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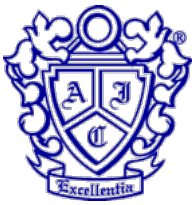

Trespass – Get Off My Lawn You Kids!

March 19, 2025

Presenters:

- **Melissa A. Zeller, Esquire**
  - **The Law Office of William B. Lawson, P.C.**
- **Judge Susan Earman**
  - **General District Court for Fairfax County**
- **John C. Altmiller, Esquire**
  - **Altmiller Melnick DeMers Steele & Rosati**
- **Nicholas J. Gehrig, Esquire**
  - **Bean, Kinney & Korman**
- **Isaac Small**
  - **Antonin Scalia Law School Student**

Nuisance and Trespass

Fact Pattern #1

Richard owns a townhouse with a backyard that includes a patio and a retaining wall separating his property from his neighbor, Joseph. Joseph has a large tree on his property, which has grown significantly over the years. The tree's roots have extended into Richard's yard, damaging the retaining wall, displacing patio pavers, and clogging Richard's sewer pipes. Additionally, overhanging branches drop debris onto Richard's roof and gutters.

What can Richard do?

Can Richard cut the roots of the tree, even if it could kill the tree?

Can Richard cut the encroaching branches, even if it could kill the tree?

Richard initially attempted self-help by trimming the branches and repairing some damage, but the root system continued to expand, worsening the structural damage to his property. He sued Joseph, seeking an injunction to remove the tree and damages to cover repair costs. The trial court ruled against Richard.

Was the trial court correct?

Under the same scenario, the court agreed with Richard that the tree constituted a trespass, and that he would otherwise be entitled to injunctive relief. However, the court ruled that the damage from the tree began over eight years ago, and Richard's claim was therefore barred by the applicable five-year statute of limitations for property damage.

Was the trial court correct?

Relevant Authority

I. Nuisance vs. Trespass

Nuisance and trespass are occasionally used interchangeably when describing an interference with the use or enjoyment of real property. However, it is important to understand the distinction between the two causes of action. Trespass is the interference with the exclusive possession of property, *Haywood v. Massie*, 188 Va. 176, 182, 49 S.E. 2d 281 (1948). Nuisance is the interference with the reasonable enjoyment of property, *Barnes v. Graham Virginia Quarries, Inc.,* 204 Va. 414, 417, 132 S.E.2d 395 (1963).

Understanding the differences between these two causes of action is obviously necessary in order to properly plead those causes. The distinction may also be crucial in determining the relief that is available, and to whom it is available.

a. Nuisance

The term nuisance, in legal parlance, extends to everything that endangers life or health, gives offense to the senses, violates the laws of decency, or obstructs the reasonable and comfortable use of property. *Bragg v. Ives*, 149 Va. 482, 497, 140 S.E. 656 (1927). "[S]uch things as are nuisances at all times and under all circumstances" are considered to be nuisance *per se*. *Price v. Travis*, 149 Va. 536, 547, 140 S.E. 644, 647 (1927).

Depending on the circumstances, there may be a duty to mitigate in cases of nuisance. There are cases holding that no duty rests on an owner of property which has been injured by a nuisance to take active measures to prevent further injury in order to minimize his damages, especially where the nuisance is in a place over which he has no control. But that principle is generally limited to cases of absolute nuisance, or nuisances in the strict sense, where the standard of reasonable conduct does not require action by the injured person. Even in a case of pollution, usually classified strictly as a nuisance, it is the duty of a person injured by the wrongful act of

another to take such reasonable precautions to prevent increase of injury as would be taken by a reasonable man under the circumstance. *Haywood v. Massie*, 188 Va. 176, 181-182, 49 S.E.2d 281 (1948).

b. Trespass

A trespass is an unauthorized entry onto property which results in interference with the property owner's possessory interest therein. Thus, in order to maintain a cause of action for trespass to land, the plaintiff must have had possession of the land, either actual or constructive, at the time the trespass was committed. In addition, to recover for trespass to land, a plaintiff must prove an invasion that interfered with the right of exclusive possession of the land, and that was a direct result of some act committed by the defendant. Any physical entry upon the surface of the land constitutes such an invasion, whether the entry is a walking upon it, flooding it with water, casting objects upon it, or otherwise. *Cooper v. Horn*, 248 Va. 417, 423, 448 S.E.2d 403 (1994).

A trespass does not have to be intentional in order to be actionable. Civil liability may be predicated upon unintentional trespass. *Parker v. Hartford Fire Ins. Co.*, 222 Va. 33, 35, 278 S.E.2d 803, 804 (1981). An unintentional act may be accidental, inadvertent, or by mistake. *Barnes v. Moore*, 199 Va. 227, 231, 98 S.E.2d 683, 686 (1957). Although proof of a negligent act may be sufficient to support a civil action for trespass, such proof is not a necessary element of that cause of action. *Cooper v. Horn*, 248 Va. 417, 423-424, 448 S.E.2d 403 (1994).

II. Relief

a. Money Damages

The money damages available for nuisance are broad. Damages in a nuisance claim may include lost profits and diminution in value, as well physical and emotional harm. Profits are not excluded from recovery because they are profits. Recovery for their loss may be had if such loss

is the proximate result of the defendant's wrong and if they are established with reasonable certainty. If remote, speculative, contingent or uncertain, they are not recoverable. *Haywood v. Massie*, 188 Va. 176, 180, 49 S.E.2d 281 (1948). A nuisance may diminish value of realty. The condition also may interfere with some right incident to the ownership or possession of real property. Such interference may be accomplished by substantially impairing the occupant's comfort, convenience, and enjoyment of the property, causing a material disturbance or annoyance in the use of the realty. *Bowers v. Westvaco Corporation*, 244 Va. 139, 149, 419 S.E.2d 661 (1992). The Court in *Bowers* also held that a litigant in this type of case is entitled to recover, as an element of damages, compensation for physical or emotional injuries resulting from a nuisance which has endangered "life or health."

Nor are damages limited only to owners. Pursuant to the Restatement (Second) of Torts, at § 821E, "possession" is not limited to occupancy under a claim of some other interest in the land, but occupancy is a sufficient interest in itself to permit recovery for invasions of the interest in the use and enjoyment of the land; members of the family of the possessor of a dwelling who occupy it along with him may properly be regarded as sharing occupancy with intent to control the land and hence as possessors; when there is interference with their use and enjoyment of the dwelling they can therefore maintain an action for private nuisance. *See Bowers*, 244 Va. at 149.

b. Injunctive Relief

The jurisdiction of a court of equity to restrain by injunction the creation or continuance of a nuisance, which is likely to produce irreparable injury is well established and constantly exercised. *Bragg v. Ives*, 149 Va. 482, 498, 140 S.E. 656 (1927). Under traditional equitable principles, a chancellor may enjoin a continuing trespass, even when each increment of trespass is trivial or the damage is trifling, in order to avoid a multiplicity of actions at law. *Fancher v.*

Fagella, 274 Va. 549, 556, 650 S.E.2d 519 (2007). A further consideration regarding injunctive relief, as noted below, is that a claim for such relief may not be subject to the applicable statute of limitations, meaning that injunctive relief may be available where actual damages are time-barred.

c. Statute of Limitations

Every action for injury to property . . . shall be brought within five years after the cause of action accrues. Virginia Code § 8.01-243(B). 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. Forest Lakes Cmty. Ass'n v. United Land Corp. of Am., 293 Va. 113, 123, 795 S.E.2d 875, 881 (2017); see Code § 8.01-230 (providing that "the right of action shall be deemed to accrue and the prescribed limitation period shall begin to run from the date the injury is sustained in the case of . . . damage to property"); Southern Ry. v. Leake, 140 Va. 438, 441, 125 S.E. 314, 315 (1924) ("Whenever any injury, however slight it may be, is complete . . . , the cause of action then accrues"); Virginia Hot Springs Co. v. McCray, 106 Va. 461, 470-71, 56 S.E. 216, 220 (1907) (finding that that the statute of limitations begins to run once the property has been damaged). 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. *Forest Lakes*, 293 Va. at 124, 795 S.E.2d at 881.That conclusion remains true even if the damage is expected to continue beyond the end of any remedial litigation. In such cases, the claimant should forecast and claim a damage award for past, present, and future damages. Id.

The Court in *Forest Lakes* also expounded at length regarding the application of these principles:

> We adopted the prevailing view that a cause of action involving an injury of a "permanent character, resulting from a permanent structure" accrued when the injury as first sustained, even though "the injury constantly and regularly

> recurs" over time. "So far as human foresight could determine the sewer structure would continue as constructed for all time." This accrual principle applies when the "damages resulted from the erection of permanent structures, the use of which produced the injury complained of immediately after the structures were first operated, the consequences of which continued in the normal course of such operations, and might have been expected to continue indefinitely." Put another way, when the recurring injuries, "in the normal course of things, will continue indefinitely, there can be but a single action therefor, and the entire damage suffered, both past and future, must be recovered in that action," and as a result, "the right to recover will be barred unless it is brought within the prescribed number of years from the time the cause of action accrued." For more than a century, this principle has been "the firmly established rule of law in this jurisdiction." In this scenario, the limitation period runs from the start of the continuous and indefinite injury not the end of it. This rule is qualified, however, by an overarching exception that a series of "repeated actions" causing temporary injuries to property would run the limitation period anew with each such action. This exception can apply even when the physical structure causing the damage is itself a permanent fixture on the offender's property.

Forest Lakes, Va. LEXIS 94, *15-17.

In addition to providing guidance regarding the accrual of the cause of action for damages for trespass, the *Forest Lakes* decision also makes a crucial distinction that should not be overlooked. Although every action for "injury to property" is subject to a five-year statute of limitations, this limitation may not apply to actions for injunctive relief based upon a theory of trespass. The Court in Forest Lakes begins their analysis of the applicability of the statute of limitations with this crucial passage:

> The POAs' first assignment of error asserts that the circuit court erred by applying the five-year statute of limitations in Code § 8.01-243(B) to bar their claim for trespass damages. The assignment of error makes no mention of the injunctive relief they sought in their amended complaint or the equitable doctrine of laches. We thus limit our analysis to the question of whether Code § 8.01-243(B) barred the POAs' claim for trespass damages.

Forest Lakes, 293 Va. at 123, 795 S.E.2d at 881. Although not decided by the Court, there remains the implication that a claim for injunctive relief would be subject to the doctrine of laches, rather

than to the five-year statute of limitations. In fact, the Court of Appeals reached that same conclusion five years later in *Willems v. Batcheller*, 78 Va. App. 199, 890 S.E.2d 659 (2023).

The analysis begins with Virginia Code § 8.01-230, which identifies when a statute of limitation begins to run:

> In every action for which a limitation period is prescribed, the right of action shall be deemed to accrue and the prescribed limitation period shall begin to run from the date the injury is sustained in the case of injury to the person or damage to property, . . . except where the relief sought is solely equitable.

Therefore, as set forth in the statute, the limitation period does not accrue in cases where solely equitable relief is being sought. Axiomatically, a period that never begins to accrue cannot expire.[1] The Court of Appeals confirmed that the statute means exactly what it says:

> Here, the appellants pled that no sufficient remedy existed at law and were therefore seeking equitable remedies based on their claims of trespass and nuisance regarding the bamboo. Hence, by the plain terms of Code § 8.01-230, the right of action was not deemed to have accrued at the time the injury began and the five-year statute of limitations does not apply to their claims.

Willems v. Batcheller, 78 Va. App. 199, 221, 890 S.E.2d 659, 670 (2023). Although this result is dictated by the express statutory language, the Court appeared to recognize that further explanation was appropriate:

> The appellees contend that the circuit court's interpretation violates the clear Virginia precedent that "equity follows the law." *May v. R.A. Yancey Lumber Corp*., 297 Va. 1, 19, 822 S.E.2d 358 (2019) (quoting *Belcher v. Kirkwood*, 238 Va. 430, 433, 383 S.E.2d 729, 6 Va. Law Rep. 582 (1989)). First, we note that many of the cases cited by the appellees in support of this proposition predate the adoption of Code § 8.01-230, and clearly insofar as they are in conflict, the statute controls. As for citations after Code § 8.01-230's adoption, the appellees

[1] This logical syllogism is well illustrated by the attorney Kobayashi when discussing the strength of the approach undertaken by his client, Keyser Soze: "One cannot be betrayed if one has no people." *The Usual Suspects* (1995).

> point to *May*. The appellees contend that in *May,* the Court recognized a "disguised breach of contract claim subject to the five-year statute of limitations" hidden in the plaintiff's equitable pleading. We disagree. In *May*, the plaintiff brought an action seeking declaratory and injunctive relief challenging certain corporate actions. *Id*. at 9. The defendant responded, in part, by arguing that plaintiff's action was precluded by the doctrine of laches and unclean hands. *Id*. The circuit court subsequently held that laches barred the plaintiff's claim. The Supreme Court reversed stating that "it is 'well-established' that 'in respect to the statute of limitations equity follows the law.'" *Id*. at 19 (quoting *Belcher*, 238 Va. at 433); *see also Kappa Sigma Fraternity, Inc. v. Kappa Sigma Fraternity*, 266 Va. 455, 467, 587 S.E.2d 701 (2003). In *Kappa*, the Supreme Court "suggest[ed] that a declaratory judgment challenging corporate amendments is like a breach of written contract claim" and observed that "[t]he statute of limitations for written contracts is five years." *May*, 297 Va. at 19. In May the plaintiff filed her complaint well within five years. Thus, the inference to be gleaned from *May* is that laches will not be found to bar a complaint that, were it brought at law, would be within the statute of limitations. It should not, as the appellees suggest, be taken to mean that the plain language of Code § 8.01-230 can be ignored.

Willems, 78 Va. App. at 221-22, 890 S.E.2d at 670-71. It is notable that the Court identifies an important principle regarding equitable relief, which is that although such claims are not subject to statutes of limitation, it appears that the doctrine of laches cannot create, as a matter of policy, a time period shorter than what would be the applicable statute of limitations had the relief sought not been equitable. This is the best of both worlds: equitable claims are not limited by any statute of limitation, but they cannot be barred by the doctrine of laches if they are filed within a statute of limitation that would otherwise apply were it not equitable relief that was being sought.

The inapplicability of the statute of limitations to claims for solely equitable relief, although clearly justified by the express language in the statute, is surprising to many attorneys. In fact, the defendant in *Willem*s asserted that the application of the plain statutory language would lead to "absurd" results. The Court disagreed, and articulated what it found to be a clear policy decision by the General Assembly:

> The appellees further contend that applying the plain meaning of Code § 8.01-230 leads to absurd results. Although we agree that it is an established principle of statutory interpretation that "statutes are to be construed so as to avoid an absurd result," *Eastlack v. Commonwealth*, 282 Va. 120, 126, 710 S.E.2d 723 (2011) (citing *Commonwealth v. Doe*, 278 Va. 223, 230, 682 S.E.2d 906 (2009)), the absurdity alleged by the appellees to flow from this interpretation of Code § 8.01-230 is that a party may wait many years longer than the statute of limitations would allow before bringing an action so long as they limit their prayer for relief to equitable remedies, requiring a defendant to bear the burden of asserting laches. We find no absurdity here. The General Assembly has made the policy decision that simply time alone will not bar a party from bringing a request seeking equitable relief. This does not limit the viability of the doctrine of laches. Instead, where prejudice accrues to a defendant occasioned by the plaintiff's failure to assert their rights, the laches doctrine ensures that the defendant will not be disadvantaged. Therefore, the circuit court correctly concluded that the statute of limitations did not preclude the appellants' claims.

Willems, 78 Va. App. at 222-23, 890 S.E.2d at 671.

It is difficult to overstate the effect of the proper application of Virginia Code § 8.01-230. Some obvious applications involve injunctive and declaratory relief in cases such as trespass or suits to quite title. However, there are some less obvious applications that could significantly expand the viability of claims available to a plaintiff. One example would be a claim of fraud in connection with a real estate transaction. The statute of limitations for fraud is two years, although that period of time can theoretically be extended by the so-called "discovery rule"[2] if a plaintiff can show that the fraud could not have been discovered through the exercise of due diligence. This can result in significant litigation over when a plaintiff should have discovered a false statement or concealment by a seller and can be even further complicated by the overlapping concept of *caveat emptor*. Even in cases where the facts may seem to justify the tolling statute under the

[2] Virginia Code §8.01-243(C)(2): "In cases in which fraud, concealment, or intentional misrepresentation prevented discovery of the injury within the two-year period, for one year from the date the injury is discovered or, by the exercise of due diligence, reasonably should have been discovered."

discovery rule, a plaintiff may still be forced to litigate that issue, distracting from the underlying claim. If, however, the plaintiff seeks the remedy of rescission, the statute does not apply and the defendant will be forced to show actual prejudice, as discussed more fully below.

III. Tree Cases

In *Fancher v. Fagella*, 274 Va. 549, 650 S.E.2d 519 (2007), the Virginia Supreme Court established the new rule regarding trespass and nuisance with respect to trees:

> Accordingly, we hold that encroaching trees and plants are not nuisances merely because they cast shade, drop leaves, flowers, or fruit, or just because they happen to encroach upon adjoining property either above or below the ground. However, encroaching trees and plants may be regarded as a nuisance when they cause actual harm or pose an imminent danger of actual harm to adjoining property. If so, the owner of the tree or plant may be held responsible for harm caused to [adjoining property], and may also be required to cut back the encroaching branches or roots, assuming the encroaching vegetation constitutes a nuisance. We do not, however, alter existing . . . law that the adjoining landowner may, at his own expense, cut away the encroaching vegetation to the property line whether or not the encroaching vegetation constitutes a nuisance or is otherwise causing harm or possible harm to the adjoining property. Thus, the law of self-help remains intact.

Fancher, 274 Va. at 555-56. The Court has also addressed potential liability for negligence related to damage caused by trees.

> In *Fancher*, this Court articulated a rule allowing relief where trees encroaching onto the land of another constitute a nuisance, and held that trees encroaching upon the property of another are a nuisance where they cause actual harm or the imminent danger of actual harm. *Fancher* therefore recognized that a trial court must determine whether circumstances are sufficient to "impose a duty on the owner of a tree to protect a neighbor's land from damage caused by its intruding branches and roots."
>
> Cline asserts that the principles stated in *Fancher*, logically extended, dictate finding the existence of a duty in this case. We disagree. The rule expressed in *Fancher*, allowing imposition of a duty on the owner of a tree to protect a neighbor's land from damage caused by the tree, addresses a narrow category of actions arising from nuisance caused by the encroachment of vegetation onto adjoining improved lands. The duties imposed in *Fancher* and *Smith* are dramatically different than duties necessary to support an action for personal injury predicated upon a duty of a landowner regarding the natural decline of trees on his or her property, which is adjacent to a roadway. The

> *Fancher* line of precedent does not support a duty on the part of a landowner to inspect and cut down sickly trees that have the possibility of falling on a public roadway and inflicting injury. Thus, *Fancher* does not support finding a cause of action in the instant matter, where the alleged injuries arose from an allegedly dead or decaying tree falling from private land onto a vehicle traveling on a public highway.

Cline v. Dunlora S., LLC, 284 Va. 102, 108-09, 726 S.E.2d 14, 17-18 (2012)

Fact Pattern #2

Betsy bought her new home at a foreclosure sale. Two days after the sale and before the Trustee filed the deed with the county clerk, she went to visit the property to check out its condition and to see if she could offer the former owner cash for the keys to the home. While she was inspecting the property, the former owner, who was still residing in the property, called the police and had her arrested for trespass.

Was Betsy trespassing?

Was the former owner trespassing?

Is the answer different if the question is whether Betsy or the former owner was guilty of civil trespass?

Relevant Authority

§ 18.2-119. Trespass after having been forbidden to do so; penalties.

If any person without authority of law goes upon or remains upon the lands, buildings or premises of another, or any portion or area thereof, after having been forbidden to do so, either orally or in writing, by the owner, lessee, custodian, or the agent of any such person, or other person lawfully in charge thereof, or after having been forbidden to do so by a sign or signs posted by or at the direction of such persons or the agent of any such person or by the holder of any easement or other right-of-way authorized by the instrument creating such interest to post such signs on such lands, structures, premises or portion or area thereof at a place or places where it or they may be reasonably seen, or if any person, whether he is the owner, tenant or otherwise entitled to the use of such land, building or premises, goes upon, or remains upon such land, building or premises after having been prohibited from doing so by a court of competent jurisdiction by an order issued pursuant to §§ 16.1-253, 16.1-253.1, 16.1-253.4, 16.1-278.2 through 16.1-278.6, 16.1-278.8, 16.1-278.14, 16.1-278.15, 16.1-279.1, 19.2-152.8, 19.2-152.9 or § 19.2-152.10 or an ex parte order issued pursuant to § 20-103, and after having been served with such order, he shall be guilty of a Class 1 misdemeanor. This section shall not be construed to affect in any way the provisions of §§ 18.2-132 through 18.2-136.

Community Associations

Fact Pattern #3

Howard and Sarah own a condominium unit in Highpoint Place. One night, their water heater bursts, causing significant water damage to their unit. The Highpoint Place Condominium Association steps in to repair the damages, spending $16,000 in restoration costs. The Association attempts to recover the costs from Howard and Sarah's homeowner's insurance, but their insurance provider denies the claim.

Highpoint Place then sues Howard and Sarah, arguing that, under Virginia law, unit owners are responsible for damage originating from their own unit, even if the damage was not caused by their negligence.

Is Highpoint Place Correct?

If Howard and Sarah successfully defend the Association's claim, are they entitled to recover their attorney' s fees?

Howard and Sarah counter that the Association was supposed to maintain insurance for the benefit of unit owners and had failed to secure adequate coverage, leaving them unfairly responsible for the repair costs.

Are Howard and Sarah correct?

How might the concept of equitable estoppel apply to Howard and Sarah's argument that they were led to believe the Association's insurance would cover their damages?

(*See Highridge Place Condo. Unit Owner's Ass'n v. Langley*, 66 Va. Cir. 185 (Cir. Ct. 2004)).

Relevant Authority

§ 55.1-1955. Upkeep of condominiums; warranty against structural defects; statute of limitations for warranty; warranty review committee.

A. Except to the extent otherwise provided by the condominium instruments, all powers and responsibilities, including financial responsibility, with regard to maintenance, repair, renovation, restoration, and replacement of the condominium shall belong (i) to the unit owners' association in the case of the common elements and (ii) to the individual unit owner in the case of any unit or any part of such unit, except to the extent that the need for repairs, renovation, restoration, or replacement arises from a condition originating in or through the common elements or any apparatus located within the common elements, in which case the unit owners' association shall have such powers and responsibilities. Each unit owner shall afford to the other unit owners and to the unit owners' association and to any agents or employees of either such access through his unit as may be reasonably necessary to enable them to exercise and discharge their respective powers and responsibilities. To the extent that damage is inflicted on the common elements or any unit through which access is taken, the unit owner causing the same, or the unit owners' association if it caused the damage, shall be liable for the prompt repair of such damage.

The trial court in *Highridge Place Condo. Unit Owner's Ass'n v. Langley*, 66 Va. Cir. 185, 186 (Cir. Ct. 2004), in finding the unit owner liable, relied upon Virginia Code §55.1-1955 [formerly §55-79.79], stating that "Code § 55-79.79 places the financial responsibility for the maintenance, repair, renovation, restoration, and replacement of any individual unit on the unit owner unless otherwise provided in the condominium instruments." However, it is not clear that such "powers and responsibilities" result in the conclusion that a unit owner is strictly liable to another unit owner (or the Association) for damage resulting without negligence.

§ 55.1-1915. Compliance with condominium instruments.

A. The declarant, every unit owner, and all those entitled to occupy a unit shall comply with all lawful provisions of this chapter and all provisions of the condominium instruments. Any lack of such compliance shall be grounds for an action to recover sums due, for damages or injunctive relief, or for any other remedy available at law or in equity, maintainable by the unit owners' association or by its executive board or any managing agent on behalf of such association or, in any proper case, by one or more aggrieved unit owners on their own behalf or as a class action. A unit owners' association shall have standing to sue in its own name for any claims or actions related to the common elements as provided in subsection B of § 55.1-1956. Except as provided in

subsection B, the prevailing party shall be entitled to recover reasonable attorney fees, costs expended in the matter, and interest on the judgment as provided in § 8.01-382. This section does not preclude an action against the unit owners' association and authorizes the recovery, by the prevailing party in any such action, of reasonable attorney fees, costs expended in the matter, and interest on the judgment as provided in § 8.01-382 in such actions.

§ 55.1-1963. Insurance.

A. The condominium instruments may require the unit owners' association, or the executive board or managing agent on behalf of such association, to obtain:

1. A master casualty policy affording fire and extended coverage in an amount consonant with the full replacement value of the structures within the condominium, or of such structures that in whole or in part comprise portions of the common elements;

2. A master liability policy, in an amount specified by the condominium instruments, covering the unit owners' association, the executive board, if any, the managing agent, if any, all persons acting or who may come to act as agents or employees of any of the foregoing with respect to the condominium, and all unit owners and other persons entitled to occupy any unit or other portion of the condominium; and

3. Such other policies as may be required by the condominium instruments, including workers' compensation insurance, liability insurance on motor vehicles owned by the unit owners' association, and specialized policies covering lands or improvements in which the unit owners' association has or shares ownership or other rights.

B. Any unit owners' association collecting assessments for common expenses shall obtain and maintain a blanket fidelity bond or employee dishonesty insurance policy insuring the unit owners' association against losses resulting from theft or dishonesty committed by the officers, directors, or persons employed by the unit owners' association, or committed by any common interest community manager or employees of the common interest community manager. Such bond or insurance policy shall provide coverage in an amount equal to the lesser of $1 million or the amount of reserve balances of the unit owners' association plus one-fourth of the aggregate annual assessment of such unit owners' association. The minimum coverage amount shall be $10,000. The executive board or common interest community manager may obtain such bond or insurance on behalf of the unit owners' association.

C. When any policy of insurance has been obtained by or on behalf of the unit owners' association, written notice of such obtainment and of any subsequent changes in or termination of the policy shall be promptly furnished to each unit owner by the officer required to send notices of meetings of the unit owners' association. Such notices shall be sent in accordance with the provisions of subsection A of § 55.1-1949.

Fence Issues

Fact Pattern #4

Fred owns a farm and runs cattle on a 50 acre section that partially shares a boundary line with his neighbor Ted' property. Fred has erected a barbed wire fence around the 50 acre section that is 42" high. Ted has no fence around his property except for the portion of the shared boundary line that Fred has fenced.

Fred goes on vacation and his cows escape and get into Ted's bean field, destroying his crop. Ted calls Fred to come get his cows, but Fred doesn't return his call.

1. Is Fred liable for trespass?
2. If Fred is liable for trespass, what damages does he owe to Ted?
3. What if anything can Ted do about the cows that are still in his field?

Relevant Authority

§ 55.1-2804. Description of lawful fence.

Every fence shall be deemed a lawful fence as to any domesticated livestock that could not creep through such fence, if it is:

1. At least five feet high, including, if the fence is on a mound, the mound to the bottom of the ditch;

2. Made of barbed wire, at least 42 inches high, consisting of at least four strands of barbed wire, firmly fixed to posts, trees, or other supports substantially set in the ground, spaced no farther than 12 feet apart unless a substantial stay or brace is installed halfway between such posts, trees, or other supports to which such wires are also fixed;

3. Made of boards, planks, or rails, at least 42 inches high, consisting of at least three boards firmly attached to posts, trees, or other supports substantially set in the ground;

4. At least three feet high, if such fence is within the limits of any town whose charter neither prescribes, nor gives to the town council power to prescribe, what shall constitute a lawful fence within such corporate limits; or

5. Any other fence, except as otherwise described in this section, if it is:

    a. At least 42 inches high;

    b. Constructed from materials sold for fencing or consisting of systems or devices based on technology generally accepted as appropriate for the confinement or restriction of domesticated livestock; and

    c. Installed pursuant to generally acceptable standards so that applicable domesticated livestock cannot creep through the same.

A cattle guard reasonably sufficient to turn all kinds of livestock shall also be deemed a lawful fence as to any domesticated livestock.

Nothing contained in this section shall affect the right of any such town to regulate or forbid the running at large of cattle and other domestic animals within its corporate limits.

The Board of Agriculture and Consumer Services may adopt regulations regarding lawful fencing consistent with this section to provide greater specificity as to the requirements of lawful fencing. The absence of any such regulation shall not affect the validity or applicability of this section as it relates to what constitutes lawful fencing.

§ 55.1-2810. Damages for trespass by animals; punitive and double damages.

A. If any domesticated livestock enters into any grounds enclosed by a lawful fence, as defined in §§ 55.1-2804 through 55.1-2807, the owner or manager of any such animal shall be liable for the actual damages sustained.

B. Punitive damages may be awarded but shall not exceed $20 in any case.

C. For every second and subsequent trespass, the owner or manager of such animal shall be liable for double damages, both actual and punitive.

§ 55.1-2811. Lien on animals.

If the court enters judgment for the owner or tenant of the grounds enclosed by a lawful fence pursuant to § 55.1-2810, the landowner shall have a lien upon such animal. Upon entry of the judgment, the court shall issue a writ of fieri facias pursuant to § 8.01-478, and the animal found to have trespassed shall be levied upon by the officer to whom such execution was issued, who shall sell such animal, as provided in Chapter 18 (§ 8.01-466 et seq.) of Title 8.01.

§ 55.1-2814. How governing body of county may make local fence law.

The board of supervisors or other governing body in any county, after publishing notice as required by subsection F of § 15.2-1427, may, by ordinance, declare the boundary line of each lot or tract of land or any stream in such county, any magisterial district of such county, or any selected portion of such county, to be a lawful fence as to any or all domesticated livestock, or may declare any other kind of fence for such county, magisterial district, or selected portion of the county than as prescribed by § 55.1-2804 to be a lawful fence, as to any or all of such animals.

§ 55.1-2815. Effect of such law on certain fences.

A declaration made by ordinance adopted pursuant to § 55.1-2814 shall not apply to relieve the adjoining landowners from making and maintaining their division fences, as defined by § 55.1-2804; however, Article 6 (§ 55.1-2821 et seq.) shall apply to such division fences.

§ 55.1-2820. When unlawful for animals to run at large.

It is unlawful for the owner or manager of any domesticated livestock to permit any such animal, as to which the boundaries of lots or tracts of land have been or may be constituted a lawful fence, to run at large beyond the limits of his own lands within the county, magisterial district, or portion of such county in which such boundaries have been constituted and are a lawful fence.

Adjoining landowners shall build and maintain, at their joint and equal expense, division fences between their lands, unless one of them chooses to let his land lie open or unless they agree otherwise.

§ 55.1-2822. When no division fence has been built.

If no division fence has been built, either one of the adjoining landowners may give notice in writing of his desire and intention to build such fence to the landowner of the adjoining land, or to his agent, and require him to build his half of such fence. The landowner so notified may, within 10 days after receiving such notice, give notice in writing to the person so desiring to build such fence, or to his agent, of his intention to let his land lie open. If the landowner giving the original notice subsequently builds such division fence and the landowner who has so chosen to let his land lie open, or his successors in title, subsequently encloses his land, he, or his successors, shall be liable to the landowner who built such fence, or to his successors in title, for one-half of the value of such fence at the time such land was so enclosed, and such fence shall thereafter be deemed a division fence between such lands.

If, however, the person so notified fails to give notice of his intention to let his land lie open, and fails to agree, within 30 days after being so notified, to build his half of such fence, he shall be liable to the person who builds the fence for one-half of the expense, and such fence shall thereafter be deemed a division fence between such lands.

Notwithstanding the provisions of this section, no successor in title shall be liable for any amount prior to the recordation and proper recordation of the notice in the clerk's office of the county in which the land is located.

§ 55.1-2823. When division fence already built.

When any fence (i) that has been built and used by adjoining landowners as a division fence, or any fence that has been built by one landowner and the other landowner is afterwards required to pay half of the value or expense of such fence under the provisions contained in this article, and (ii) that has thereby become a division fence between such lands, becomes out of repair to the extent that it is no longer a lawful fence, either one of such adjoining landowners may give written notice to the other, or to his agent, of his desire and intention to repair such fence and require him to repair his half of such fence. If the landowner receiving written notice fails to repair his half within 30 days after being so notified, the one giving such notice may then repair the entire fence so as to make it a lawful fence, and the other shall be liable to him for one-half of the expense of such repairs.

§ 55.1-2824. Recovery of amount due in connection with division fence.

Any sum that may be due and payable by one adjoining landowner to another in pursuance of any of the provisions of §§ 55.1-2822 and 55.1-2823 may be recovered by action or warrant in debt, according to the jurisdictional amount.

§ 55.1-2825. Requirements for agreement to bind successors in title; subsequent owners.

No agreement made between adjoining landowners, with respect to the construction or maintenance of the division fence between their lands, shall be binding on their successors in title unless it (i) is in writing and specifically so state, (ii) is recorded in the deed book in the clerk's office of the county in which the land is located, and (iii) is properly indexed as deeds are required by law to be indexed.

If any notice, as required by § 55.1-2822 or 55.1-2823 is recorded in the deed book in the clerk's office of the county in which the land is located and is properly indexed as deeds are required by law to be indexed, then any subsequent owners of such land shall be liable for any sum that may be due pursuant to § 55.1-2824.

§ 55.1-2826. How notice given.

Any notice required to be given pursuant to this article shall be given to the landowner, if he resides in the county in which the land lies; otherwise, it may be given to such person as, under the laws of the Commonwealth, would be his agent or to any person occupying such land as tenant of the landowner, who shall, for the purposes of this article, be deemed the agent of such landowner.