NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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RE: *Carniol v. Nayak, et. al.*, Case No. CL-2021-642

Dear Counsel:

This case came before the Court for a bench trial on June 7, 2023, on Plaintiffs' action for trespass and Defendants' counterclaims for trespass and nuisance. The Court is being asked—apparently for the first time in Virginia—the appropriate damage award for lost aesthetic value of trees. Plaintiffs are seeking damages based on the stumpage value of six white pine trees, or in the alternative, diminution in the market value of their real estate. Plaintiffs are also seeking damages for the cost to remove damaged trees, the cost to repair a damaged pool fence, the cost to replace a damaged spa blower, and the cost to replace a damaged pool cover. Defendants request in their counterclaim damages for trespass and nuisance.

For the reasons that follow, the Court awards $26,800 in damages to Plaintiffs for their trespass claim and $2.00 in nominal damages to Defendants for their trespass and nuisance counterclaims.

OPINION LETTER

FACTS

This case arises from a trespass dispute between next-door neighbors residing in Vienna, Virginia. Plaintiffs and Counter-Defendants, Burton J. Carniol and Karen M. Espaldon own real property located at 1223 Carpers Farm Way, Vienna. They have lived on the property since 1996. Defendants and Counter-Plaintiffs, Sandip Nayak and Rutu Sahani own real property located at 1221 Carpers Farm Way, Vienna. They have lived on the property since 2013. Plaintiffs and Defendants did not have any substantial personal relations or communications prior to this dispute.

Defendants allege that since August 22, 2013, Plaintiffs have repeatedly and periodically entered onto Defendants' property to maintain landscaping and a pedestal fixture, and to trim the branches of a white pine tree located exclusively on Defendants' property. Defendants claim the tree sustained damage from the trimming.

Six mature white pine trees of various sizes were located exclusively on Plaintiffs' property and ran along the property line between the two properties. The trees provided Plaintiffs with a sight barrier between Plaintiffs' house and Defendants' house, and privacy from Route 7. The trees also provided Plaintiffs with a sound barrier that mitigated noise from Route 7. Some of the trees' branches hung across the property line over Defendants' property. Defendants allege that the encroachment of the trees' branches caused damage to Defendants' property in the form of significant vine infestations, growth of wild plants, fallen branches and other debris, and snake infestations.

Between March 9, 2019, and March 14, 2019, Plaintiffs were away on vacation. Sometime during that period, Defendants hired contractors to trim portions of the lower and middle branches of the trees that crossed over onto their property. Defendants claim this was to abate the nuisance caused by the encroaching branches. However, Defendants' contractors cut off branches around the circumference of the trees, even onto Plaintiffs' property so that the trees were bare for several feet. In fact, the trees had been "lollipopped.[1]" In order to complete the work, Defendants' contractors had entered onto Plaintiffs' property without Plaintiffs' permission.

On March 14, 2019, Plaintiffs returned from vacation and learned almost immediately that the trees had been altered without their consent. On March 15, 2019, Plaintiffs emailed Defendants alleging that Defendants had trespassed when cutting the limbs from their trees without approval and accused Defendants of violating then Virginia Code §55-331 to §55-335. The damages from the contractors' trespass that are listed by Plaintiffs include damage to pool equipment, other personal property, and the fence located exclusively on Plaintiffs' property. In addition to the physical damage to their property, Plaintiffs allege loss of the enjoyment of their property.

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[1] The parties used this term extensively. It means exactly what it implies—the trees looked like a giant lollipop. Only the trunk extended upward, finally culminating in branches at the top. As I noted in court, the distorted appearance of the trees was hideous. The trees looked, as I said, stupid.

On March 25, 2019, Plaintiffs contacted arborist Lew Bloch to perform a tree valuation. On March 29, 2019, Mr. Bloch visited Plaintiffs' property to inspect the lollipopped trees, evaluate their viability post-pruning, and prepare a report as to their monetary value. On April 3, 2019, Mr. Bloch's report stated that the value of the trees immediately before they were pruned was $45,800 and that five of the six trees were so severely damaged that they should be removed. He stated that only one tree was still viable and could be retained. At trial, Mr. Bloch expanded upon his report and testified that once pruned, all the trees were still alive, but lost their aesthetic and functional value as a sight and sound barrier and were structurally unsound. He recommended that five of the six trees be removed.

On or before April 14, 2019, Plaintiffs contracted and committed to removing the trees during the week of April 29, 2019. During this time, Defendants were waiting for their own arborist to assess any damage to the trees and provide a valuation. Plaintiffs later confirmed that tree removal was scheduled to occur on or about May 2, 2019.

On April 28, 2019, Defendants emailed Plaintiffs the report from their expert arborist Mr. Jeffrey Lange, which stated that none of the trees had been damaged beyond viability, that they were in good condition, showed good vigor, appeared to be reasonably healthy and appeared likely to continue to thrive. Nevertheless, Plaintiffs still proceeded with their plan to have the trees cut down, and on May 2, 2019, had five of the six trees completely removed.

On or about May 2, 2019, and continuing through about May 5, 2019, while cutting down the trees located on Plaintiffs' side of the property line, Plaintiffs, either on their own or through contractors, entered onto Defendants' property. During this tree removal, Plaintiffs caused damage to a support column of Defendants' back deck, the patio underneath the deck, and a sprinkler head on Defendants' property.

Plaintiffs brought their suit initially on January 12, 2021. After receiving from the Court leave to amend the Complaint, Plaintiffs filed their Amended Complaint on April 2, 2021. On April 23, 2021, Defendants filed their Answer and Grounds of Defense to the Amended Complaint and separately on that date also filed their Counterclaim to Amended Complaint.

At trial, Plaintiffs presented testimony from three witnesses to support their claim of trespass and alleged $58,000 in damages against Defendants. Defendants presented testimony from four witnesses to support their response and counterclaim. Their counterclaim alleged one count of trespass and one count of nuisance, with alleged damages totaling $29,895.

At trial, Plaintiffs argued that Defendants or their agents entered onto Plaintiffs' land without permission to cut the trees' branches. Defendants responded that because the trees caused a nuisance to Defendants' property, Defendants were permitted to take such actions necessary to abate such nuisance, including any alleged trespass.

Plaintiffs presented two different theories of recovery. First, they request the stumpage value of the trees in the amount of $45,800. Second, they request in the alternative the diminution in the market value of Plaintiff's property in the amount of $25,000. Plaintiffs also

alleged they are entitled to $12,800 in other damages for things such as the cost to remove the damaged trees ($11,000); the cost to repair their damaged pool fence ($1,200); the cost to replace their damaged spa blower ($300), and cost to replace their damaged pool cover ($300).

In their Counterclaim, Defendants alleged one count of trespass and one count of nuisance against Plaintiffs and asked for $29,895 in total damages. Defendants first alleged that Plaintiffs or their agents repeatedly trespassed onto their property to maintain certain encroachments without Defendants' permission and asked for $15,795 in damages. Defendants also alleged that Plaintiffs' failure to prevent the encroachments of the trees' branches on their property constituted a continuing nuisance for which Defendants suffered damages and incurred costs. Defendants argued they had to resort to self-help to abate such nuisance and asked for $14,100 in damages.

The trial presented two questions:

1. Was Defendants' trespass onto Plaintiffs' property justified because of the alleged nuisance caused by Plaintiffs' encroaching trees?

2. Should the Court grant relief to Plaintiffs for the stumpage value of the trees when practically, the trees only had aesthetic value?

ANALYSIS

I will first discuss the common law standard for trespass in Virginia, then address Defendants' argument that their trespass was justified to abate a nuisance, then explain why the Court declines to award damages to Plaintiffs for stumpage value of the trees, and finally address Defendants' counterclaims for trespass and nuisance.

I. Defendants entering onto Plaintiffs' property to trim the trees' branches constituted trespass under Virginia common law.

The common law standard for trespass in Virginia was set forth by the Supreme Court of Virginia in the 1994 case, *Cooper v. Horn*, 248 Va. 417, 423, 448 S.E.2d 403 (1994). In *Cooper*, the Court held that:

> "'[A] trespass is an unauthorized entry onto property which results in interference with the property owner's possessory interest therein.' 5 Richard R. Powell, *The Law of Real Property* ¶ 707 (Patrick J. Rohan ed., 1994). 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.'"

Id. Defendants' contractors entered onto Plaintiffs' property without permission and interfered with Plaintiffs' possessory interest in the land that they owned. Defendants' actions clearly constituted trespass under Virginia law.

II. Defendants' proposed justifications for their trespass under the Restatement of Torts, Second, fail.

Defendants alleged arguendo, both in their pleadings and at trial, that their entrance onto Plaintiff's property to trim the trees' branches was justified pursuant to Sections 201 and 197 of the Restatement of Torts, Second. The Court rejects these arguments and holds that Defendants were without justification for their trespass.

In Virginia, when a landowner's vegetation encroaches onto an adjoining landowner's property, "... 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." *Fancher v. Fagella*, 274 Va. 549, 556, 650 S.E.2d 519 (2007).

Undoubtedly, Defendants would have been allowed to trim the tree branches overhanging their property without it constituting trespass so long as they did not cross the property line onto Plaintiffs' property. However, Defendants did cross the line, did trespass, and did cause serious damage to the trees.

Defendants propose that under two sections of the Restatement of Torts, Second, any trespass by Defendants' contractors was justified. Section 201, Entry to Abate Private Nuisance, of the Restatement of Torts, Second provides that:

> (1) An entry on land in the possession of another by a possessor of neighboring land is privileged if the entry is made (a) for the purpose of abating a structure or other condition on the land, which constitutes a private nuisance to the actor's possessory interest in the other land, and (b) at a reasonable time and in a reasonable manner, and (c) after the possessor upon demand has failed to abate the nuisance, or without such demand if the actor reasonably believes it to be impractical or useless.

See Restatement (Second) of Torts, § 201 (1965).

In the present case, Defendants never demanded that Plaintiffs abate the nuisance. Additionally, it is unlikely that Defendants reasonably believed that a demand would be impractical or useless. It would not impose a substantial burden on Defendants to knock on Plaintiffs' front door to ask them to tend to the encroaching tree branches. Defendants' proposed justification under § 201 of the Restatement, Second, fails.

Section 197, Private Necessity, of the Restatement, Second provides that:

> (1) One is privileged to enter or remain on land in the possession of another if it is or reasonably appears to be necessary to prevent serious harm to (a) the actor, or his land or chattels, or (b) the other or a third person, or the land or chattels

> of either, unless the actor knows or has reason to know that the one for whose benefit he enters is unwilling that he shall take such action. (2) Where the entry is for the benefit of the actor or a third person, he is subject to liability for any harm done in the exercise of the privilege stated in Subsection (1) to any legally protected interest of the possessor in the land or connected with it, except where the threat of harm to avert which the entry is made is caused by the tortious conduct or contributory negligence of the possessor.

See Restatement (Second) of Torts § 197 (1965).

The Comment on Subsection (1) explains that "The privilege stated in this Subsection exists only where in an emergency the actor enters land for the purpose of protecting himself or the possessor of the land or a third person or the land or chattels of any such persons. Furthermore, the privilege must be exercised at a reasonable time and in a reasonable manner." *See* Restatement (Second) of Torts § 197 cmt. a (1965).

In the present case, the trees may very well have caused a nuisance to Defendants. However, Defendants themselves acknowledged at trial that they lived with this nuisance for five and a half years. This testimony suggests that the encroaching trees did not put Defendants in an emergency situation, and their trespass did not occur at a reasonable time. Defendants could have reasonably waited until Plaintiffs returned from vacation and discussed the problems posed by the encroachment with them before taking such drastic measures. Therefore, Defendants' proposed justification under § 197 of the Restatement, Second fails.

Virginia common law has not extended the law of self-help beyond the *Fancher* holding. In other words, I have found no Virginia court that expressly permitted actors in cases of encroaching vegetation to trespass in their execution of self-help. Defendants attempted to argue their actions were justified under two sections of the Restatement, Second, but Defendants' actions do not fit within the elements of these sections. Therefore, Defendants did not provide a compelling justification for their trespass. Next, I must examine the appropriate value of damages to award Plaintiffs for this trespass claim.

III. Examination of Damages for Plaintiffs' Trespass Claim

The next issue before the Court is what damages, if any, shall be awarded to Plaintiffs for their loss. Plaintiffs have asked for damages for the stumpage value of the trees or in the alternative, for the diminution in the market value of the real estate. There is no shortage of case law on this issue of damages, and the cases seem to be in conflict. Ultimately, it can be said that in Virginia, the correct measure of damages for *nonmerchantable* trees is the diminution in the market value of the property. *See Norfolk & W.R. Co. v. Richmond Cedar Works*, 160 Va. 790, 803, 170 S.E. 5 (1933).

The Court considered the possibility that these trees could indeed have value as merchantable timber, as white pine trees are often manufactured into construction lumber. Normally, the owner of merchantable trees that are damaged would be awarded the stumpage value of the trees. *Id.* However, this case differs. Plaintiff Carniol himself testified about the trees' aesthetic value as a sight and sound barrier. It might be possible to conclude that Mr. Carniol over-emphasized this aspect of the trees, but his position is not unreasonable and the value as a sight and sound barrier was important to him. Although at trial both parties presented some evidence as to the stumpage value of the trees, the Court easily can conclude that these trees were not nurtured for purposes of timber and all evidence leads to the inescapable conclusion that the value of these trees was their aesthetic value. It would be unjust and to award Plaintiffs such a large sum of money, $45,800 specifically, for the stumpage value of the trees that Plaintiffs could have never expected to see had this tortious act not been committed by Defendants. Therefore, I conclude that these trees were nonmerchantable.

In *Wood v. Weaver,* 121 Va. 250, 258, 92 S.E. 1001 (1917) the Supreme Court of Virginia identified stumpage value as a potential measure of damages. In *Wood*, the Court held that for trespass claims consisting of the cutting of standing trees, landowners may elect to bring an action in damages for the diminished market value of the land or for the stumpage value of the trees, i.e., the value of the trees as they stood immediately before they were severed from the land. *See Wood*, 121 Va. at 258. However, from a review of the subsequent cases from the Supreme Court of Virginia, it becomes apparent that stumpage value is only a potential available remedy for trees that had value as merchantable timber. *See Norfolk*, 160 Va. at 803.

In 1922, in *Honaker Lumber Co. v. Kiser*, 134 Va. 50, 58, 113 S.E. 718 (1922), the Court held that when the defendant cut and removed merchantable timber from the plaintiff's land, and "broke down fences, damaged the undergrowth, tore up the soil, and practically cleared the land of brush and everything growing thereon," the most accurate way to measure damages was to "ascertain the value of the land immediately before the defendant began to cut the timber and immediately after it completed the cutting of the same." It further reasoned that "When a thing, whether it be a building, a tree, or shrub, is destroyed by a wrongdoer, the most natural and best measure of the damage is the value of the thing destroyed as an appurtenant to, or part of, the realty; and ordinarily the value of the thing destroyed would be the measure of the injury to the freeholder." *See id.* (*citing Disbrow v. Westchester Hardwood Co.*, 164 N. Y. 415, 58 N. E. 519 (1900)).

Wood and *Honaker* left the common law somewhat unclear on what the proper measure of damages is for injured trees that did not have merchantable value as timber. In 1933, the Supreme Court of Virginia clarified this issue in *Norfolk & W.R. Co. v. Richmond Cedar Works,* when it distinguished damages to merchantable timber from damages to real property. *Norfolk* stands for the proposition that where timber has no merchantable value, the assessment of damages for the harm to such trees, is the damage to the freehold. *See Norfolk*, 160 Va. at 803. Specifically, the Court held that "Where merchantable timber is injured or destroyed, we assess damages for such injury or

destruction. If the growth is not merchantable, or is of special value, as a shade tree for example, we assess damages to the freehold. That is to say, the timber destroyed should be dealt with as such and the young growth on this land which had no merchantable value, but did add to its value, should be dealt with as a part of the land itself." *See id.*

Norfolk's progeny further reinforces its proposition that diminution in market value is the proper measure of damages in cases such as this one. Two illustrative circuit court cases address specifically how aesthetic value of trees should be considered in determining damages.

In *Goldson v. Corpora*, 1999 WL 33968347 *2 (Nelson County, 1999), the Nelson County Circuit Court reasoned that while "appellate courts in the states of Washington, Louisiana, Arkansas, Maryland, Wisconsin, Michigan, New Jersey, and possibly North Carolina allowed replacement costs of trees, particularly when the trees are ornamental or have intrinsic value to the owner other than merchantable timber," Virginia has not extended recovery of damages to allow the replacement cost of trees. The *Goldson* court did, however, reason that replacement costs or intrinsic value may be incorporated into the testimony of diminished value by a real estate expert. *See id.* at *2-3.

In *Faulkner v. Thompson*, 2017 WL 11452749 *2-3 (Richmond County, 2017), the Richmond County Circuit Court reasoned that if the counterclaim plaintiffs timely designated an expert to testify to the reduction in property value from counterclaim defendants removal of shrubs, bushes and ornamental trees from the plaintiff's property, the plaintiffs may have been able to recover for those losses. *Faulkner* demonstrates first, that a Virginia circuit court was willing to consider awarding damages for nonmerchantable trees and plants, and second, that the mentioned court required timely expert testimony on the plants' impact on property value to consider granting damages for such loss.

Turning to the present case, both Plaintiffs and Defendants presented evidence and expert testimony as to the stumpage value of the trees, and Plaintiff's valuations came out substantially higher than Defendants' valuations. However convincing either side's expert testimony on stumpage value was, the Court will not award damages based on this measure because the trees were nonmerchantbale, as Plaintiffs never intended to harvest them. The Court will follow the proposition set forth in *Norfolk*, and award damages to Plaintiffs based on the damage to the freehold, that is, the diminution in market value of Plaintiff's real estate as a result of Defendants' damage to the trees. Because Virginia circuit courts have been willing to consider evidence of aesthetic loss in awarding damages for diminution in market value, the court grants weight to Plaintiffs' expert real estate appraiser's testimony and to Plaintiff Carniol's testimony about the aesthetic value of the Trees as a sight and sound barrier. Accordingly, the Court awards $25,000 in damages to Plaintiffs for the diminution in market value of the real estate; the Court finds this value to sufficiently incorporate the trees' aesthetic value. Additionally, the Court awards Plaintiffs $1,800 in damages for the cost to repair their damaged pool fence ($1,200), the cost to replace their damaged spa blower ($300), and the cost to

replace their damaged pool cover ($300). In total, the Court awards plaintiffs $26,800 in damages for their trespass claim.

IV. Defendants' counterclaim for nuisance and trespass

Defendants' counterclaim to Plaintiffs' amended complaint alleges one count of trespass and one count of nuisance. Although this counterclaim has merit, Defendants failed to provide evidence of monetary damages suffered. Therefore, the court awards nominal damages in the amount of $1.00 for each count.

Count I of Defendants' counterclaim alleges trespass. As I discussed previously with regard to Plaintiffs' trespass claim, *Cooper v. Horn*, 248 Va. at 423, provides the Virginia common law standard for trespass. Defendants alleged that Plaintiffs repeatedly and periodically entered onto Defendants' property to maintain their landscaping. Defendants also allege Plaintiffs entered onto Defendants' property to cut down the branches of the trees that ran along the property line, causing damage to Defendants' back deck, patio, and sprinkler head. Clearly, these alleged acts by Plaintiffs interfered with Defendants possessory interests, and constitute trespass. Defendants prayed for $15,795 in damages for this trespass claim. However, Defendants never explained what calculations were used to arrive at this value. Because Defendants failed to present sufficient evidence as to the monetary damages suffered, the court awards $1.00 in nominal damages to Defendants for their trespass claim.

Count II of Defendants' counterclaim alleges nuisance. Specifically, Defendants alleged that the encroaching tree branches constituted a continuing nuisance, and prayed for $14,100 in damages. In *Fancher*, 274 Va. at 556, the Supreme Court of Virginia discussed nuisance in the specific context of encroaching trees and held that "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." The Court also held that if a nuisance is found, "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." *See id.*

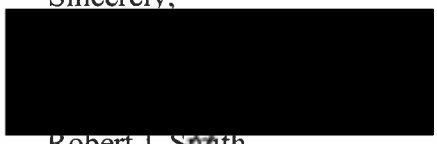
Turning to the present case, Defendants alleged in their filings and at trial that the encroachment of Plaintiffs' tree branches caused significant damage to Defendants' backyard, threatened Defendants' small children, and resulted in increased cleaning costs. However, Defendants did not provide specific valuations as to the expenses incurred because of this encroachment nor expert testimony on the value that should be awarded for their alleged suffering. Because Defendants failed to present evidence sufficient to support an award of the prayed for amount of monetary damages, the Court awards $1.00 in nominal damages to Defendants for their nuisance claim.

In total, the court awards Defendants $2.00 in nominal damages for their counterclaim, because while Defendants did suffer at the expense of Plaintiffs' actions, Defendants failed to provide an evidentiary basis for the monetary damages requested.

CONCLUSION

I find that Plaintiffs have argued a credible case for trespass and are entitled to recover for their loss. Because Virginia common law has not extended to allow recovery for stumpage value of nonmerchantable trees, the Court awards Plaintiffs $26,800 in damages based on the diminution in market value of their real estate ($25,000) and other costs ($1,800). The Court also awards $2.00 in nominal damages to Defendants for their counterclaim. Although Defendants' trespass and nuisance counts are not without merit, Defendants failed to provide sufficient evidence to support their requested amount of monetary damages.

Sincerely,



Robert J. Smith