IN THE

Supreme Court of Virginia

RECORD NO. 180631

JANE WASHBURN ROBINSON, Trustee for
the JANE WASHBURN ROBINSON LIVING TRUST,

Appellants,

v.

NELS P. NORDQUIST and
JENNIFER D. NORDQUIST,

Appellees.

BRIEF OF APPELLEES

John D. McGavin, Esquire
Virginia Bar No. 21794
Dawn E. Boyce, Esquire
Virginia Bar No. 32923
BANCROFT, McGAVIN,
HORVATH & JUDKINS, P.C.
9990 Fairfax Boulevard, Suite 400
Fairfax, Virginia 22030
Telephone: (703) 385-1000
Facsimile: (703) 385-1555
jmcgavin@bmhjlaw.com
dboyce@bmhjlaw.com

Counsel for Appellees

LANTAGNE LEGAL PRINTING 801 East Main Street Suite 100 Richmond, Virginia 23219 (804) 644-0477
A Division of Lantagne Duplicating Services

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COME NOW, Nels Nordquist and Jennifer D. Nordquist, by counsel, and state as follows:

I. STATEMENT OF THE CASE

This case involves a dispute between neighboring landowners Nels Nordquist and Jennifer D. Nordquist ("Nordquists") and Jane Washburn Robinson, Trustee ("Robinson"). The trial court granted a Plea in Bar on the statute of limitations to Robinson's claims of Trespass (Counts V and VII) and Private Nuisance (Count VI) related to alleged water intrusion. The claims were dismissed because plaintiff alleged a continuous and ongoing harm which was barred by the statute of limitations. The court allowed non-water related claims to continue, which plaintiff nonsuited and are not part of this appeal.

The court also interpreted a 1960 Easement and 1969 Indenture involving the subject properties. The court ruled that the section of the 1960 Easement preserving "light and air" to Robinson 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 therefore unenforceable." JA 209, ¶ 1(b).

The court ruled the 1969 Indenture was valid and enforceable and established a 3 foot section that could not be used by the Nordquists to erect a building or structure as defined in §36-97 of the Code of Virginia, but could be used by the owner of 404 Duke to build a chimney. JA 209 ¶¶ 1(c)(e). The court did not specifically address the definition of the term "open yard" in the Order. JA 209, original ¶1(e) redacted. On motion to reconsider, the court found the term "open yard" to be ambiguous and thus limited to Section 2 of the 1969 Indenture such that the 3 foot section shall remain free of buildings and structures, except a chimney, should Robinson elect to erect a chimney, and expanded the definition of structure. JA 369 (Sept. 13, 2017 Order ¶¶ 5(a)(b) with reference to Jan. 25, 2017 Order redacted but reinstated ¶ 1(e)).

Robinson submits the trial court's decisions were in error. The court granted Robinson's Petition for Appeal, On January 7, 2019, Robinson filed her Opening Brief. This Response follows.

II. STATEMENT OF FACTS

On December 4, 2015, Robinson filed this cause of action alleging the Nordquists took possession of property adjacent to Robinson in 2005. JA 145, ¶ 97. Between 1998 and 2005, Robinson alleges she did not sustain a single incident of water penetration from the outside environment

of the western wall of 404 Duke Street. Id. However, damage from encroaching water began shortly after the Nordquists took possession in 2005 and continued until the time of filing suit. JA 145–46, ¶¶ 99-106. There are no allegations of intermittent encroachment or harm; all claims of encroachment and damage are described as "persistent," "have continued," "has resulted and continues," "continuous encroachments have resulted and continue to result in water damage," "these encroachments have been on-going." JA 145–46, ¶¶ 97-107.

The Nordquists filed a Plea in Bar arguing the claims accrued in 2005 and were barred by the statute of limitations. Because this case was filed on December 4, 2015, any claims for property damage occurring before December 4, 2010 are time barred. The matter was set for trial on January 30, 2017. On January 25, 2017, a hearing was set for various motions including Nordquists' Plea in Bar.[2] At the hearing, counsel for Robinson stated "Your Honor, I think it does make sense to deal with some of these dispositive issues first before we move into the evidentiary motions *in limine*. Obviously, Mr. McGavin will be presenting argument on the Demurrer and the Plea in Bar." JA 377, lines 17–18.

[2] See list of motions attached to Objection to Plaintiff's Written Statement in Lieu of Transcript: Hearing Conducted on December 16, 2016.

Argument was presented in support of the Plea in Bar on the statute of limitations. The Nordquists argued the Amended Complaint asserted a continuous and not intermittent harm, the cause accrued long before December 4, 2010, and the claim was barred by the statute of limitations. *See* JA 144–47, ¶¶ 88, 97-109). The court determined, based upon the pleadings alone, Robinson had alleged a continuing trespass and granted defendants' Plea in Bar. JA 461– 62 (Tr., Jan. 25, 2017, p. 87-88).

The court also considered Demurrer and Cross Motions for Partial Summary Judgment on the interpretation of an Easement and subsequent Indenture, raised by Robinson's request for Declaratory Relief (see Counts I-V, Am. Complaint). The 1960 Easement provides for ". . . a perpetual easement to keep and maintain openings on the west side for the premises 404 Duke Street overlooking the premises 406-408 Duke Street for the purpose of admitting light and air through said openings, and to locate ventilation outlets on and in said west side." JA 163–66 (Exhibit A).

The 1969 Indenture provides in pertinent part:

"1. The 1960 Easement is hereby expressly affirmed.

2. A 3-foot strip of (herein called the Median), the easterly portion of 406-408, adjoining the westerly boundary of 404, shall forever be and remain open and free of all buildings and structures except the chimney or chimneys hereinafter in Section 3 of this Indenture provided for, and except as

aforesaid the same shall be and remain open yard, the right so secured hereby appurtenant to 404 and enjoyed by the party of the second part and any and all persons who succeed her in the ownership of 404.

3. The party of the second part, her heirs and assigns, shall have the right, exercisable at any time and from time to time without notice to the owner at the time of 406-8, to erect on the Median one or more chimneys adjacent to the westerly wall of the structure not 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. It is expressly agreed that -

a) the footings required for any such chimney may overlap and extend beyond the westerly line of the Median and encroach upon 406-8, for themselves, provided such encroachment be subterranean only; and

b) the workmen employed in the erection, or maintenance, of any such chimney shall be permitted free access to 406-8, for themselves, their tools and materials, to the extent necessary to permit the orderly and efficient conduct of such erection, or maintenance."

JA 167–69 (Exhibit B).

III. AUTHORITIES AND ARGUMENT

A. Introduction

Robinson makes five assignments of error in her brief all of which are without support and misstate the applicable law. Robinson argues that the trial court failed to consider evidence and ruled on the Plea in Bar based

solely on the Amended Complaint, which she contends is incorrect and should have been decided by a jury considering the evidence. In ruling on the Plea in Bar, however, the court determined that the pleading itself clearly plead a continuous trespass and nuisance since 2005 and was thus time barred by the statute of limitations for making claims for property damage occurring prior to December 4, 2010. Robinson offers no support for her contention that the court is required to consider evidence on a Plea in Bar when it is able to rule based on the pleadings alone.

Following dismissal of the claims based on the statute of limitations for the continuous trespass, Robinson sought to amend her Complaint to change her pleading of a continuous trespass to that of an intermittent trespass. The trial court declined to allow Robinson leave to amend her complaint a second time and Robinson offers no support that this was in error five days prior to trial.

The trial court determined that the terms “light and air” in the 1960 Easement and 1969 Indenture were vague and therefore unenforceable, thus Robinson’s attempt to secure for herself an uninterrupted and clear view of the Nordquists’ yard was an overreach not contemplated by the Easement or Indenture. With respect to the Easement, the trial court correctly ruled that the document is limited in scope and does not

contemplate Robinson's broad interpretation of "open yard" that she asserts in her Amended Complaint.

Finally, the court's decision not to issue a Rule to Show Cause, but rather to establish a protocol for entering the Nordquists' property to gain access for the purposes of maintaining openings and ventilation was proper considering the contentious nature of the case and Robinson's blatant attempt to obtain unfettered access.

This Honorable Court should affirm the lower court's rulings.

B. The Court Properly Sustained the Plea in Bar Based on the Admissions in the Amended Complaint that Any Trespass or Nuisance Claim was due to Continuous Rather than Intermittent Harm. (Robinson's First Assignment of Error)

a. Standard of Review

The court's decision that the Plea in Bar could be decided as a matter of law is a pure question of law, which is reviewed *de novo*. *See* Smith v. McLaughlin, 289 Va. 241, 251(2015) (when "[t]here are no disputed facts relevant to the plea in bar and it presents a pure question of law" it is reviewed *de novo*); Lostrangio v. Laingford, 261 Va. 495, 497 (2001).

b. It Was Proper for the Court to Rule On the Plea in Bar As a Matter of Law.

Under Virginia Code § 8.01-243(B), Robinson is barred from making claims for property damage sustained prior to December 4, 2010. *See*

Hampton Rds. Sanitation Dist. v. McDonnell, 234 Va. 235, 239 (1987) (five-year statute of limitations applicable to each separate occurrence of intermittent trespass and to any action for *continuous* trespass). The Amended Complaint alleges "continuous," "on-going" encroachments that have resulted in "constant cleaning efforts" and "persistent filth and standing water." JA 145–46, ¶¶ 97-106. The court determined that, as alleged, the Amended Complaint made a claim for continuous trespass. JA 476, lines 11-17. Following this decision, the court determined it could rule as a matter of law that the continuous trespass claim was time barred based on the allegations in the Amended Complaint. JA 473, lines 6-22.

Robinson argues the court's ruling was based on an "improper factual finding" that the "Plaintiff's Trespass and Nuisance claims were 'continuous' rather than 'intermittent.'" (First Assignment of Error). However, the court ruled *as a matter of law,* based on the factual allegations in the Amended Complaint, that the claim asserted was for continuous trespass and nuisance. JA 476, lines 11-17. As defense counsel argued at the hearing, "the Plaintiff does not need to have evidence for a plea in bar if the pleadings on their face take the case outside the statute of limitations." JA 469, lines 9-12; JA 473, lines 17-23; JA 474, lines 1-2.

The mere fact that the defendants *offered* to put on evidence in support of their Plea in Bar did not vest Robinson with a right to present evidence contrary to the allegations in the Amended Complaint. The court may rely upon the factual allegations made by a party in its pleadings in entering a judgment. *See* Va. Sup. Ct. R. 3:20 (permitting the use of pleadings to support summary judgment). "Pleadings are as essential as proof, and no relief should be granted that does not substantially accord with the case as made in the pleading." Bank of Giles County v. Mason, 199 Va. 176, 180 (1957). Robinson has not presented any legal support for the contention that the court lacked the authority to rule as a matter of law on the narrow issue of the statute of limitations based on the *allegations of the plaintiff* in the Amended Complaint. Similarly, Robinson's demand for a jury regarding issues *of fact* did not obligate the court to hear evidence if the court determined that the matter could be resolved *as a matter of law*. Smith, 289 Va. at 251 (stating that when "[t]here are no disputed facts relevant to the plea in bar and it presents a pure question of law").

The court's decision to hear argument on the Plea in Bar and not to take evidence, based on the ruling that the Amended Complaint alleged a continuous trespass, was not a denial of due process, nor was it an unfair surprise. The issue of the statute of limitations and the arguments

regarding a continuous or intermittent trespass had already been fully briefed by the parties by the time of the January 25, 2017 hearing. Further, Robinson cannot allege that she was unaware that the Plea in Bar would be addressed at the hearing, as it was Robinson's own counsel who first mentioned the Plea in Bar to the court at the hearing. Although Robinson's counsel later asserted that the Plea in Bar could not be resolved until evidence had been presented, he initially raised the Plea in Bar and acknowledged that "it does make sense to deal with some of these dispositive issues first. . . . ***Obviously, Mr. McGavin will be presenting argument on the demurrer and plea in bar***." JA 377, lines 14-18. Consistent with the course suggested by Robinson's counsel, Nordquists' arguments dealt with the dispositive legal issues that could be determined as a matter of law. Just because Robinson is displeased with the court's ruling on those dispositive issues does not make the court's decision to rule on the Plea in Bar a violation of due process.

Further, the court's ruling did not contradict or otherwise run "contrary" to what the Plea in Bar requests. The Nordquists' raised the issue of the statute of limitations in the Plea in Bar and argued the claims for property damage were barred by the statute of limitations because the Amended Complaint alleged a continuous trespass. These issues were

squarely before the court and were ripe for a ruling at the time of the hearing.

c. The Court's Holding that Robinson Alleged a Continuous, Rather than an Intermittent, Trespass/Nuisance is Consistent with Recent Supreme Court Precedent and Should Not Be Altered

Alternatively, Robinson argues that the court's decision on the intermittent vs. continuous trespass issue was legally incorrect. This Court's decision in Forest Lakes Cmty. Ass'n v. United Land Corp. of Am., 293 Va. 113 (2017) and its subsequent decision in Shin v. Joyaux, 2017 Va. Unpub. LEXIS 8 (April 6, 2017), demonstrate that the court's January 25, 2017 ruling correctly applied Virginia law.

In her opening brief, Robinson relies heavily on the Norfolk Railway cases in an attempt to rely on the general distinction between structures that are unlawful in and of themselves, for which the cause of action accrues "at once upon the erection of the unlawful structure," and structures that are not *per se* injurious, for which a cause of action accrues only upon the injurious use of the "structure." *See* Norfolk & W. Ry. Co. v. A.C. Allen & Sons, 118 Va. 428 (1915) ("Norfolk Railway I"); Norfolk & W. Ry. Co. v. A.C. Allen & Sons, 122 Va. 603 (1918) ("Norfolk Railway II").

Contrary to Robinson's argument on appeal that the Nordquists' "sprinkler system" is not itself unlawful, but that only its use or activation was tortious, the Amended Complaint makes it clear that Robinson asserts that the irrigation system itself was unlawful. The Amended Complaint alleges that the defendants' irrigation "methods" are injurious to Robinson in and of themselves. JA 145, ¶ 99. The Amended Complaint expressly identifies the defendants' "sprinkler system" itself as one such tortious "method." JA 145, ¶ 100. Robinson describes its alleged "persistent and damaging encroachments of water" as being the "direct result" of these "methods," "primarily (although not exclusively) their sprinkler system." JA 145, ¶ 101. Robinson further alleges that this same tortious "sprinkler system" physically "infringes upon" and "invade[s]" the Median both above ground and below grade and that the sprinkler heads present an "obstacle" to the plaintiff's enjoyment of its supposed easement rights. JA 143, ¶¶ 81-86. Thus, both with regard to its tortious effect on Robinson and its illegal location within the Median, the Amended Complaint clearly alleges the "sprinkler system" itself as unlawful.

Thus, even under the Norfolk Railway precedents, to the extent that the same principle applies to this case in determining the accrual of a cause of action, Robinson's own Amended Complaint pleads itself into the

realm of continuous trespasses that "accrue[] at once upon the erection of the unlawful structure, and Robinson may recover once for all." Norfolk Railway I, 118 Va. at 432.

Further still, Robinson's reliance on the Norfolk Railway cases overlooks the much more recent, analogous, and plainly controlling authority of Forest Lakes. Even to the extent that the principle underlying Norfolk Railway I applies to this case, however, Robinson's novel reliance on this unlawful vs. lawful "structures" distinction—like its attempt to argue around its "continuous" trespass admission—is directly contradicted by the pleadings themselves. Robinson confusingly argues that it was not a continuous intrusion that occurred on an unending basis, but rather a "continuing" intrusion in the sense that she suffered repeated intrusions at different intervals since the Nordquists' purchased the property in 2005. Under this theory, in order for there to be a continuous trespass, it would have to occur every single day. This is not supported by the law in Forest Lakes and Shin and is an absurd contention. Moreover, it is directly contradictory to Robinson's Amended Complaint.

i. The Forest Lakes Decision Articulates the Applicable Law of Accrual of a Cause of Action

In Forest Lakes, the plaintiffs, two residential property owners' associations, complained that the construction of "sediment basins" to support a commercial development caused excessive sediment to occasionally flow downstream and to fill the plaintiffs' artificial lake. Id. at 119. The sediment basins "were permanently in place by fall 2004," and the plaintiffs had both complained of excessive sedimentation and discussed the need for legal action by early 2005. Id. at 118. Suit was not filed until 2011, seeking damages for nuisance and trespass along with various equitable claims. Id. at 119. The plaintiffs' attempted to plead that "each new release of silt and sediment constitute[ed] a new and independent trespass to the [plaintiffs'] properties." Id. As here, the defendants asserted pleas in bar of the statute of limitations to the plaintiffs' nuisance and trespass claims. Based on the finding that the alleged incursions of sediment constituted a continuous, rather than intermittent, trespass, the trial court sustained the pleas in bars and dismissed the case; this Court unanimously affirmed. Id. at 122, 134.

"The general principle, well recognized in Virginia law, deems the accrual of a cause of action for 'injury to property,' . . . to take place when

the first measurable damage occurs." Id. at 123. "At that point, the limitation period begins to run. Subsequent, compounding or aggravating damage – if attributable to the original instrumentality or human agency – does not restart a new limitation period for each increment of additional damage." Id. at 123. Even where there are "recurring injuries," where those injuries "'in the normal course of things, will continue indefinitely, there can be but a single action therefor [sic], and the entire damage suffered, both past and future, must be recovered in that action.'" Id. at 126 (quoting Norfolk County Water Co. v. Etheridge, 12 Va. 379, 380-81 (1917)). The "limitation period 'will not be extended simply because the damage is much larger in later years than it was when the structures were first erected.'" *Id.* at 130 (quoting Southern Rwy. v. McMenamin, 113 Va. 121 (1912)). The applicable "caveat" to this general rule applies to the case of "recurring" or "intermittent" occurrences, each of which in and of itself constitutes "a stand-alone claim in its own right." No such stand-alone claims were pled in this case. Robinson admits this deficiency by attempting to file a second amended complaint to plead an intermittent harm.

ii. The Lower Court's Ruling Was Correct Under Forest Lakes and Shin

Forest Lakes is directly on point to this case both with regard to its discussion of intermittent vs. continuous trespasses and with regard to the issue of alleged escalation of damage after the end of the statute of limitations period. Robinson's allegations with regard to the Nordquists' watering describe a single, continuous trespass beginning at the time of Nordquist's possession of the adjacent property. As alleged, it may be presumed that Robinson's injuries "in the normal course of things, will continue indefinitely." Id. at 127. Just like the continuous (though not constant) flow of sediment downstream in Forest Lakes, it is impossible to distinguish and quantify the amount of water that flowed with ongoing and repeated lawn watering or use of a permanently installed irrigation system over time. Robinson recognized this when filing the Amended Complaint eleven years after the Nordquists' possession in 2005,[3] Robinson made no allegation of intermittent encroachment or harm or for damages based on separate occurrences, rather all claims of encroachment and damage were described as "persistent," "have continued," "has resulted and continues,"

[3] Amended Complaint filed with Motion to Amend on November 9, 2016, over objection of defendants, after extensive discovery, and three months before trial.

"continuous encroachments have resulted and continue to result in water damage," "these encroachments have been on-going." JA 145– 46, ¶¶ 97-107.

The unquantifiable and unmeasurable multiplicity of events in this case and Forest Lakes presents a marked contrast with the case of Hampton Rds. Sanitation Dist. v. McDonnell, 234 Va. 235 (1987), relied upon by Robinson. In Hampton Rds., "a sewage plant operating under 'normal conditions' did not discharge wastewater on any private property." Id. at 129. It was only "[w]hen the volume in the sewage plant . . . reached 'three times the normal quantity,' [that] a discharge occurred through operation of a bypass valve." Id. Crucially, "that abnormal condition occurred on nine separate occasions over a 12-year period with each occasion resulting in a discharge," each of which was "too temporary and episodic to justify the running of a single limitation period." Id.

This analysis is not altered by Robinson's claim that the situation somehow worsened or escalated beginning in "mid-2011." JA 147, ¶ 109. An increase in severity of the degree of damage does not entitle a plaintiff to bring separate claims. Forest Lakes, 293 Va. at 129. (rejecting "assumption that it matters, for accrual purposes, that the continuing nature of the damage might fluctuate or even get worse over time").

Following this Court's Decision in Forest Lakes, it considered another case with facts even more analogous to the present. Shin v. Joyaux, applied the principles of continuous and intermittent trespasses as discussed in Forest Lakes and Southern Railway Co. v. White and lends further support for the contention that the water intrusion as pled by Robinson, was that of a continuous trespass for which there can only be one recovery.

In Shin, James Shin purchased a building in December 1997. 2017 Unpubl. LEXIS 8, *1 (VA. April 6, 2017). A short time after purchasing the property, he noticed that the second and third floors of his building sustained water damage after heavy storms, but as it did not interfere with the operation of his business on the first floor, he did not take issue with it. Id. In October 2002, Main Joyaux purchased the property next to Shin's. Id. At some point, the previous owner of Joyaux's property replaced the roof and covered up portions of the drainage system which caused the rain to pool in the location of the covered drain. Id. In late 2013, Shin began renovating his property to create a residence on the second floor. Id. at *2. In August of 2014, Shin noticed that after heavy storms, water would collect on Joyaux's roof and spill onto his roof, which was lower. Id. Shin filed suit for trespass against Joyaux arguing that his property suffered continuous water damage as a result of the water flow from Joyaux's roof. Id. The trial

court refused to recognize each heavy rainstorm as an intermittent injury and found that his claims were time barred because the building suffered continuous damage since 1997. Id.

The Court, in discussing the holding in Forest Lakes, pointed out that a cause of action involving a permanent injury accrues when the injury was first sustained, even though it occurs regularly over time. Id. at *4. The Court pointed out that regardless of whether "waters are *continuously* polluted, or lands are perpetually overflowed by backwater from a dam," or cases in which "the overflows are *recurrent and of short duration* . . . the same principle of liability is appropriate to all cases where the nuisance is *permanent and a constant and continuous* agency of injury. Id. at *4 (quoting White, 128 Va. 551, 569 (1920)) (emphasis added).

In applying the principles discussed in Forest Lakes and White, the Court determined that the roof, which is permanent and was the cause of the injury, would "continue in due course without change from any cause except human labor." Id. (citing White, 128 Va. at 566). It went on to hold that where a nuisance is permanent and would continue indefinitely, there can only be one recovery for the entirety of the damage sustained both past and future. Id. (citing Forest Lakes, 293 Va. at 124). "The moment it was established that the roof was a permanent menace it created an immediate action." Id. (quoting White, 128 Va. at 566) (internal quotation

marks omitted). Given the principles set forth in White and Forest Lakes, the Court determined that the cause of action accrued when the injury was first sustained, and in that case, it was when the first water damage occurred after Joyaux replaced the roof. Id. at *5.

Robinson attempts to distinguish Shin by arguing that the sprinkler system, unlike a roof and drainage system, can be turned off, and therefore, does not create a continuous trespass and further that the flooding in Shin only occurred through an act of God or nature. However, there is no allegation in the Amended Complaint that the sprinkler system was ever turned off and on, as Robinson argues in her Opening Brief. Instead, it was alleged in the Amended Complaint that the Nordquists' watering methods, "primarily (though not exclusively) their sprinkler system" caused continuous and persistent encroachments. JA 145 ¶ 101 – JA 146 ¶ 103. Further, there is nothing in the Complaint that the watering methods would cease and the harm end. JA 146 ¶ 106. Whether the sprinkler system *could* turn off or the roof in Shin *could* be repaired to cease the flooding was not the point; once the encroachments began, they continued without an indication of ever ceasing. Moreover, the Court in Forest Lakes and Shin was clear that even a trespass that is not a daily occurrence such as a heavy rainstorm, is still a continuous trespass if the trespass is one

that a "perpetual menace," that has resulted and will result in a persistent trespass. This is what is pled in the Amended Complaint and based on this, the trial court found that the Robinson had in fact pled a continuous trespass.

Based on Forest Lakes and Shin and the express admissions in the Amended Complaint, it was proper for the court to rule based on the pleadings that Robinson alleged a continuous trespass, and that the trespass and nuisance claims were barred by the applicable statute of limitations.

C. The Court Properly Denied the Robinson's Motion to Amend at the January 25, 2017 Hearing, and this Issue Need Not Be Revisited. (Robinson's Second Assignment of Error)

a. Standard of Review

Whether to grant leave to amend "is a matter resting within the sound discretion of the trial court." The standard of review on appeal is whether there was an abuse of discretion. *See* Mortarino v. Consultant Eng'g Servs., 251 Va. 289, 295-96 (1996).

b. Argument

After the court rulings on January 25, 2017 and a mere five days before trial, Robinson orally moved for leave to amend her Complaint to reshape her factual allegations in an attempt to evade the operation of the

statute of limitations. The court properly denied the Motion. There was no reasonable basis to amend stated except Robinson's intent to change her claims from continuous to intermittent -- a dramatic reversal of the case and only 5 days from trial.

This neighbor dispute has been ongoing in various legal iterations since December 2014, by Robinson, suing individually, in actions based on substantially similar factual allegations. (Civil Action 14-1625 Robinson v. Nordquist–nonsuited and Civil Action 15-2254, Robinson v. Nordquist–voluntarily dismissed with prejudice). Robinson amended her complaint just three months before trial and then made an oral motion to completely change her claims five days before trial. As counsel for the Nordquists pointed out at the January 25, 2107 hearing, "to force these Defendants after all this expense, all these experts to allow to amend and delay this trial because the Plaintiff now wants a new theory . . . And then we had this case which would be the fourth iteration of this where they filed the complaint and then amended complaint over our strenuous objection saying it comes too late . . . and then to be seeking leave to amend . . . five days before trial is inherently unfair." JA 471, lines 7-13.

The only occurrence between the filing of the Amended Complaint and the subject motion to file a second Amended Complaint was the court's

ruling on the Plea in Bar. This was not a reasonable basis for seeking leave to amend, and leave to amend would not have furthered the ends of justice, but rather would have subverted those ends by condoning nakedly strategic conduct that is not contemplated by Rule 1:8 and that would have been extraordinarily prejudicial to the defendants. This dispute between neighbors has been ongoing in its various legal iterations for over three years and has already gone through both a nonsuit and a voluntary dismissal by Robinson. Robinson has made substantially the same factual allegations throughout the various complaints and amended complaints filed in over three years of litigation in this case. This is not a valid reason to seek to amend a Complaint.

Based on the foregoing, the court's denial of the motion was not an abuse of discretion. Brown v. Jacobs, 289 Va. 209, 218-19 (2015) (affirming denial of leave to amend and denial of motion to reconsider filed after demurrer to amended complaint was sustained) and this Court should affirm the lower court's denial of Robinson's Motion to Amend the Complaint.

D. The Court Properly Sustained Nordquists' Demurrer[4] to the 1960 Easement. (Robinson's Third Assignment of Error)

a. Standard of Review

Appellate review of the sustaining of a demurrer involves a matter of law and therefore the standard of review is *de novo*. Glazebrook v. Bd. of Supervisors, 266 Va. 550 (2003).

b. Argument

The central dispute in this case involves the interpretation of a 1960 "light and air" Easement and a 1969 Indenture (collectively "easement documents"), which together prohibit the owner of the Nordquists' property from building immediately up to the property line adjoining the western side of the Robinson property. The 1960 Easement attempted to create a perpetual easement of light and air without defining the scope of that right. The Indenture defined the scope of the ill-defined Easement by creating a three-foot "Median" along the eastern boundary of the Nordquists' property, in which its owners are not allowed to build. It also gave the owner of the Robinson property, a right to direct "workmen" to construct a chimney in the Median.

[4] Rulings on the Easement Documents were on Demurrer but also Cross Motions for Partial Summary Judgment.

Robinson alleged in her Amended Complaint the right to a view, arguing the light and air easement created a perpetual right to see and enjoy the Nordquists' yard. JA 139–40, ¶¶ 57-65). Robinson alleged "Defendants' have admitted that the arbor, trees, and bushes were strategically positioned in order to block the view from Plaintiff's windows into Defendant's yard." JA 140, ¶ 65). This claim and Robinson's multi-year effort to assert this right created the need for a court to interpret the parties' rights under the easement and to address the concept of "open yard."

Robinson's expansive reading of the easement documents is not supported by Virginia law and is a clear abuse of the terms of the documents. Easements are historically disfavored and were not permitted under the common law. Tardy v. Creasy, 81 Va. 553, 557 (1886). Other than the rights expressly granted, Robinson has no right of entry upon her neighbor's land; nor does Robinson have a right of access to air, light, and view over the entire adjoining property. To the extent that the easement documents depart from the common law, Robinson's rights are narrowly construed. Because any right granted in an easement constitutes a burden on the use and ownership of the defendants' property, Robinson may

exercise only the rights that are expressly granted. See generally, Lynchburg v. Smith, 166 Va. 364, 370 (1936).

Contrary to Virginia law, Robinson has persistently and repeatedly alleged a right to a view, asserting that her rights to light and air, and to open yard go beyond the 3 foot median. The trial court correctly ruled that the term "light and air" in the original Easement is vague and unenforceable, and limited the scope of the easement to the modifications outlined in the 1969 Indenture to permit use of the 3 foot strip to access openings and to erect a chimney. Robinson's clear over reach and misstatement of her rights in this litigation, and previously, was finally clarified once and for all by the court, and those rulings should not be disturbed on appeal.

The original Easement was written in 1960. Robinson and the Nordquists were not involved in the process at the time. There is no clear statement in the Easement, or in the Amended Complaint of the condition of the property then as compared to now. The original easement set no right to a view, and no parameters for the amount of light or air to be preserved. The terms are hopelessly vague and subject to abuse by an overreaching, unreasonable neighbor. This is precisely what occurred here. Whether Robinson's view of the amount of air or light is correct is left

solely to her subjective whims, and disagreement on that scope has been met with repeated lawsuits. No property owner should be burdened with such a vague easement, and then subjected to changing subjective views of what is just the right amount of light and air. Robinson will not own the property forever, just as the owners in 1960 did not, and the future owners' view of light and air will likely be different than Robinson's and Nordquists'.

The case law supports the trial court's decision. The 1960 Easement of light and air contained no boundaries or scope, as would generally be required to properly create an easement with well-defined boundaries. See, e.g., First Nat'l Trust & Savings Bank v. Raphael, 201 Va. 718, 720 (1960) (interpreting a light and air easement that barred improvements "which will in any manner, or by any means whatsoever lessen, obstruct, impede or hinder the flow or use of light now enjoyed").

Defining the boundaries for a light and air easement is not impossible. In First Nat'l Trust & Sav. Bank v. Raphael, 201 Va. 718 (1960), the Court determined that the parties to an easement properly defined the scope and boundaries of a light and air easement. The document required that the servient tenement and his heirs and successors never erect in the rear of his lot any building, improvement, or thing that would "obstruct, impede or hinder the flow or use of light now enjoyed by said Boyd from

that direction—or which will in the remotest degree darken his lights, apertures and windows, in that part of his house now occupied as a family residence." Id. at 720. Clearly, an easement for something as imprecise as light and air can be defined in a detailed and unambiguous manner. That easement had definite boundaries and a clear scope. The 1960 Easement is very different with no boundaries or limits.

On the pleadings presented, the easement terms, and the claims made by Robinson, the trial correctly determined that the terms light and air in this easement from 1960 are vague and ambiguous, and therefore unenforceable. Accordingly, the trial court's ruling was correct and should be affirmed.

E. The Court Correctly Ruled the 1969 Deed of Indenture is Limited in Scope and Affords Robinson Only Rights Expressly Contemplated. (Robinson's Fourth Assignment of Error)

a. Standard of Review

The standard of review for the interpretation of the easements is *de novo*. Beach v. Turim, 287 Va. 223, 225 (2014).

b. Argument

The 1969 "Indenture" avoided in part the fatal defect in the original easement by giving it more precision, but not complete clarity. Specifically,

Section 2 identifies a three-foot-wide strip of land, called "the Median," which is to remain:

> open and free of all buildings and structures except the chimney or chimneys hereinafter in Section 3 of this Indenture provided for, and except as aforesaid the same shall remain open yard, the right so secured hereby to be appurtenant to 404 and enjoyed by the party of the second part and any and all persons who shall succeed her in the ownership of 404.

JA 167–69 (Exhibit B).

Robinson asserts a broad interpretation of the term "open yard" in her Amended Complaint. Robinson complains of construction of an arbor and planting of trees outside the 3 foot median limiting the open yard, a sprinkler system, soil for beds, trellises with ivy that grow within the 3 foot median, and toys or yard equipment in the 3 foot median. JA 140, ¶ 67.

The trial court correctly determined that the term "open yard" is vague and ambiguous in the 1969 Indenture, and is unenforceable, except to keep the 3 foot strip free of buildings and structures, and to permit construction of a chimney. JA 369, ¶¶ 5(a)(b) (with reference to Jan. 25, 2017 Order redacted but reinstated ¶ 1(e)). Because the 1960 Easement and 1969 Indenture failed to define "buildings and structures," the trial court relied on the Virginia Statewide Uniform Building Code § 36-97[5]

[5] The Uniform Virgina Building Code defines "building" in relevant part as,

("VSUBC") for an appropriate definition. It later expanded the definition of "structure," finding the VSUBC's definition too limiting.[6] JA 369, ¶ 5(b). These definitions are consistent with the trial court's ruling that buildings and structures as a matter of law are not sprinkler heads, hoses, and ladders.

Further, this interpretation and limitation is consistent with the easement documents, which essentially created a no-build zone. Historically, such negative no-build zone easements have been a common solution for ensuring that one property owner does not build immediately up to a boundary in a manner that would inconvenience a neighbor. See Hennen v. Deveny, 71 W. Va. 629, 632-33 (1913) (collecting several cases from Massachusetts, New York, Tennessee, and Maine in which a no-build easement was preserved along a property line for the benefit of the neighboring property owner). In this case, the intent is to prevent permanent man-made structures that would prevent Robinson from

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"a combination of any materials, whether portable or fixed, having a roof to form a structure for the use or occupancy by persons, or property."

[6] Structure is defined as "an edifice that is a man-made construction or an item artificially built up and composed of parts joined together for occupancy use or ornamentation, whether installed on, above, or below the surface of the land." JA 369, ¶ 5(b).

exercising her rights to build a chimney, expressly authorized by the Indenture.

Under Virginia law, there are no implied easement rights; the dominant estate's rights under an express easement are "strictly construed" according to the granting documents. Beach v. Turim, 287 Va. 223, 229 (2014); Anderson v. Delore, 278 Va. 251, 257 (2009) (express easements interpreted according to "rules governing the construction of written documents"); Walton v. Capital Land, Inc., 252 Va. 324, 326-27 (1996) ("the servient landowner retains the right to use the land in ways not inconsistent with the uses granted in the easement") (citing Restatement of Property § 450, cmt a, b, e). The boundaries and scope of an easement are fixed as a matter of law by the granting deed unless the deed is ambiguous. Old Dominion Boat Club v. Alexandria City Council, 286 Va. 273, 284 (2013). This indenture was ambiguous.

The Nordquists conceded that the 3 foot median is a valid and enforceable easement, but challenged the expansive claims by Robinson, which had the effect of limiting the Nordquists' use and enjoyment of their property well beyond the 3 foot Median. The trial court agreed, and this decision is based on sound interpretation of the documents and a common sense decision to protect the Nordquists' property rights. Simply stated,

Robinson attempted for years to impose an unreasonable interpretation of the antiquated documents, and this required court intervention to end this burdensome debate. The court's interpretation should be affirmed.

F. The Court Correctly Refused to Issue a Rule to Show Cause and Properly Established a Protocol for Access. (Fifth Assignment of Error)

a. Standard of Review

In reviewing the trial court's decision to deny Plaintiff's Motion for a Rule to Show Cause, an abuse of discretion standard applies. Gilmore v. Finn, 259 Va. 448, 466 (2000). The standard of review for the trial court's interpretation of the easement is *de novo*. Beach, 287 Va. at 225.

b. Argument

The court properly denied the Petition for a Rule to Show Cause. The parties had been involved in litigation involving the interpretation of the Easement Documents for approximately three years. On March 22, 2017, the court issued an order interpreting the parties' rights, which was challenged by both sides with Motions to Reconsider, resulting in the Order being suspended by agreement until July 7, 2017 to allow argument on the motions. The March Order provided for access for the purposes of "maintaining the openings and ventilation." JA 208, ¶ 1(a). The access granted was not unfettered and was not for any other purpose. Unfettered

access has been repeatedly sought by Robinson, who maintains the Nordquists cannot even lock their gates to secure their property and protect their children and animals, because she might want to enter. This interpretation has been repeatedly questioned by the lower court.

When ruling upon the interpretation of the Easement, the court specifically explained the scope of what is contemplated by "keep and maintain openings":

> [T]he Court agrees that the language of the 1960 easement or indenture which provides that the party of the second part a perpetual easement to keep and maintain openings on the west side, that that would permit the owner of the Plaintiff's property and Plaintiff to access the easement to maintain her openings. That would be, for instance, cleaning the windows, repairing the windows, or installing new windows, you know, anything related to maintaining the openings.

JA 460, lines 4-13.

By letter dated May 10, 2017, Robinson, through counsel, indicated that she intended to enter the defendants' property to allow "a pest control specialist to treat parts of the Trust's properties in order to prevent intrusion of insects into the openings of the properties." Petition for Rule to Show Cause [Docket #1502] at Exhibit A. The wording of the request itself is a blatant display of Robinson's attempts to abuse and distort the easement language. Even though the request was not the type contemplated by the

easement or the order of the lower court, the Nordquists agreed to permit access to the yard for the requested purpose as a courtesy and not as a matter of right. Petition for Rule to Show Cause [Docket #1502] at Exhibits A, B. Nordquists sought only clarification as to who would be entering and regarding the specific work to be performed, so that they could prepare accordingly in light of their safety-related concerns for their dog and their children. Robinson declined this invitation and insisted on proceeding with the petition on June 14, 2017 despite the pending hearing on June 30, 2017 on the Motions to Reconsider.

The court properly concluded that there was a legitimate dispute, as evidenced by the additional language addressing access in the court's September 13, 2017 Order, JA 369–70, ¶ 6, which prescribed the means to be utilized for access, and concluding at the hearing:

> And with respect to access, . . . I'm not going to add the word, reasonable, to the language of the order, . . . because I think that it clearly is inferred or implied that any access to enter the yard of the defendants' must be reasonable.

JA 640, lines 8-13.

The Nordquists' response to Robinson's request was consistent with the court's explanations and clarifications, and consistent with the court's ultimate ruling on June 30, 2017. The court has correctly interpreted the

Easement and allowed for reasonable access to be afforded, given Robinson's blatant attempts to abuse her limited rights. The court's refusal to issue a rule should be affirmed.

IV. CONCLUSION

Based on the foregoing, the Appellees request that this Honorable Supreme Court affirm the lower court's rulings on all five of Robinson's assignments of error.

Respectfully Submitted,
NELS P. NORDQUIST and
JENNIFER D. NORDQUIST
By Counsel

/s/ John D. McGavin

John D. McGavin, Esquire, VSB No: 21794
Dawn E. Boyce, Esquire, VSB No. 32923
BANCROFT, McGAVIN, HORVATH &
JUDKINS, P.C.
9990 Fairfax Boulevard, Suite 400
Fairfax, Virginia 22030
(703)385-1000 Telephone
(703)385-1555 Facsimile
jmcgavin@bmhjlaw.com
dboyce@bmhjlaw.com
Counsel for Appellees

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with Va. Sup. Ct. Rules 5:26 and 5:29. I further certify that that on this 1st day of February, 2019 I have caused to be filed three (3) copies and an electronic PDF of Brief of Appellees with the Clerk of the Supreme Court of Virginia and by causing a PDF of the Brief of Appellee Nordquist to be emailed to and one (1) copy to be mailed to:

Thomas F. Urban, II, Esquire (VSB No: 40540)
LAW FIRM OF URBAN & FALK, PLLC
P.O. Box 321043
Alexandria, Virginia 22320
(703)861-5235 Telephone
(703)340-1450 Facsimile
urgan_law@yahoo.com
Counsel for Appellant

Michael D. Charnoff, Esquire (VSB No: 43929)
PERRY CHARNOFF PLLC
1010 N. Glebe Road, Suite 310
Arlington, Virginia 22201
(703)291-6650 Telephone
(703)563-6692 Facsimile
mike@perrycharnoff.com
Counsel for Appellant

/s/ John D. McGavin