present case asserted (despite its comparison of the current facts to Shin) that it did not consider the actual facts of the intrusions involved in this case, but instead, merely looked at certain wording used in Plaintiff's Amended Complaint, JA at 619-623, which had previously passed muster from the same judge. JA at 123.

Because the trial court deviated from this Court's previous decisions regarding the "continuous" / "intermittent" analysis, Appellant respectfully requests that this Court reverse the ruling of the trial court dismissing the Trespass and Nuisance claims, provide that court with guidance regarding the correct application of Norfolk Railway, McDonnell, Forest Lakes and Shin, and instruct the court to allow the case to be tried on these claims before a jury.

2. The Denial of Plaintiff's Motion for Leave to Amend her Allegations Regarding Plaintiff's Trespass and Nuisance claims. Assignment #2.

Standard of Review – The standard of review regarding a refusal to allow an amendment of a claim is whether the trial court abused its discretion. AGCS Marine Ins. Co. v. Arlington Cnty., 293 Va. 469, 487-88 (2017).

After the trial court dismissed Plaintiff's Trespass and Nuisance claims, Plaintiff sought leave to amend the claims to clarify that Plaintiff was asserting

that the trespass and nuisance were "intermittent" as opposed to "continuous," in conformity with the evidence attached to Defendants' Plea in Bar and the other evidence adduced in discovery. JA at 462 (lines 14-16), 463 (line 1), 474 (lines 7-15); 238 (Plaintiff's Motion for Reconsideration); 531 (lines 15-17), 555-556. The trial court denied this motion, JA at 475 (lines 2-3); 210 (3/22/2018 Order); 369 (9/13/2018 Order), even though Plaintiff had never amended this aspect of Plaintiff's Trespass and Nuisance claims. Upon reconsideration, the trial court held that a trial was needed on several other issues, JA at 368, so there would have been sufficient time for any necessary preparation for trial on the Trespass and Nuisance claims as well.[16] Allowing such leave would not have prejudiced Defendants, as Defendants have claimed that they were never given guidance as to whether Plaintiff was asserting a "continuous" or "intermittent" case. JA at 255-256. Therefore, Defendants would have been preparing for both types of trespass and nuisance during the previous discovery.

The most important reason that the trial court erred in denying Plaintiff's motion for leave to amend is the fact that Plaintiff was merely seeking to amend

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[16] The trial court's denial of Plaintiff's motion for leave to amend occurred on January 25, 2017, JA at 475; 210, and was affirmed by the court during its June 30, 2017 hearing on the motions for reconsideration. JA at 369. As of the date on which Plaintiff non-suited its remaining claims, February 14, 2018, no trial date for these claims had been set. These claims have since been re-filed.

the complaint to conform to the facts adduced during discovery and the court was predetermining whether such an amendment would have stated a claim for an "intermittent" trespass or nuisance. AGCS Marine, 293 Va. at 487-88; Perk v. Vector Resources Group, Ltd., 253 Va. 310, 317 (1997). Although the court had allowed one other amendment on an issue solely involving the remedy sought by Plaintiff, the court had not allowed any amendment regarding the substance of Plaintiff's liability claims or, most importantly, whether the Trespass and Nuisance claims were "continuous" or "intermittent." This contradicts the above-referenced decisions of this Court.

For these reasons, even if this Court does not reverse on the issues in Assignment of Error #1, this Court should reverse the trial court's refusal to allow the amendment of these claims and remand with instructions to allow the amendment and a jury trial on these claims.

3. **Erroneous Holding that "Perpetual Easement" for "Light and Air" is "Vague" and "Unenforceable," Ignoring Intent of the Drafters. Assignment #3.**

Standard of Review – The standard of review for questions of law regarding the interpretations of an easement in sustaining a Demurrer, is *de novo*. Beach v. Turim, 287 Va. 223, 225 (2014).

On March 9, 2016, the trial court considered Defendants' Demurrer to

Plaintiff's original Complaint which sought to declare the 1960 Easement to be vague and unenforceable. At that time, the trial court overruled this portion of Defendants' Demurrer. JA at 123. On January 25, 2017, however, the trial court "admit[ted] or cop[ped] to the fact that I think that I have a better handle of the case at this point than I did ten months ago." JA at 454 (lines 11-12). The trial court ruled that the "1960 indenture is vague and unenforceable as written in that the dimensions for 'light and air' are not well defined or specified. The term 'light and air,' in the 1960 easement, is vague and ambiguous, without dimensions, and is therefore, unenforceable." JA at 206 (¶ I.1.b.).

The trial court's holding is contrary to this Court's preference for effectuating the intent of the parties to an agreement. Aetna Cas. & Sur. Co. v. Fireguard Corp., 249 Va. 209, 215 (1995); Wilson v. Holyfield, 227 Va. 184, 187 (1984). As this Court has explained, "[t]he guiding light in the construction of a contract is the intention of the parties as expressed by them in the words they have used, and courts are bound to say that the parties intended what the written instrument plainly declares." Wilson, 227 Va. at 187 (quoting Meade v. Wallen, 226 Va. 465, 467 (1984)). When applying the rules of contract interpretation,

> the whole instrument is to be considered, and not one provision only, in determining the meaning of any and all its parts; not the words merely in which the provisions are expressed but their object and purpose, as disclosed by the language, by the subject matter, the condition and

> situation of the parties, are to be considered. Consideration must be given to the general circumstances surrounding or attending its execution, and effect given to each provision, if possible.

Carpenter v. Gate City, 185 Va. 734, 740-41 (1946).[17]

In the present case, in Defendants' Demurrer Memorandum, Defendants argued that "the easement documents are 'clear, unambiguous, and explicit'" and sought the trial court to determine their meaning as a matter of law. JA at 243 (quoting Hoffman Family LLC v. Mill Two Assoc. P'ship, 259 Va. 685, 695 (2000)).[18] In that very memorandum, Defendants asserted an argument that somehow the 1960 Easement was amended by the 1969 Indenture to limit the protection for "light and air" to three feet from Plaintiff's property. JA at 244-245. Nonetheless, at the January 25, 2017 hearing, Defendants orally argued that the "light and air" easement was vague and ambiguous. JA at 381, 385-386, 388. In agreeing with the Defendants, the trial court never considered the intent of the parties to the 1960 Easement. See JA at 455-457; 209.

Based upon the language of the "light and air" easement, and its explicit

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[17] As this Court has further explained, where a contract contains ambiguity, courts may receive parol evidence to determine the parties' intention. Aetna Cas., 249 Va. at 215. Permissible parol evidence includes evidence of "facts and circumstances surrounding the parties" and "negotiations between the parties." Stroud v. Stroud, 49 Va. App. 359, 367, 641 S.E.2d 142, 146 (2007).

[18] Defendants made the exact same argument in their original Demurrer. JA at 65-66 (quoting Hoffman Family LLC).

reaffirmation in 1969, the intent of the parties to the 1960 Easement was to ensure that 404 Duke Street would not have any diminution in the light and air that was received by its windows and other openings on the western side of the property. Because the servient estate (408 Duke Street) would own the property immediately adjacent to the windows and other openings, the dominant estate owner wanted to make sure that light and air would not be blocked from these windows and openings. The amount of diminution can be determined by the amount of light and air that was being received by the openings at any time since 1960 after a change caused by the owners of 406 Duke Street compared to the amount of light and air that was being received by the openings before those owners caused that change. Whether there was a diminution in the amount of light and air reaching the Plaintiff's property would be an issue of fact to be determined by the jury.

Because the trial court failed to consider the intent of the parties to the 1960 Easement regarding the "perpetual easement . . . for the purpose of admitting light and air through said openings," thus contravening a long line of decisions of this Court, this Court should reverse the trial court's holding that the "light and air" perpetual easement was vague and unenforceable and remand for a jury trial to determine whether Defendants' actions caused a diminution in light

or air being accessed by the windows and other openings of Plaintiff's properties.

4. The Holding Ignoring the Requirement that the Median Created by the Indenture "Shall be and Remain Open Yard." Assignment #4.

Standard of Review – The standard of review for questions of law regarding the interpretations of an easement in sustaining a Demurrer, is *de novo*. Beach, 287 Va. at 225.

The trial court held that the 1969 Indenture, which created a median which "shall be and remain open yard," only prevented "structures" and "buildings" from being placed within that median. JA at 209. In doing so, the trial court ignored and effectively wrote out of the 1969 Indenture the language that stated that the median "shall be and remain open yard." JA at 134, 168. This Court's precedent requires that contract interpretation must give meaning to all words; a court will "not regard any language as meaningless, unless compelled to do so." Paramount Termite Control Co. v. Rector, 238 Va. 171, 174 (1989); Berry v. Klinger, 225 Va. 201, 208 (1983). No such compelling circumstances exist here.

"When two provisions of a contract seemingly conflict, if, without discarding either, they can be harmonized so as to effectuate the intention of the parties as expressed in the contract considered as a whole, this should be done." Plunkett v. Plunkett, 271 Va. 162, 168 (2006) (quoting Ames v. American Nat'l Bank of Portsmouth, 163 Va. 1, 39 (1934)); see also, Carpenter v. Gate City, 185

Va. at 740-41 ("the whole instrument is to be considered, and not one provision only, in determining the meaning of any and all its parts;" consideration must be given to circumstances of execution and "effect given to each provision, if possible.") The trial court's holding defeats the intent of the parties when they entered into the easement between the owners of the two properties. The owner of 404 Duke Street, under the terms of the indenture, not only wanted to keep the three-foot median free from buildings and structures, but from all obstructions in order to allow access to the openings along the western side of the property (as set forth in the 1960 Easement and reiterated in the 1969 Indenture), and also to ensure that a chimney (or chimneys) could be built within the three-foot median, as permitted in the 1969 Indenture. JA at 134-135, 168. Allowing the owners of the servient estate to encumber the median with trees, bushes, and other obstructions defeats the purpose for creating the "open yard" median.

Under the construction supported by Defendants, and adopted by the trial court, these purposes would be effectively eviscerated by the servient estate's use of the median for things other than "structures" and "buildings." Under the trial court's interpretation, the servient estate could plant a hedge of bushes or trees all the way up to Plaintiff's property or even place boulders next to the property. While this would not fall within the court's definition of "structures"

or “buildings,” it would eliminate the benefit for which the median was created.

Even if the trial court believed that the reference to “structures” and “buildings” somehow was intended to qualify the requirement that the median “shall be and remain open yard,” this conflict between the two provisions at best created an conflict regarding the purpose for which the median was created. That purpose is set forth in the very document that created the median – the 1969 Indenture. JA at 133-135, 168-169. Rather than trying to reconcile the two admonitions – one that the median “shall forever be and remain open and free of all buildings and structures” and the other that required that the median “shall be and remain open yard” – the trial court merely ignored the latter. The trial court should have given effect to both provisions – that the median should be free of “all buildings and structures” as well as “remain open yard” without any obstructions in order to “harmonize” the two provisions “so as to effectuate the intention of the parties as expressed in the contract considered as a whole."

Because the trial court ignored the specific language in the 1969 Indenture and failed to give effect to certain words in the Indenture, contrary to this Court’s precedent, this Court should reverse the holding of that court and instruct the trial court as to the appropriate construction of the 1969 Indenture, which is to prohibit any of Defendants’ objects to be placed within the three-foot median,

and allow the jury to determine whether this provision has been violated.

5. **The Erroneous Refusal to Issue a Rule to Show Cause and Creation of a "Plan" Violating the Rights of Plaintiff Under the 1960 Easement. Assignment #5.**

Standard of Review - The standard of review regarding the trial court's interpretation of the easement is *de novo*, Beach, 287 Va. at 225, and this Court applies an abuse of discretion standard regarding the factual basis of the refusal of the trial court to issue a rule to show cause, but a *de novo* standard for its application of law to the facts. Shebelskie v. Brown, 287 Va. 18, 22-23 (2014).

The Order signed by the trial court on March 22, 2017 held that

> the owner of 404 Duke Street and 303 [South] Royal Street shall be granted access to enter the yard of 406 Duke Street for the purposes of maintaining the openings and ventilation outlets on and in the west side of 404 Duke Street and 303 S. Royal Street.

JA at 208-209. This holding is consistent with the plain language of the 1960 Easement which granted a "perpetual easement" to the owner of 404 Duke St. and her successors "to keep and maintain openings on the west side of the premises: 404 Duke Street overlooking the premises 406-8 Duke Street." JA at 165.

After March 22, 2017, Plaintiff's counsel sought access for her contractor to the yard of 406 Duke Street for pest control services by contacting Defense Counsel. Defendants refused to provide Plaintiff with information or the ability to access the property (which had locked gates) on the date on which the contractor

sought entrance. Defendants refused any access to the property at all unless Plaintiff satisfied onerous requirements including providing information "as to the work that is to be performed," and that the pest control service would have to coordinate their visit with Defendants rather than be allowed to enter without such restriction. Further, Defendants refused to allow Plaintiff's Trustee access to the property. Motion for Rule to Show Cause [Docket #1502] at Exhibits A, B. [20]

Plaintiff brought a Petition for Rule to Show Cause to address why Defendants failed to comply with the Court's March 22, 2017 Order. Docket #1502. The Court refused to order Defendants to show cause during a hearing on June 14, 2017, but set the matter for hearing in conjunction with the motions for reconsideration. When the trial court finally considered the Defendants' refusal to provide access to Plaintiff, the court refused to order an evidentiary hearing or issue the Rule to Show Cause, stating that "it's a legitimate matter of dispute and I don't think it would be proper to issue a rule on the basis of an alleged violation of the Order." JA at 640 (lines 4-7).

Instead, the trial court ordered the parties to "come up with a plan for how access can be afforded without giving the plaintiff the access code or a key to the

[20] As the evidence showed, Defendants used the same pest control service as did Plaintiff, JA at 633, but nonetheless tried to inhibit Plaintiff's ability (and that of their own pest control company) to access the yard of 406 Duke Street.

defendants' back yard." JA at 640 (lines 21-23). Ultimately, the trial court, again without any evidentiary hearing, adopted a plan devised by Defendants that required the Trust when seeking access to "keep or maintain the openings and locate ventilation outlets on the western side of [its] properties" to 1) "provide a statement of the purpose for which [it] seeks entry, the name of the company if any that will be accessing the median, and three proposed dates" to which Defendants had 48 hours to respond for non-emergency access; and 2) requiring Plaintiff to contact Defense Counsel in an emergency "for issues that cannot be resolved by Fire Personnel, EMS, Police, or Rescue." JA at 369-370 (9/13/2017 Order at ¶ 6).

In doing so, the trial court exceeded its authority by re-writing the 1960 Easement to limit the access to which Plaintiff is entitled. Further, the court's ad hoc plan created a new protocol that would not be binding on any future owner of either estate as it would be found nowhere in the Land Records of Alexandria City.

An easement provides access for the purpose for which it was drafted without reservation or restriction. As this Court has stated "every use of an easement not necessarily included in the grant is trespass to realty and renders the owner of the dominant tenement liable in a tort action to the owner of the servient tenement for all damages proven to have resulted therefrom." Raven Red Ash Coal Co. v. Ball, 185 Va. 534, 538 (1946). In the present case, the dominant estate

has access "to keep and maintain openings on the west side of the premises: 404 Duke Street overlooking the premises 406-8 Duke Street." JA at 165. Rather than re-writing the easement and restricting this access, if the dominant estate owner exceeds the rights granted under the easement, the remedy is an action for trespass.

Because the trial court exceeded its authority and contravened the precedent of this Court by adding restrictions to Plaintiff's right of access, this Court should reverse the trial court and remand this matter to that court with instructions to enter an order allowing Plaintiff access "to keep and maintain" the openings on the western side of Plaintiff's properties, consistent with the plain language of the 1960 Easement and the 1969 Indenture.

CONCLUSION

For the reasons set forth above for each Assignment of Error, Appellant respectfully requests that this Court reverse the judgment of the Alexandria City Circuit Court and remand to that court with instructions consistent with the rulings of this Court.

CERTIFICATE OF SERVICE

I hereby certify that Rule 5:26(e) of the Supreme Court of Virginia has been complied with and pursuant to the Rule, a PDF version of this brief has been filed through VACES and three paper copies delivered to the Clerk's Office. An electronic version has also been delivered to opposing counsel via email to

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404 Duke Street, The Elisha Janney House
Historical and Architectural Report, November 2016

A. **404 Duke Street is an Historically Significant Alexandria and Virginia State Property and Structure.** It retains a high level of historic integrity as an excellent surviving example of the important early era, the foundation of the Old and Historic Alexandria District. Over two centuries, a succession of historically notable and prominent personages owned or lived at 404 Duke Street. These inhabitants made important contributions to the City of Alexandria, the State of Virginia and the nation. Further, the property was used for historic activities, representative of their era and of the City's legacy. Some key examples:

- **Elisha Janney** – In 1802, the property comprising current 404-408 Duke Street was acquired by Elisha Janney (b. 1761, Alexandria).[1] Of a notable Alexandria Quaker family, Elisha was an early Alexandria merchant, and his brother Joshua a renowned silversmith. Other Janney family members varyingly took possession of the property until 1839.
- **John Janney**, born in Alexandria (1798) and later lived at 404 Duke with his father Elisha. John was a member of the VA Constitutional Convention, President of the VA Secession Convention. He 1861 he appointed Robert E. Lee as commander VA forces.[2]
- **Richard Bland Lee,** younger brother to Light Horse "Harry" Lee, was a delegate to the Virginia House, and was Virginia's first US Congressman (1789-1795). He lived at 404 Duke Street for about a year in 1811 after losing Sully Plantation to Harry's debts.[3]
- **Benjamin Higdon Lambert** bought 404 Duke Street in 1854.[4] His son Pvt. Benjamin Lambert (b. 1844) was a Civil War Virginia Rifleman (17th VA Infantry). Another son, Jordan Lambert (b. 1851), a chemist, co-founded the Listerine company. Jordan's son Gerard Lambert became head of Gillette Safety Razor and in time the Warner-Lambert Co.[5]
- **Katherine (Kate) Waller Barrett** acquired 406-408 Duke in 1896; later owned 404 Duke.
    - Kate Waller Barrett lived at 408 Duke from 1897 until her death.[6] Connected from its origins to 404 Duke Street, 408 Duke Street had its own illustrious history; Dr. Elisha C. Dick lived in a one story brick house there in 1796. Dick was George Washington's attending physician at his death in 1799. The house was raised to 3 stories in 1826 and significantly altered (19th -21st centuries.)[7]
    - Humanitarian, social reformer, philanthropist, and pioneering feminist, Kate Waller Barrett left a profound legacy in Alexandria and across the U.S. Born in Falmouth, VA in the 1857, after marrying Robert Barrett, an Episcopal clergyman, she became a medical doctor in and Doctor of Science(1892/1894).
    - She co-founded in 1895, with philanthropist C. Crittenton, the Florence Crittenton Homes for unwed mothers (90 US-wide by 1900). She was a leader in the Daughters of the

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[1] "Lot 84 at the Southwest Corner of Duke and Royal Streets (now 404-408 Duke) was conveyed by the [City] Trustees to John Muir on July 18, 1758." Historic American Building Survey (HABS), VA-696 1967/1975 (408 Duke) and VA-703, 1967/1975 (404 Duke). The HABS, a joint program of the National Park Service, Library of Congress and American Institute of Architects documents American achievements in architecture.
[2] Janney history based on John Janney Papers, Virginia Polytech Special Collections, Virginia State Heritage
[3] Lee Family Digital Archive, Chapter 1, and *The Lee Family in Old Town Alexandria*, March 16, 2013, http://jay.typepad.com/william_jay/2013/03/the-lee-family-in-old-town-alexandria.html
[4] HABS VA-703 reports the deed recorded June 16, 1854.
[5] Documented from Find-A-Grave and Clarke Co. VA Historical Association.
[6] This was established from Alexandria City Directories, US Census data, City Deeds, and BAR records
[7] Extensive historical data exists on 408 Duke Street. See City BAR case records for summary, e.g., BAR 2006-0033

American Revolution, Auxiliary League, League of Women Voters, and several other organizations. The first woman honored with a flag at half-staff over the US Capitol at her death. [8]

- **In 1902 Florence Crittenton Mission** acquired 404 Duke Street (HABS VA-703).[9] City Directories list it as an orphanage rather than for unwed mothers.[10] In April 1914 the Crittenton Organization conveyed the Deed to Kate Waller Barrett.[11]
- **After 1920, Robert South Barrett, her son, lived at 404 Duke until his death in 1959** [12]
  - Kate Waller Barrett left her estate in trust in 1925, divided among her six children. Robert and wife Viola (owner) lived at 404 Duke Street from 1920. [13]
  - Robert was a civic and philanthropic leader, e.g., Trade Commissioner for the US Department of Commerce, Alexandria Gazette editor/publisher, and from 1925 the head of the Crittenton Organization. He donated funds for many charitable causes among them the first Alexandria library- dedicated to his mother (1937), and the Alexandria Boy's Club. He led the fund drive for a Washington Masonic Memorial.[14]
- **Moose Lodge,** Sanborn map, 1941, reflects 404 Duke Street with this use in this period.[15]
- **Barrett Trustees Split and Sell Properties of 404 and 408 Duke Street**
  - In 1961, the Trustees sold 404 Duke to Robert's daughter Viola Barrett Greenland and spouse Milton Greenland. In 1985 Viola and second husband Loren Pope sold 404 Duke to Macklin-Hansen Real Estate; in turn it went the ELC Corp. This sale included the flounder (now 303 S. Royal and 305 S. Royal). In 1969 the family sold 408 (with yard "406") to E. Grey and Sherry Lewis. E. Grey and his then wife Carolyn Lewis resold it in 2002. Also in 1969, the family trustees signed a Deed to convey Kate Waller Barrett's papers to the Library of Congress.[16] In 1960 and 1969 Easements were put in place (see below page 6).

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[8] This summary was drawn from extensive Barrett biographical files at the Barrett Special Collections Library. A special act of Congress in 1898, signed by President McKinley, granted a national charter to the National Florence Crittenton Mission, the first such charter given to a charitable organization. See Wikipedia, at https://en.wikipedia.org/wiki/National_Florence_Crittenton_Mission.

[9] *Looking at the History of the Janney House*, Out of the Attic, December 19, 2013, Office of Historic Alexandria. HABS VA-703 reports the Crittendon Mission bought 404 Duke from Lambert heirs. U.S. Census records may not fully reflect inhabitants of 404 and 408 Duke Street inhabitants. The 1900/1910 Census lists Kate Waller Barrett as owner and head of house at 408 Duke, but does not list 404 Duke. Census records of 1930/1940 show Robert S Barrett as owner of 404 Duke. City Directories show Kate W Barrett at 408 Duke from 1897 until her death. City Directories report Robert S. Barrett (her son) living at 408 until 1919, but from 1920 he is at 404 [402] Duke St.

[10] See Alexandria City Directory 1904 (etc.). Jane Washburn Robinson, current owner, also reported this from Viola Barrett Greenland. See also footnote 9.

[11] Deed Book 63, p. 443, Circuit Court of Alexandria

[12] Robert S. Barrett, publisher (etc.) . City Directories list him at 408 Duke before 1919 and 404 Duke from 1920 on.

[13] Deed of Trust, June 1 1925, Deed Book 82, p.554. See also Will Book 48 p 442

[14] Robert South Barrett, biographical summary, Alexandria-Washington Mason Lodge 22 website.

[15] In the 1950s the Moose Lodge was also briefly housed at 508 Wolfe Street (now demolished); the Lodge may have had short tenures in rented spaces. See *Out of the Attic*, Office of Historic Alexandria, November 5, 2009.

[16] Deed Book 612, page 254-259, Circuit Court of Alexandria.

B. A Priceless Alexandria and US Historical Architectural Structure: a late Georgian/Federal transition mansion

The house at 404 Duke Street is a defining structural specimen of Alexandria; part of the core fabric of Georgian and Federal structures that make the Old and Historic Alexandria District notable in the U.S. Built in 1808-09, 404 Duke Street remains among a handful of early Alexandria Georgian to Federal style freestanding homes characterized by monumental massing, still in a near- original style and configuration.[17] It is in league with the most prized homes of the Old and Historic Alexandria District, likened in stature in architectural historian's findings to the Dulany House (601 Duke Street, 1783-4)[18], the Lloyd House (220 N. Washington, 1797)[19] and the General Roberdeau House (418 South Lee St, 1780).[20]

Exterior Features

- ***An "an elegant … brick house… finished in the handsomest style***," per the Alexandria Gazette in June 1809, it remains today one of the most imposing structures in the City. The design of 404 Duke Street displays the symmetry, formality and ordered rhythm evoking the Georgian style, despite its more Federal era 1809 construction.[21] Selected as an American architectural achievement, it is documented in the Historic American Building Survey (HABS) as "Elegant in an urbane architectural sense…embodies generous size and subtleties of proportion and workmanship."[22] The architect is unknown but possibly local and based on patterns.[23]
- ***Displays Transition to more refined Federal style*** The house lacks a masonry or brick belt course, often seen in Georgian structures. The 6 over 6 double hung windows with large panes are more typically Federal era, when larger glass was made. It has a brick painted cornice at the roof line, instead of a more Georgian wood cornice (601 Duke, 631 King). The side-entry form has a distinguished entryway with a Greek Revival in-set foyer, with black and white stone flooring, framed by elegantly curved wrought iron railings. This entry has a small pediment with dentil molding framed by pilasters with the inner door framed by elegant ogee molding.[24] A boot jack sits alongside.
- ***Near Original Configuration*** The top and side of the house at 404 Duke Street appear in their current form in the famous 1863 Magnus Bird's Eye View of Alexandria – even in

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[17] HABS VA-703 cites the Alexandria Daily Gazette – Commercial and Political, June 20, 1809, which reports the property has "an elegant three story brick house built within the last year."
[18] "One of the choice examples of early American elegance in the United States." Richard Pratt, *A Treasury of Early American Homes*, New York: Whittlesley House, 1949, reference HABS VA-447.
[19] HABS VA-697 Considered among the finest examples of late Georgian Architecture
[20] HABS, VA-703, 404 Duke Street, Elisha Janney House
[21] Penny Morrill, *Who Built Alexandria? Architects in Alexandria, VA 1750-1900*, and *Old Town Alexandria Architecture,* 1750-1900. Kate Waller Barrett Library, Special Collections She reports that a taste for Georgian style lingered in Old Town long after the Revolutionary War ended.
[22] See HABS case VA-703, 404 Duke Street
[23] Peter Smith, *Art of Sound Building, Patterns and Sources for Alexandria Architecture*, 1749-1994, VA REF 720.97cc LYC, and Penny Morrill, *op cit.* Buildings constructed in the early Alexandria, and across early eastern US development, were often based on British architectural pattern books.
[24] The Greek Revival entry was presumably added later in the 19th century, documentation not found by HABS. HABS notes ogee moldings in the entry door "jambs are repeated in the inner door (new) and baseboards, to match the 19th century interior doors."

this view one notes few such scale homes and with double chimneys.[25] Further, its original configuration is seen in the 1877 Hopkins Map, appearing in great part as it does today.[26] A review of Sanborn maps across years shows remarkable consistency in footprint and much of its form (a side porch was added but removed, see below).[27]

- ***Exterior features almost entirely original*** A 30' x 35' main home, with 3 ½ stories, 3 bays, and a side-gabled roof, it also has a large interior gable-end double chimney and arched windows in two front dormers. It has fine detailing including flat cambered (gauged) brickwork arches, and white painted stone lintels, around 6 over 6 windows. This structure's Flemish bond pressed brickwork façade is considered "one of the finest examples of the craft in early Alexandria."[28] The east facing exterior wall has decorative "S's, stars and shields" used to finish off rods at the terminating wall of the structure.
- ***Other Special Features*** This is also one of a limited number of Alexandria homes still retaining a decorative 19th century cast iron "downspout boot" at its southern corner.[29] Ghost marks of an earlier (likely 1920s) frame porch addition remain on the east side. The main house has a flounder type extension about 60' long by 20' wide which has been stuccoed/plastered. The 303 S. Royal portion of the flounder dates from 1798 and has its original wood floors; this flounder possibly incorporated the Dr. Dick's original smokehouse.[30] This portion of the flounder boasts a "fire mark" – an early fire company insurance symbol. This may be from Dr. Dick's original June 8, 1796 insurance from Mutual Assurance Society which lists the smokehouse.[31]

- ***Interior Features***
  The main structure has a side entry and side hall form, similar to the more classic Georgian Dulany house (631 Duke). The entry hall and opening into the parlor evoke import and monumentality of scale in keeping with the exterior. The interior is elegant but not highly ornamented, possibly reflecting the original Quaker family owner. There is an archway with fluted columns and bead molding that frames the view of the stair at the end of the hall. The home has expansive, graciously proportioned rooms on the first and second floors with 12' ceilings, very large windows, chair rails and simple but substantial crown moldings. The parlor fireplace mantel is original. The second floor has an impressively scaled "Long Room" across the entire building width which serves as a library and sitting room. There are notable ceiling medallions with scallop motifs and wood floors, including some original wood. Sculpted-form gilded plaster cornices frame

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[25] Bird's Eye View of Alexandria, Charles Magnus, 1863, image held by the Library of Congress.
[26] G.M. Hopkins, City Atlas of Alexandria, VA 1877, GM Hopkins Philadelphia. Kate Waller Barrett Library, Special Collections
[27] Sanborn Fire Insurance Company Maps, held at Kate Waller Barrett Library, Special Collections.
[28] *Looking at the History of the Janney House*, Out of the Attic, December 19, 2013 2013, Office of Historic Alexandria
[29] Downspout boots are "cast iron sections running approximately the last four feet of the downspout… to the ground…[where] they angle outwards …to direct exiting rainwater away from the base of the building." There are 41 downspout boots within the historic district of Alexandria. *Looking for Rainy Signs of Social Status in Old Town Alexandria,* John Kelley, The Washington Post, November 11, 2013
[30] HABS VA- 703.
[31] Mutual Assurance document for Dr Dick is filed as record 9-71, Duke 400 Block South Side, 138-C.

windows with matching floor to ceiling mirrors in the parlor and dining room.[32] These appear custom made for the spaces, likely in the 19th century, but are undocumented.[33]

c. Alterations and Sensitive Restoration of Original Interior of 404 Duke Street

Structural/Exterior Alterations:

- The house's original rubble stone style cellar was deepened in 1923 into a basement, with concrete footings added then to reinforce the foundation.[34]
- In the 1920s, a two story rear sun room was added. These are of white painted frame and glass. A frame porch was added to the east side of the structure (facing S. Royal Street), likely during this sun room addition. This side frame porch was removed by then-owners Viola and Milton Greenland in 1960; its ghost outlines remain on the east side brick. [35]
- Other minor alterations, such as new roofing and similar improvements, have made only minor changes in the exterior structure or appearance.

Interior Alterations:

- Sanborn maps (1941 updated 1950-55) show the house as apartments. It is not clear that the house was at that time actually altered for separate apartments or simply renting rooms.
- ***Restoring to more original interiors*** In 1988, upon purchasing 404 Duke Street, current owner Jane Washburn Robinson found 3 separate apartments in the main 404 structure. In 1988 Mrs. Robinson undertook a sensitive renovation of the main house, hiring architect Robert Holland to return the interior of the home to its former and much more original configuration. They retained the two story 1920s rear-windowed porch to help accommodate a modernized kitchen and bath.[36] This renovation removed partition walls and fixtures that had created three apartments each with kitchens and bathrooms. Holland modernized the one remaining kitchen, remaining bathrooms, and air-conditioning and heating systems. Where modernization in form was done, Holland created features that echoed and respected the original architecture, such as shaping an archway from the kitchen into the sunroom to match the archway in the sunroom exterior wall. The resulting effect of the renovation is of the strong original spaces with only subtle modernization, mostly in functional kitchen and bathrooms near the rear of the house.
  New Finished Basement As part of this restoration, Holland expanded the useable space for Mrs. Robinson's kitchen by finishing the basement space into large additional kitchen work and storage rooms. New wood work, painting and extensive shelving were added to this basement area, and a built-in wine cellar, just down the stairs from her ground floor kitchen.

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[32] This exterior and interior architectural summary is based on HABS VA-703, and a personal review of building premises in 2016.
[33] The mirror and cornices have been evaluated by experts and were possibly made in the 1830s, per current owner Jane Washburn Robinson who has extensive knowledge of the home gained from Viola Barrett Greenland.
[34] HABS, VA-703. The east side foundation is more shallow than the west, suggesting the east side was conceived to share with a town home next door but none was built
[35] City of Alexandria Building Alteration Permit # 16758 approved 15 December 1960, to remove the frame porch.
[36] Multiple building permits and code reviews were issued at this time and are available in file. Permits in 1987 and 1988 include wall, plumbing, gas, electric, fire code, etc. work in separating the flounder from 404, plus kitchen renovation in 404. Further permits issued in 1988 include the interior renovations in the main house, e.g. removing partitions, kitchens, baths, etc. Main house interior restoration designed and managed by Holland Associates Architects of Alexandria VA.

Restoration of the Flounder at 303 S. Royal The flounder was formally separated from the main house since 1987 and is now itself two homes, 303 and 305 S. Royal Street.[37] Jane Washburn Robinson bought the original portion of the flounder, 303 S. Royal, in 1992 which had fallen into poor condition. Here as in 404 Duke Street, Mrs. Robinson did extensive repairs, restoring its plaster, wood floors, and other key original features, while adding modern comfort such as air-conditioning.

d. Important Effect of Easements on Historic 404 Duke Street

- **Two Easements are in place to the intended protection of 404 Duke Street**; established at the time of split and sale(s) of 404 and 408 Duke Street. These also protect the rear wall of 303 S. Royal, the flounder at the back of 404 Duke.
    - December 1960, Deed of Bargain, Sale and Easement, grants a perpetual easement "to keep and maintain openings on the west side for the premises 404 Duke overlooking the premises 406-408 Duke, for the purposes of admitting light and air through said premises and to locate ventilation outlets on the west side." [38]
    - July 1969, Indenture affirms the 1960 easement and expands it to include a 3 foot median on the east side of the yard of 408 to be kept forever "open and free" of buildings and structures and to remain open yard.[39]
- **Adherence to these easements is important to retaining not only the historic integrity of appearance, but the stable and continuing viable condition of these old and important 1798 and 1808-9 structures**
    - The owner of 404 Duke Street must be able to assure protection of the exterior wall and foundations exposed to the conditions created by any actions in the yard of 408 Duke Street. This includes the exterior rear-wall of the 1798 flounder, which is equally exposed to this yard.
    - The NPS (Historic Preservation) warns against overgrowth of plants (e.g., keep plants and tree limbs away from structures) and all conditions promoting moisture around brick and foundation materials. Their Technical Brief 39 states "Uncontrolled moisture is the most prevalent cause of deterioration in older and historic buildings. It leads to erosion, corrosion, rot, and ultimately the destruction of materials, finishes, and eventually structural components."[40]

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[37] 303 S. Royal belongs to Jane Washburn Robinson, while 305 does not. Each is a 2 and ½ story separate home. Viola Barrett Greenland reported to Mrs. Robinson that the 305 S. Royal segment of the flounder was added by her father, Robert S. Barrett, in 1920.
[38] Deed Book 526, page 224-5, December 9, 1960, Circuit Court of Alexandria
[39] Deed Book 699, p. 765-6, July 14, 1969, Circuit Court of Alexandria
[40] National Park Service Technical Preservation Services, Holding *the Line: Controlling Unwanted Moisture in Historic Buildings* https://www.nps.gov/tps/how-to-preserve/briefs/39-control-unwanted-moisture.htm#indentifydamage