VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 6th day of April, 2017.

James Shin, Appellant,

against Record No. 160559
Circuit Court No. CL15-525

Alain Joyaux*, Appellee.

Upon an appeal from a judgment rendered by the Circuit Court of the City of Petersburg.

Upon consideration of the record, briefs, and argument of counsel, the Court is of opinion that there is no reversible error in the judgment of the Circuit Court of the City of Petersburg.

In December 1997, James Shin ("Shin") purchased a building located at 100 North Sycamore Street in the City of Petersburg. Shortly after purchasing the property, he noticed that the second and third floors of the building experienced water damage during heavy rain storms. Shin attributed the damage to the age of his roof and did not take issue with the problem as it did not interfere with the operation of his restaurant on the first floor.

In October 2002, Alain Joyaux ("Joyaux") purchased the building adjacent to Shin's. At some point prior to Joyaux's purchase, the previous owner had replaced the building's roof and covered up portions of its drainage system in the process. The roof was graded inward, angled towards the middle of the building, causing rain water to pool where there was previously a drain.

In late 2013 or early 2014, Shin began renovating the top two floors of his building, intending to create a residence for himself on the second floor and apartments for rent on the third floor. While renovating, Shin replaced his roof and drainage system. In August of 2014, Shin noticed that during heavy rain storms, water would collect on Joyaux's roof until it overflowed onto his roof, which was slightly lower. As a result, Shin argued that his building continued to suffer water damage as a direct result of excess water flowing from Joyaux's

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* We have reformed the case caption to reflect the correct name of the appellee.

building.

On August 27, 2015, Shin brought an action against Joyaux, alleging claims of nuisance and trespass due to water damage on his building. Joyaux filed a Special Plea of the Statute of Limitations and Laches ("Special Plea"). Neither party conducted discovery. The parties relied solely on their pleadings to support their arguments during a hearing on the Special Plea.

In a letter opinion dated December 16, 2015, the trial court found that both of Shin's claims were time-barred by Code § 8.01-243(B) ("Every action for injury to property . . . shall be brought within five years after the cause of action accrues."). The trial court reasoned that Shin's claims became actionable against Joyaux in 2002 because the building suffered continuous water damage starting in 1997. The trial court refused to recognize each heavy rain storm as an intermittent injury. On January 11, 2016, the trial court granted the Special Plea and dismissed Shin's complaint with prejudice.

Shin argues on appeal that the trial court erred in dismissing his complaint because (1) the injuries were intermittent thus the statute of limitations had not expired and (2) the trespass did not become substantial and unreasonable until 2014. The disposition of this case is controlled by the Court's recent decision in *Forest Lakes Cmty. Ass'n, Inc. v. United Land Corp. of America*, ___ Va. ___, 795 S.E.2d 875, 2017 Va. LEXIS 6 (2017).

"'If the parties present evidence on [a] plea ore tenus, the circuit court's factual findings are accorded the weight of a jury finding and will not be disturbed on appeal unless they are plainly wrong or without evidentiary support.'" *Id.* at ___, 795 S.E.2d at ___, 2017 Va. LEXIS 6, *2 (quoting *Hawthorne v. VanMarter*, 279 Va. 566, 577, 692 S.E.2d 226, 233 (2010)). "Thus, under the 'governing standard of review' applicable to judges sitting as factfinders no less than jurors, 'we review factfinding with the highest degree of appellate deference.'" *Id.* (quoting *Vasquez v. Commonwealth*, 291 Va. 232, 248, 781 S.E.2d 920, 929 (2016) (citation omitted)). "We thus review the evidence in the light most favorable to the prevailing parties and accept as true any reasonable inferences that could be drawn from the evidence before the factfinder." *Id.*

In *Forest Lakes*, the Court reaffirmed the view we adopted in *Virginia Hot Springs Co. v. McCray*, 106 Va. 461, 56 S.E. 216 (1907), recognizing "that a cause of action involving an injury of a 'permanent character, resulting from a permanent structure' accrued when the injury was *first* sustained, [*Virginia Hot Springs*,] at 470-71, 56 S.E. at 220, even though 'the injury

constantly and regularly recurs' over time, *id.* at 467, 56 S.E. at 219." *Forest Lakes*, ___ Va. at ___, 795 S.E.2d at ___, 2017 Va. LEXIS 6, *16 (citation omitted). We further recognized that the concepts of trespass and permanent nuisance defy any attempts at formulaic applications. There we stated that "[b]ecause the underlying issue — determining the boundaries of a cause of action — depends so heavily on the factual context of each case, our jurisprudence has tailored these principles to analogous fact patterns and rights of action." *Id.* at ___, 795 S.E.2d at ___, 2017 Va. LEXIS 6, *14-15.

In the most analogous case to the facts at bar, a railway built a culvert that was inadequate to properly direct the flow of water during periods of heavy rainfall. *Southern Railway Co. v. White*, 128 Va. 551, 104 S.E. 865 (1920). We recognized that whether the facts of

> the cases in which waters are continuously polluted, or lands are perpetually overflowed by backwater from a dam, and a case like the one in judgment in which the overflows are recurrent and of short duration . . . the same principle of liability is appropriate to all cases where the nuisance is permanent and a constant and continuous agency of injury.

Id. at 569, 104 S.E. at 871. Under either scenario, the cause of action accrued when the injury was first sustained.

Applying the principles more thoroughly discussed in *Forest Lakes* and *Southern Railway v. White*, we hold that the roof, which is the cause of the injury, is a permanent structure. It "will continue in due course without change from any cause but human labor." *Southern Ry. v. White*, 128 Va. at 566, 104 S.E. at 870. It is held that the damage is original and where a nuisance is permanent, "the consequences of which, in the normal course of things, would continue indefinitely there can be but a single cause of action therefor and the entire damage suffered, both past and future, must be recovered in [that] action." *Forest Lakes*, ___ Va. at ___, 795 S.E.2d at ___, 2017 Va. LEXIS 6, *16 (citation omitted). The moment it was established that Joyaux's roof was a "perpetual menace," it created "an immediate cause of action." *Southern Ry. v. White*, 128 Va. at 566, 104 S.E. at 870.

Shin's argument that the statute of limitations did not begin to run until the interference with his property became substantial and unreasonable, occasioned by his renovation of his

building, is incorrect both on the facts of this case and the law. Factually, the argument is inconsistent with his pleadings. Specifically, Shin pled, "[s]ince [he] purchased the building [Shin] has suffered water damage to his building during heavy rain storms." Legally, Shin's argument focuses on his subjective determination of how much damage constituted a nuisance. To the contrary, nuisance is an objective standard. To constitute a nuisance, the interference that "will or does produce such a condition of things as, in the judgment of reasonable men, is naturally productive of actual physical discomfort to persons of ordinary sensibilities." *Herring v. Wilton*, 106 Va. 171, 173, 55 S.E.2d 546, 547 (1906). As we stated in *Forest Lakes*, "[a] showing of 'increased damage,' by itself, does not defeat the application of the statute of limitations." ___ Va. at ___, 795 S.E.2d at ___, 2017 Va. LEXIS 6, *21 (quoting *Southern Ry. v. McMenamin*, 113 Va. 121, 132, 73 S.E. 980, 983 (1912)).

The five-year statute of limitations in Code § 8.01-243(B) began to run when the first water damage occurred after the roof was replaced on Joyaux's property. Shin did not file a complaint until 2015, eighteen years after purchasing the property and noticing the water damage. Accordingly, the trial court did not err in granting the Special Plea and dismissing Shin's complaint with prejudice. Therefore, the judgment of the trial court is affirmed. The appellant shall pay to the appellee two hundred and fifty dollars damages.

This order shall be certified to the said circuit court.

A Copy,

Teste:

Patricia L Harrington

Clerk