



Stormwater drainage and "common enemies"

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For the second time in three years, the Virginia Supreme Court has revisited the "common enemy rule" pertaining to stormwater drainage. First came the case of Kurpiel v. Hicks, in which the Supreme Court seemed to weaken that rule by overturning the dismissal of a trespass suit by one pair of homeowners against another based on flooding of the plaintiffs' lot. On June 4, 2015, however, the court reiterated the strength of the common enemy rule in a case arising from Norfolk.

Collett v. Cordovana involved three lots located on West Ocean View Avenue in Norfolk. Gina Collett's property was situated between a home owned by Gary and Margaret Cordovana, on one side, and 1273 West Ocean View, LLC ("1273 WOV"), on the other. In July of 2013, Collett sued both the Cordovanas and 1273 WOV for "directing massive quantities of water runoff and pollutants from their properties" onto Collett's property, causing significant financial and emotional damage. Like the plaintiff in Kurpiel, Collett sued on the theory of trespass for the flooding from the neighboring properties, but also added counts for nuisance, negligence and negligence per se. She demanded \$500,000.00 in compensatory damages and \$350,000.00 in punitive damage against each of the defendants, as well as injunctive relief.

In support of her claim, Collett asserted that the Cordovanas modified the topography of their property by dumping a load of gravel in the parking area and raising the elevation by approximately four inches. The Cordovanas allegedly graded the gravel in such a manner as to make stormwater flow from their property on to Collett's. As to 1273 WOV, Collett complained that 1273 WOV had dumped mulch on its property, raising the level of that property. That, combined with the absence of drain pumps, an adequate berm, gutters and drain pipes or proper grading assured that water would flow on to Collett's property. Collett notified both the Cordovanas and 1273 WOV that the stormwater from their properties caused lasting pools of water on Collett's property that became breeding grounds for mosquitos and other pests. She thus sued both the Cordovanas and 1273 WOV in Norfolk Circuit Court, but the court

dismissed both suits based on the defense of the common enemy rule.

When the Virginia Supreme Court took up the appeal, it first reiterated the basics of the common enemy rule it had stated in Kurpiel. Specifically, surface water is the common enemy, and each landowner may fight it off as best he can, provided that he does so reasonably and in good faith and not wantonly, unnecessarily or carelessly. The common enemy rule allows the owner of lower property to take measures to prevent inundation by surface water, even if that involves throwing it back upon neighboring property so long as he does not do so wantonly, unnecessarily or carelessly. Protected by the rule, a homeowner may, in the reasonable development of his property, grade it or erect a building on it and not be liable for discharging additional diffused surface water as a result thereof.

The court then contrasted the allegations in Kurpiel with the claim by Collett against the Cordovanas and 1273 WOV. The plaintiffs in Kurpiel alleged ten separate, specific acts by their neighbors they claimed wantonly, unnecessarily and carelessly flooded the Kurpiels' property with stormwater, including stripping the neighboring land of virtually all vegetation, clearing the vegetation in violation of the Chesapeake Bay Preservation Act, extensively regrading the property and changing its elevation, leaving the land unvegetated longer than necessary and replanting insufficient and inadequate vegetative cover, and failure to use proper drainage controls. Those allegations were specific enough, according to the court, to allow the Kurpiel case to go forward.

On the other hand, Collett alleged only that the Cordovanas and 1273 WOV had dumped gravel and mulch on their properties, which slightly raised the elevations and caused Collett's lot to flood. That was simply a recitation of what the common law allowed them to do. Those permitted acts, combined with a simple statement that the defendants had developed, maintained and altered their properties in an unreasonable, careless and reckless manner, were insufficient to state valid claims for trespass, nuisance or negligence, or overcome the common enemy rule defense.

As for Collett's claim of negligence per se, the court explained that negligence per se differs from ordinary negligence in that the standard of conduct allegedly violated by the defendant is set by statute, rather than common law. In order to prove negligence per se, Collett needed to show that the defendants violated a statute enacted for public safety, that she belonged to the class of persons for whose benefit the statute was enacted and the harm she suffered was the type the statute was meant to avoid, and that the statutory violation was the cause of her damages. Collett complained that the pools of standing water on her property had become breeding grounds for mosquitos and other pests, so she cited two Norfolk ordinances pertaining to nuisance and to drainage under the rat and mosquito control chapter of the city code. Those provisions were designed to allow the City of Norfolk to control nuisance property and pests, however, and did not provide a private right of action to Collett. Because those statutes were meant to enable the city to control nuisances and pests, Collett was not among the class of persons for whose benefits the statutes were enacted, nor was the harm she suffered the type the statutes were designed to prevent. The court thus rejected her negligence per se claim as well.

The Virginia Supreme Court appears to be refining the common enemy rule doctrine. Based on the Collett and Kurpiel cases, homeowners now know that flooding from stormwater caused by minor changes of grade from dumping mulch or gravel will not overcome the defense of that rule, but stripping of vegetation (especially in violation of the law), failure to timely and adequately restore vegetation and

major changes of elevation can overcome the rule.

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