# 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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# REPLY BRIEF OF APPELLANT

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## ARGUMENT

Appellant Jane Washburn Robinson, Trustee ("Plaintiff") for the Jane Washburn Robinson Living Trust (the "Trust"), hereby files this Reply Brief in order to correct various misstatements of law and fact in the brief filed by Appellees Nels P. Nordquist and Jennifer D. Nordquist ("Defendants").

### 1. Assignment of Error # 1- Plaintiff Did Not Allege A "Continuous" Trespass and Nuisance; Defendants' Plea in Bar, Facts, and Law Establish Intermittent Trespass and Nuisance

#### A. Erroneous Factual Finding Regarding Accrual of Claims

The parties agree that the five-year statute of limitations for property injury applies to Plaintiff's Trespass and Nuisance claims, Code of Virginia § 8.01-243(B), but disagree regarding when those claims accrued in the present case. Defendants assert that the Amended Complaint "alleged a continuous trespass," Appellees' Brief ("Appellees' Br.") at 10, 16, 20, 21, and thus, the claims accrued in 2005. Id. at 6.[1] Defendants go as far as to argue that Plaintiff's Trustee "made

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[1] Defendants conflate two distinct types of water intrusion and misstate the trial court's factual finding. The evidence shows that water intrusion from hand watering and a moveable circular watering sprinkler entered Plaintiff's kitchen in 2005. Joint Appendix ("JA") at 264-265. Later, water intrusion from an underground irrigation system, installed in 2008, sent water into Plaintiff's basement. JA at 266-271. It is this latter irrigation system, which is turned off every winter, that caused most of the damage alleged in the Amended Complaint. The trial court's Order failed to state when it specifically found that the water intrusion alleged in the Amended Complaint began, but made a general factual finding that the water intrusion "began prior to December 4, 2010." JA at 210.

no allegation of intermittent encroachment or harm or for damages based upon separate occurrences . . . ." Id. at 16, 15 ("no stand-alone claims" pled).[2]

To the contrary, in the Amended Complaint (and the original Complaint), Plaintiff's Trustee alleged that "Defendants continued and are still continuing up to the present day to cause repeated and **intermittent** trespasses upon Plaintiff's properties which have resulted, and continue to result, in significant damages being inflicted upon Plaintiff's properties." App. at 160 [Amended Complaint at 30 (¶ 157)] (emphasis added). Further, the Amended Complaint anticipated that Defendants' repeated "trespasses would require Plaintiff to file a multiplicity of suits in order to protect Plaintiff's rights." App. at 161 [Amended Complaint at 31 (Wherefore clause (iv) for Count VII: Intentional Trespass - Encroachment of Water into Plaintiff's Properties)]. Such a "multiplicity of suits" would only occur if Plaintiff was alleging an intermittent trespass. Moreover, Defendants confuse "continuous" with "continuing" – the former, as used in Virginia case law, means "uninterrupted," "unbroken," or "unending," while the latter can be used to refer to an "intermittent" trespass or nuisance. See Norfolk & W. Ry. Co. v. A.C. Allen & Sons., 118 Va. 428, 435 (1915) ("Norfolk Railway I"); Harvey v. Mason City, & Ft. D. R. Co., 129 Iowa 465, 105 N. W. 958, 961 (1906).

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[2] In fact, Plaintiff describes two stand-alone claims involving water intrusion in 2011. JA at 147 (Amended Complaint at ¶ 108). In discovery, Plaintiff gave dates of water intrusion with gaps when the system was de-activated. JA 329-337.

Ten months prior to the January 25, 2017 hearing, the trial court found the Complaint to be ambiguous as to whether it alleged a "continuous" or "intermittent" trespass and nuisance exactly because of these types of allegations. Transcript (3/6/2016) at 63 [Attached to Docket No. 1721] (Court noting ambiguity of allegations). At the March 6, 2016 hearing, Plaintiff's counsel explained the fact that the irrigation system was turned off during the winter and thus, the trespass and nuisance was (at least initially) intermittent. Id. at 64.

**B. Trial Court Did Not Consider "Factual Context" of Case**

Defendants encourage this Court to ignore the facts as documented in discovery and the exhibits attached to their own Plea in Bar Memorandum and to rely on Defendants' characterization of the Amended Complaint to affirm the factual findings and holding that the Trespass and Nuisance claims are time barred. Appellee Br. at 7-11. Defendants claim they merely "offered" to put on evidence in support of their Plea in Bar, despite the fact that such evidence was attached to their Memorandum. JA at 241, 262-288. That evidence demonstrated that there were disputed factual issues to be resolved to properly rule on the Plea in Bar. Moreover, the trial court must have considered some evidence in order to find that the trespass and nuisance "began prior to December 4, 2010." JA at 210 (Order).

Plaintiff had repeatedly invoked the right to have a jury decide the Plea in Bar. JA 230-31; Plaintiff's Opposition to Defendants' Plea in Bar to Amended

Complaint (Docket #1113) at 2; JA at 378 (lines 11-13); JA at 464 (lines 13-15).[3] On January 25, 2017, the trial court had initially granted Defendants' Demurrer on the statute of limitations and "converted" its ruling to a Plea in Bar when informed that the Demurrer did not raise that basis for dismissal. JA at 464-472. Ignoring this Court's admonition that "determining the boundaries of a cause of action . . . depends so heavily on the factual context of each case," Forest Lakes Cmty. Ass'n v. United Land Corp. of Am., 293 Va. 113, 125 (2017), Defendants argue that "the Plaintiff does not need to have evidence for a plea in bar if the pleadings on their face take the case outside of the statute of limitations." Appellees' Br. at 8.[4]

Defendants encourage this Court to ignore both form and substance to affirm the Plea in Bar despite the overwhelming evidence that the facts, as set forth in Defendants' own pleadings and discovery in the case, establish an "intermittent" trespass and nuisance. This is particularly improper here, when the same trial court judge considered the same arguments and gave guidance to the parties that the

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[3] Defendants imply that Plaintiff's counsel waived the right to a jury trial on the Plea in Bar by noting that Defendants intended to argue their Plea in Bar at the hearing as a part of a list that had been handed up to the circuit court judge. Appellees' Br. at 3, 10 (citing JA 377, lines 14-18); see JA at 376, line 19-21. This ignores the fact that Plaintiff's counsel immediately thereafter asserted Plaintiff's right to a jury trial, JA at 378 (lines 11-13), and reiterated that right when the trial court converted the Demurrer into a Plea in Bar. JA at 464 (lines 13-15).

[4] Defendants argue that "[p]leadings are as essential as proof," Appellees' Br. at 9, yet Defendants ignore their own pleading (Memorandum in Support of Plea in Bar) that sets forth the proof that the trespass and nuisance in the present case were intermittent. JA at 241, Exhibits 3-9 [JA 262-288].

Complaint did not state a "continuous" trespass. The parties, relying on that ruling, conducted substantial discovery and were five days from a jury trial.

### C. Cases Cited by Defendants Support Plaintiff's Arguments

Defendants misconstrue a series of cases by turning them on their head. Appellees' Br. at 11-15. In Forest Lakes, the trial court conducted an extensive evidentiary hearing to determine the actual governing facts of the controversy, despite the complaint's allegations. 293 Va. at 119-122. That trespass involved discharges from defendant's sediment basins that emitted sediment into a creek that flowed into a lake owned by the plaintiff. The defendant in Forest Lakes had no ability to dictate when the sediment was discharged from the basins. Id. at 118.[5]

Defendants also rely on this Court's decision in Shin v. Joyaux, Record No. 160559 (Va. April 6, 2017), Appellees' Br. at 11, 18-21, which involved the continuous threat of a flow of rainwater from a roof onto a neighbor's property,[6] not an irrigation system turned on and off by its owner and which the evidence shows was turned off every winter. The Court in Shin found that the nuisance in that case was "continuous" because "the nuisance is permanent and a constant and

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[5] Plaintiff's own expert in Forest Lakes "never testified that there was any period of time in which sediment flow was not continuous." 293 Va. at 121.

[6] Contrary to Defendants' assertion that Plaintiff's analysis would require a trespass to "occur every single day" in order to be a "continuous" trespass, Appellees' Br. at 13, Plaintiff's position is that there must be the possibility that there could be a trespass every day. In the present action, no trespass could occur during the months that the irrigation system is de-activated during the winter.

continuous agency of injury." Shin, at *4. The facts in the present case establish that the water intrusion was not of "a constant and continuous" nature because the irrigation system was not activated for the winter months. Further, as this Court stated, the trespass in Shin would "continue in due course without change from any cause except human labor." Id. at *4. In the present case, the irrigation system was activated and turned on each cycle by human labor and control. The rain in Shin, unlike the city water in the present case, is not controlled by the Defendants.

Defendants further misconstrue this Court's precedent regarding unlawful versus lawful structures involved in a trespass and Plaintiff's analysis on that basis. Appellees' Br. at 11-13. Defendants argue that, because Plaintiff has claimed that part of the irrigation system above ground is within the Median, it is "unlawful" because it violates the 1969 Indenture and the trespass must be a "continuous" trespass pursuant to Norfolk Railway I, 118 Va. at 432. Appellees' Br. at 13. Whether "unlawful" includes a violation of an easement, there is a dispute about whether the irrigation system violates the easement (Assignment of Error #4). Nonetheless, that question does not need to be resolved to adjudicate this matter.

In Norfolk Railway I, this Court explained 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.

118 Va. at 432 (emphasis added). Defendants ignore the bolded portion and

confuse the two separate trespasses here – the trespass of the irrigation system in the Median (Assignment #4) and the trespass of water leaked from the irrigation system into Plaintiff's property. Although the irrigation system itself may be permanent and "unlawful," this does not mean that the water intrusion from the irrigation system would be continuous. Whether the irrigation system is activated each spring, and the system turned on each day, is a decision of the Defendants which creates a "stand alone claim in its own right" each time that there is a water intrusion due to the system and thus, "a new cause of action [may] accrue" for each such trespass." See Forest Lakes, 293 Va. at 124. These cases ultimately support a determination that the trespass and nuisance here were intermittent.[7]

### D. Defendants attempt to create straw men requirements that are not consistent with Virginia Precedent

Defendants argue that, like in Forest Lakes, "it is impossible to distinguish and quantify the amount of water that flowed with the ongoing and repeated lawn watering or use of a permanently installed irrigation system over time." Appellees'

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[7] To distract from the evidence available at the Plea hearing, Defendants argue that "there is no allegation in the Amended Complaint that the irrigation system was ever turned off and on, as Robinson argued in her Opening Brief." Appellees' Br. at 20. There is no dispute that the irrigation system was turned off every winter, as was established in discovery and admitted in Jennifer Nordquist's Answers to Interrogatories. JA at 122 ("An irrigation system was installed in June 2008 and has been in use since that date, though depending on the season and the advice of our irrigation contractor, the system is adjusted for weather and is also not pressurized or turned on at certain times of year.")

Br. at 16. Forest Lakes involved a water pollution case in which the sediment coming from the defendant's basins, as opposed to other sources, was at issue. 293 Va. at 120. In the present case, the issue is not the amount of water that trespassed from Defendants' watering methods, but the amount of damage caused by these watering methods.[8] As established in discovery, Plaintiff has documented, through pictures and videos, the amount of damage throughout the relevant time period.

Similarly, Defendants attempt to compare the number of trespasses involved in Hampton Roads Sanitation Dist. v. McDonnell, 234 Va. 235, 237-240 (1987), to the present case. Appellees' Br. at 17. In Hampton Roads, a sewage plant opened a valve to permit discharge onto the plaintiff's property and thereby committed intermittent trespasses nine separate times over a 10-month period. Id. at 238-42. Defendants put undue weight on the number of trespasses in that case. In Hampton Roads, it was not the amount of discharges that were important, but the fact that

> [t]he undisputed evidence established that Hampton Roads designed, constructed, owned, **operated, and controlled** the bypass valve. Thus, as the trial court observed, **Hampton Roads committed a trespass each time "it caused the overflow valve to operate and discharge sewerage on [McDonnell's] property**."

Id. at 240 (emphasis added). Like in the Hampton Roads case, Defendants here

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[8] In another effort to deflect attention from the facts, Defendants assert that "[a]s alleged, it may be assumed that Robinson's injuries 'in the normal course of things, will continue indefinitely.'" Appellees' Br. at 16. To the contrary, the real "factual context of [the] case," Forest Lakes, 293 Va. at 125, establishes that Defendants must affirmatively act in order to create a trespass or nuisance.

control the irrigation system's operation -- when the system will be activated after the winter and each specific day that it will be turned once it is activated.

Defendants argue that the Forest Lakes decision rejects the idea that "it matters for accrual purposes, that the continuing nature of the damage might fluctuate or even get worse over time." Appellees' Br. at 17 (citing 293 Va. at 129). In the present case, Plaintiff has alleged that the water intrusion from Defendants' watering methods "intensified in amount and extent of damage since mid-2011," JA at 147 (Amended Complaint ¶ 109), but the purpose of that allegation was to demonstrate that Plaintiff could identify the amount of damages caused by Defendants' watering methods, not to establish whether the trespass and nuisance were "continuous" or "intermittent."

For the foregoing reasons, the granting of Defendants' Plea in Bar must be reversed and remanded with instructions to allow these claims to be tried by a jury.

**2. Assignment of Error #2 – Amendment Necessary to Clarify Facts**

Defendants assert that the trial court was correct in denying Plaintiff's motion to amend its Trespass and Nuisance Claims after the court granted Defendants' Plea in Bar, citing the long history of various lawsuits by different parties. Appellees' Br. at 21-23. Yet, Defendants ignore the most relevant part of that history – the hearing on March 6, 2016 in which the trial court, with the same judge presiding, held that the Trespass and Nuisance Claims did not allege

a "continuous" trespass and nuisance, but were ambiguous, and that this ambiguity could be fleshed out in discovery. Transcript (3/6/2016) at 63-66 [Attached to Docket No. 1721]. At the March 6, 2016 hearing, the trial court, considering the allegations and whether they set forth a "continuous" or "intermittent" trespass, held that "the complaint adequately apprizes [sic] the defendants of the nature of the cause of action and the claims asserted. And that the information you're seeking by way of bill of particulars is available to you through the discovery process." Id. at 66, lines 10-15.[9] Given these unique circumstances, the trial court abused its discretion by refusing to allow Plaintiff to amend the complaint in order to reflect the actual nature of the "factual context of [the] case," Forest Lakes, 293 Va. at 125. Defendants would not be prejudiced as they would have relied on the March 6, 2016 ruling while conducting discovery.

### 3. Assignment # 3 - Plaintiff's Trustee Seeks to Protect Light, Not a View to Defendants' Yard; Virginia Law Supports Reversal of Demurrer

Throughout their brief, Defendants assert that Plaintiff's Trustee "alleged in her Amended Complaint the right to a view." Appellees' Br. at 25, see also, id. at 6, 25 ("no right to a . . . view"), 26 ("Robinson has persistently and repeatedly alleged a right to a view"). This assertion is a red herring, untrue, and nowhere found in the Amended Complaint. It is offensive to denigrate Plaintiff's legitimate

[9] Plaintiff sought an amendment because she relied upon the March 6, 2016 ruling, conducted ten months of hard-fought discovery, and five days before trial, the trial court ignored the results of that discovery in granting the Plea in Bar.

complaint that Defendants have blocked almost all light to every opening on the western side of both properties, the sole source of natural light to their locations. These include, most significantly, the double windows in the kitchen (JA 217, 289-292) and the large window in the entry hall (JA 293) at 404 Duke Street and the kitchen window at 303 South Royal Street. The word "view" is used only once in the entire Amended Complaint in the context of the easement for light and air. JA at 140 (Amended Complaint at ¶ 65). That paragraph discussed Defendants' hyper-sensitivity to privacy and noted that "Defendants have admitted that the arbor, trees, and bushes were strategically positioned in order to block the view from Plaintiffs windows into Defendants' yard." Id.[10] Defendants' right to privacy does not overcome their duties not to diminish the light and air reaching Plaintiff's openings as set forth in the 1960 Easement and reaffirmed in the 1969 Indenture.

Contrary to Defendants' assertion, Appellees' Br. at 24, the easement's scope was adequately defined to be that necessary to "keep and maintain openings on the west side of the premises . . . for the purpose of admitting light and air through said openings." JA at 133 (¶ 16), 165 (Exhibit A). Defendants' attempt to invalidate the "light and air" easement is contrary to this Court's preference for effectuating the intent of the parties to an agreement. Aetna Cas. & Sur. Co. v.

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[10] Another red herring is the assertion that Plaintiff seeks a right of entry upon Defendants' yard and a right of access to air, light, and a "view," other than those set forth in the easements. Appellee's Br. at 25. Those easements protect Plaintiff's right to light and air to the openings without being diminished.

Fireguard Corp., 249 Va. 209, 215 (1995). As this Court has explained,

> In resolving a dispute between landowners regarding the terms of an easement that is granted or reserved expressly by deed, we apply the customary rules governing the construction of written documents. . . . A deed may expressly create an easement but fail to define specifically its dimensions. When this situation occurs, and the deed language does not state the object or purpose of the easement, the determination of the easement's scope "is made by reference to the intention of the parties to the grant," ascertained from the circumstances pertaining to the parties and the land at the time of the grant. However, if the granting language states the object or purpose of the easement, the dimensions of the easement may be inferred "to be such as are reasonably sufficient for the accomplishment of that object."

Anderson v. Delore, 278 Va. 251, 257 (2009) (citations omitted). Here, the drafters of the easement intended to ensure that the light and air accessible to 404 Duke Street would not be diminished by actions of 406-408 Duke Street.

Defendants try to conflate the provisions of the two easements in order to merge the "light and air" provision with the "Median" provision. Appellees' Br. at 24-31. The two provisions have substantially different purposes. The "light and air" provision was created to ensure that the openings (windows, vents, etc.) on the western side of the property (that facing Defendants' yard) would have sufficient light and air for the enjoyment of its residents and visitors. See Hennan v. Deteny, 71 W.Va. 629, 632 (1913) ("Light and air are . . . essential to the enjoyment of a

dwelling or business house . . . .") The Median/"open yard" provision,[11] on the other hand, was created to ensure that the owner of 404 Duke Street would have access to the openings, as well as the ability in the future to build chimneys.

Defendants argue that the "light and air" easement was modified by the "median" easement and thereby limited to protecting the light and air only from any obstruction within three feet of the openings. Appellees' Br. at 24-26. There is no contemporaneous evidence of any such intent and Defendants have merely fabricated this theory. Under this theory, the parties would have intended to accept Defendants building a 100-foot tall building three feet from 404 Duke Street, despite the fact that it would have blocked out all light and air to the property. That is nonsensical and has no basis in fact. Given that the 1969 Indenture claims to be "affirm[ing] and enlarg[ing] the 1960 Easement," JA at 134, 168, that is not consistent with the intent of the parties as stated in the Indenture.

**4. Assignment #4 – "Open Yard" Necessary to Effectuate Intent of Parties to Allow Access to "Keep and Maintain" Openings, Build Chimney(s)**

Defendants misconstrue the allegations and arguments of Plaintiff regarding the 1969 Indenture that states that the three-foot Median "shall remain open yard."[12] Assignment of Error #4 involves the prohibition that Defendants

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[11] The Median/"open yard" provision of the 1969 Indenture is at issue in Assignment of Error #4, yet Defendants try to confuse the two provisions.

[12] Contrary to Defendants' assertion, Appellees' Br. at 29, Plaintiff does not complain about Defendants' arbors or trees outside of the three-foot Median as

may not obstruct the three-foot median by placing objects within it. As previously explained, the 1969 Indenture itself demonstrates why this was created by the drafters – to allow access to "keep and maintain" the openings of 404 Duke Street and to allow the building of chimney(s) in the Median. Defendants argue that this latter objective can be satisfied by prohibiting only the construction of "structures" and "buildings," Appellees' Br. at 29-31, without any factual or legal support. To the contrary, Defendants ignore the access issue caused by Defendants' obstructions next to the openings. Further, the full-grown thirty-foot trees and inground irrigation system with sprinkler heads protruding within the Median, all installed after Defendants were specifically advised they violated the easement, also prevent the building of these chimney(s). Contrary to Defendants' assertion, Appellees' Br. at 30, obstructions other than just "permanent man-made structures" can "prevent [Plaintiff] from exercising her right to build" chimney(s), "expressly authorized by the Indenture." To preserve these rights of access and to chimneys, the trial court's ruling must be reversed.

5. **Assignment of Error #5 – Trial Court Exceeded its Power by Re-Writing 1960 Easement.**

Contrary to Defendants' contention, Appellees' Br. at 7, 32-33, Plaintiff

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part of Assignment #4, and not unless they block light and air to Plaintiff's openings (Assignment #3). There are numerous places that Defendants could have built their ten-foot arbor – just not right in front of the double windows that provide the only light to Plaintiff's kitchen. JA at 217, 289-292.

does not and has never sought "unfettered access" to Defendants' yard. Nor has Plaintiff ever "abused" any access. Appellees' Br. at 33, 35. To the contrary, Plaintiff has only sought legitimate access to "keep and maintain" the openings of her property without having to ask permission each and every time and to wait until such permission is granted (often with unreasonable restrictions). Nowhere in the 1960 Easement did the parties give the servient estate veto power over the dominant estate's access to "keep and maintain' the openings. Plaintiff has no objection to Defendants locking their gate to secure their property, Appellees' Br. at 33, if she has the code to open that lock when she maintains the openings.

The trial court erred on two grounds – 1) it failed to conduct an evidentiary hearing on the Rule to Show Cause; and 2) it modified the terms of the 1960 Easement to restrict access. The trial court correctly found that pest control is part of the maintenance of Plaintiff's openings. JA at 645, lines 5-7.

## CONCLUSION

For the reasons set forth above for each Assignment of Error, Appellant respectfully requests that this Court reverse the judgment of the 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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