NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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LETTER OPINION

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Re: *David Willems, et al. v. James Batcheller, et al.*
Case No. CL-2020-6575

Dear Counsel:

The Court has before it the claims of Plaintiffs David Willems and Petra Willems charging trespass regarding Defendants' bamboo and fence adjoining the boundary line separating the parties' properties, and alleging nuisance as to said bamboo, a spotlight

pointed in the direction of Plaintiffs' bedroom windows, and Christmas lights festooning the fence, and the countervailing affirmative defenses of Defendants James Batcheller and Christine Bartoletta of statute of limitations, laches and adverse possession. The Court must decide: (A) whether the bamboo is a nuisance; (B) whether the bamboo is trespassory; (C) whether the spotlight and the Christmas lights are a nuisance; (D) whether Plaintiffs' claims are barred by the statute of limitations, or whether the defense of laches applies instead to the trespass and nuisance claims; and (E) whether the fence is trespassory, and whether adverse possession may be maintained as an affirmative defense thereto to excuse such trespass so as to delineate a new boundary line.

The Court holds as follows: 1) the spread of bamboo into Plaintiffs' property is a nuisance, inasmuch as it has previously damaged the roof of their shed and is substantially impairing the occupants' comfort, convenience, and enjoyment of their property, causing a material disturbance or annoyance in use of the realty, and must be controlled by Defendants in application of a relative balance of the equities test; 2) the bamboo is trespassory for it involves the human agency of planting the same in close proximity to Plaintiffs' property and in a way reasonably predictable to intrude upon their property, and though each increment of trespass is trivial or the damage is trifling, because past damage to Plaintiffs' shed informs renewed damage is foreseeable from the uncontrolled spread of the bamboo, and in application of a relative balance of the equities test also pertaining to nuisance, in order to avoid a multiplicity of actions at law, Defendants must undertake reasonable efforts to permanently abate the trespass; 3) the

spotlight pointed in the direction of Plaintiffs' bedroom windows is a nuisance while the Christmas lights affixed to the fence between the properties are not, for the freedom from discomfort and annoyance to constitute an actionable nuisance it must be significant and of a kind that would be annoying to a normal person in the community; 4) while the statute of limitations of actions under Virginia Code § 8.01-243 generally applies to claims of trespass and nuisance, in the instant case, because the relief sought by Plaintiffs is solely equitable, pursuant to Virginia Code § 8.01-230, the statutory limitation periods do not apply to Plaintiffs' claims and the defense of laches instead delimits the period within which the actions had to be brought, but Plaintiffs' claims are not barred in application thereof; and 5) while the fence is trespassory, the Defendants can procedurally maintain and have proven adverse possession as an affirmative defense thereto, and the Court finds that the boundary line between the parties' properties is now constituted by the fence installed by Defendants.

Consequently, Defendants are ordered to take permanent measures to control the bamboo in the area where it is currently planted proximate to Plaintiffs' shed in such a manner that it does not grow under or over ground past the boundary of Defendants' property nor contact the roof of Plaintiffs' shed, even in times of wind, ice or snow. Defendants are further permanently enjoined from positioning the spotlight complained of so as to allow it to shine towards Plaintiffs' bedroom windows. The Court in addition holds the boundary line between the parties' properties is determined to be the location of the fence, and that Defendants' Christmas lights affixed to the fence between the properties are not deemed to be a nuisance.

BACKGROUND

In 2002, Defendants purchased their home located at 6805 Valley Brook Drive in Fairfax County, Virginia. In 2003, Defendants installed a split rail fence surrounding the Defendants' back and side yards. At that time, the property located on the other side of the fence adjoining Defendants' property, 3503 Thomas Court (currently owned by the Plaintiffs, the Willems), was owned by Mr. and Mrs. Erbenghi. In the 2002-2003 time-period, parts of the Erbenghi lot were substantially covered in bamboo. Some of the bamboo had spread from the Erbenghi lot onto the Defendants' property in the southeast corner of the Defendants' lot. The Defendants had the fence installed where they believe the property boundary existed. The fence is contiguous around the rear yard, with no gaps or open spaces. No portion of the fence has been moved since installation.

In 2005, Defendants relocated some of the bamboo from the southeast corner to the southwest corner of their lot. The bamboo was planted for privacy and screening purposes. The bamboo was planted next to the split rail fence behind a shed with asphalt roof shingles located on the Erbenghi property. The base of the shed is less than two feet from the fence. The bamboo patch is currently located as close as thirty inches from the base of Plaintiffs' shed and overhanging the shed roof, which extends roughly to the fence line. The Defendant Mr. Batcheller prevents the growth of bamboo in the direction of his home by mowing his grass and/or destroying new rhizomes[1] as they appear.

In 2007, Mr. Batcheller purchased landscape spotlights and installed them in his back yard. The landscape lights illuminate the fence and cypress trees that are

[1] Bamboo spreads by rhizomes, which are subterranean stems growing horizontally, producing lateral roots and vertical shoots at short intervals.

immediately behind on the Plaintiffs' property. One of these spotlights is situated in such a way that it points in the direction of the Plaintiffs' bedroom windows. In the winter, the Defendants also display Christmas lights along their rear fence.

In 2015, Plaintiffs purchased the lot formerly owned by the Erbenghi's and bordering that of the Defendants. Plaintiffs almost did not buy their home due to the abundance of bamboo between the properties, but eventually moved to their home in 2016. By 2017, Plaintiffs had thinned some of the vegetation between the properties of the parties, and noticed the spotlights more prominently. The Willems maintain bamboo as part of their own landscaping design in other parts of their property. The Willems find bamboo is beautiful and provides privacy and security. In some areas of their yard bamboo growth is checked from further encroachment by a plastic barrier installed in the ground. In or after 2017, Plaintiffs requested Defendants move the angle of the spotlight which was illuminating their bedroom windows. Defendants moved the light, but thereafter placed it back to the original position. Respecting the bamboo located near the shed, it repeatedly grows into Plaintiffs' property, both overhead and underground. Plaintiffs have taken measures to cut back the overhanging bamboo and control the spread underground, but have been unable to control the bamboo intrusions permanently.

In 2020, Plaintiffs filed suit to enjoin the growth of the bamboo into their property, to alter the directionality of the spotlight pointing in the direction of their bedroom windows, and to remove the fence Defendants installed on Plaintiffs' property and with it the Christmas lights affixed thereto. Defendants responded that Plaintiffs' claims are barred

either by the statute of limitations or laches, and also because the fence is no longer trespassory as the area of its installation has been acquired by adverse possession.

At trial, Plaintiffs presented the testimony of Mr. David Maguire, who qualified as an expert in landscaping and landscaping design. Maguire testified the bamboo is in the grass family of plants, very invasive, fast-growing, aggressive, difficult to control, and that at the area adjoining Plaintiffs' shed "it is only going to get worse." He stated that although the rhizomes are only six to eight inches below surface, the tap roots go much deeper. Overhead, the bamboo is at a height of fifteen to twenty feet, and overhangs and contacts the shed roof. Maguire stated Plaintiffs can keep the underground spread in check if they continually remove the rhizomes as they appear, but related that the only environmental way to effect a permanent solution would be to dig a trench up to thirty-six inches deep and install a bamboo barrier. However, because of the limited space between Plaintiffs' shed and Defendants' fence, and due to the presence of a nearby mature tree, the proposed solution is not practicable on Plaintiffs' side of the property line. Maguire indicated that Defendants could transplant some of the bamboo from the patch of which Plaintiffs complain to the front facing Defendants' home, to maintain their screen, and then install a containment barrier on their side of the fence.

Ms. Willems testified the bamboo damages the new roof they installed on their shed. The shed sustained previous damage from a maple tree that had to be removed and also from the bamboo. Specifically, due to wind and in the winter the weight of snow, the bamboo scratches the shingles. She also detailed that one spotlight installed by Defendants to illuminate one of Plaintiffs' cypress trees points light directly at the Plaintiffs'

bedroom windows. Ms. Willems produced a picture thereof taken from the vantage point of her bedroom. Plaintiffs like to sleep with open windows but complain their sleep is disturbed by the spotlight. Defendants display Christmas lights along their fence, roughly from October to April. Plaintiffs maintain such display is a nuisance primarily because it occurs each year for up to six months in duration.

ANALYSIS

I. The Spread of Bamboo Into Plaintiffs' Property Is a Material Disturbance and Substantial Annoyance in Use of Realty for It Has and Will Foreseeably Cause Injury to Property, and Is an Actionable Nuisance That Must Be Abated by Defendants in Application of a Relative Balance of the Equities Test

The planting of bamboo is not automatically a legally actionable nuisance. In Virginia:

> A private nuisance is the using, or authorizing the use of, one's property, or of anything under one's control, so as to injuriously affect an owner or occupier of property (1) by diminishing the value of that property; (2) by continuously interfering with his power of control or enjoyment of that property; (3) by causing material disturbance or annoyance to him in his use or occupation of that property.

Virginian R. Co. v. London, 114 Va. 334, 344-345 (1912). "The term 'nuisance' includes 'everything that endangers life or health, or obstructs the reasonable and comfortable use of property.'" *National Energy Corp. v. O'Quinn*, 223 Va. 83, 85 (1982) (quoting *Barnes v. Quarries, Inc.*, 204 Va. 414, 417 (1963)). The term "material disturbance" imparts it must be "significant" or "essential." MATERIAL, Black's Law Dictionary (11th ed. 2019). An occupant's right to the use and enjoyment of land is to be construed broadly. *Bowers v.*

Westvaco Corp., 244 Va. 139, 144 (1992) (citing *Foley v. Harris*, 223 Va. 20, 28 (1982)). Such right,

> comprehends the pleasure, comfort and enjoyment that a person normally derives from the occupancy of land. Freedom from discomfort and annoyance while using land, which inevitably involves an element of personal tastes and sensibilities, is often as important to a person as freedom from physical interruption with use of the land itself. The discomfort and annoyance must, however, be significant and of a kind that would be suffered by a normal person in the community.

Id. at 145 (quoting *Foley*, 223 Va. at 28 (citations omitted)). Thus, the measure for whether Defendants have breached the reasonable comfort and enjoyment of Plaintiffs' use of their property by planting the bamboo is an objective one, not left to the subjective sensibilities of the Plaintiffs.

The Supreme Court of Virginia has cautioned that not every intruding plant may be deemed an actionable nuisance. "[E]ncroaching 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." *Fancher v. Fagella,* 274 Va. 549, 555-556 (2007). The *Fancher* Court delineated the standard to be applied for court intervention, known as the "Hawaii Rule:"[2]

> [E]ncroaching 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 . . . .

[2] The "Hawaii Rule" is derived from *Whitesell v. Houlton*, 632 P.2d 1077 (Haw. Ct. App. 1981).

Id. (emphasis added). Therefore, a nuisance claim is actionable when pertaining to plantings if there is a requisite and cognizable potential for harm.

In the instant case, Defendants transplanted bamboo located elsewhere on their property to the area bordering Plaintiffs' shed. Defendants planted the bamboo as a privacy screen between the properties because they perceived their enjoyment of their home was negatively impacted by the previous owner of Plaintiffs' property standing on his deck, frequently smoking, and with a view of Defendants' living quarters. The bamboo provided an esthetic barrier so that Defendants' problem was solved. However, in solving such problem with the planting of invasive and quickly proliferating bamboo, they created a perpetual problem for the adjoining property. When Plaintiffs purchased their property, the bamboo had proliferated, both overhead and in the soil, onto their side of the fence separating the properties. The bamboo had contributed to the damage of the roof of Plaintiffs' shed, which had to be replaced. The bamboo caused injury and presents the potential for continuing future damage. Plaintiffs have resorted to repeated self-help to prevent the uncontrolled spread of the bamboo and the foreseeable damage that would result anew to the shed from its uncontrolled growth. The degree of harm required by *Fancher* for a nuisance claim to be actionable is established.

Nevertheless, this Court must still determine if an injunction is appropriate in this cause.

> Not every case of nuisance or continuing trespass, however, may be enjoined. The decision whether to grant an injunction always rests in the sound discretion of the [Court], and depends on the relative benefit an injunction would confer upon the plaintiff in contrast to the injury it would impose on the defendant.

Fancher, 274 Va. at 556.

In order to determine the propriety of intervening, the Court must apply a relative balance of the equities test. The Court has the duty to consider all relevant factors, give them appropriate weight, discard irrelevant factors, and correctly ascertain what the law requires. *See Landrum v. Chippenham & Johnston-Willis Hosps., Inc.*, 282 Va. 346, 352 (2011); *see also Lawlor v. Commonwealth*, 285 Va. 187, 213 (2013).

> In weighing the equities in a case of this kind, the [Court] must necessarily first consider whether the conditions existing on the adjoining lands are such that it is reasonable 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. In the absence of such a duty, the traditional right of self-help is an adequate remedy. It would be clearly unreasonable to impose such a duty upon the owner of historically forested or agricultural land, but entirely appropriate to do so in the case of parties, like those in the present case, who dwell on adjoining residential lots.

Fancher, 274 Va. at 556-557. Here, the lands are not only adjacent residential lots, but the bamboo planted by the Defendants is highly invasive and non-native to Virginia. However, even if a duty is found to exist upon Defendants with respect to the bamboo, the Court must still

> determine the extent of the remedy. Under the circumstances of the case, will self-help by cutting off the invading roots and branches, followed by an award of damages to compensate the plaintiff for his expenses, afford an adequate and *permanent* remedy, obviating the need for an injunction? If not, will complete removal of the defendant's tree be the appropriate remedy when the equities are balanced? An affirmative answer to the latter question will necessitate a mandatory injunction. As in all cases in which equitable relief is sought, the [Court] decision must necessarily depend on the particular facts shown by the evidence, guided by traditional equitable principles.

Fancher, 274 Va. at 557 (footnote omitted) (emphasis added).

A landscaping expert, Mr. David Maguire, testified for the Plaintiffs that bamboo grows quickly and that because of the location of the shed and a tree, it is impractical for Plaintiffs to employ a permanent method of control of the bamboo on their side of the property line. The expert also indicated, in contrast, that Defendants could prevent intrusion from their property onto that of Plaintiffs' by installing a below ground barrier and keeping their bamboo at a greater distance from the Defendants' fence. The suggested remedies on their face do not appear to be onerous. Defendants would also retain the option of removing the bamboo altogether and erecting other plantings that are not invasive, as a screen.

The Defendants created the problem by installing known invasive plants as a privacy screen immediately abutting the border of the properties and in an area reasonably foreseeable to cause damage to a structure, the Plaintiffs' shed. Plaintiffs' enjoyment of their property is materially disturbed by the necessity of repeated and consistent intervention to restrain the invading bamboo. Further, Plaintiffs cannot by self-help alone protect the roof of their shed from damage by the bamboo in times of high wind or heavy snow. Their complaints are thus not mere product of undue sensibilities but are objectively reasonable in that any "normal person in the community" would be in his or her right to complain about continuously having to defend against damage to a structure on their property. In addition, Plaintiffs cannot abate the nuisance easily. Conversely, Defendants are able to eliminate the nuisance either by removing the bamboo from the location adjacent to the shed, or by installing a root barrier and keeping the plants trimmed to their side of the fence. In balancing the equities it is clear the Defendants can abate

the nuisance without substantial effort, and that it is equitable to require them to do so. Plaintiffs do not have the same practical option, and it is Defendants who derive the benefit from the nuisance they created.

II. The Bamboo Is Trespassory for It Involves the Human Agency of Planting the Same in Close Proximity to the Plaintiffs' Property and in a Way Reasonably Predictable to Intrude Upon Their Property, and Though Involving Only Vegetation, Must Be Abated as It Constitutes an Injurious Intrusion as Delineated In the Discussion of Nuisance Aforesaid

The Court must next consider the question whether the bamboo is trespassory. "[A]n action for common law trespass to land derives from the 'general principle of law [that] every person is entitled to the exclusive and peaceful enjoyment of his own land, and to redress if such enjoyment shall be wrongfully interrupted by another.'" *Kurpiel v. Hicks*, 284 Va. 347, 353 (2012).

> [T]o 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.

Id. at 353-54 (quoting *Cooper v. Horn*, 248 Va. 417, 423 (1994) (internal citations and quotation marks omitted)).

> [A] continuing trespass may be enjoined "even though each individual act of trespass is in itself trivial, or the damage is trifling, nominal or insubstantial, and despite the fact that no single trespass causes irreparable injury. The injury is deemed irreparable and the owner protected in the enjoyment of his property whether such be sentimental or pecuniary."

Levisa Coal Co. v. Consolidation Coal Co., 276 Va. 44, 62 (2008) (quoting *Boerner v. McCallister*, 197 Va. 169, 172 (1955)). When it comes to plantings, the remedy for a

trespass is more attenuated than for other objects. As the Supreme Court of Virginia has made clear in *Fancher*, when it comes to intrusive vegetation like bamboo, the analysis whether there is an actionable claim for trespass is, in this instance, substantially identical to the analysis applicable to nuisance.

The bamboo here is trespassory for it involves the human agency of planting the same in close proximity to the Plaintiffs' property and in a way reasonably predictable to intrude upon that property. The Court "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,* 274 Va. at 556 (emphasis added).[3] Thus, for the reasons as further developed in the previous discussion regarding nuisance, Plaintiffs are entitled to injunctive relief pursuant to their trespass claim in a balance of the equities, as Defendants' bamboo has caused past injury and Defendants are the only party positioned to effectuate a permanent abatement of their trespass.

III. The Spotlight Pointed in the Direction of Plaintiffs' Bedroom Windows Is a Nuisance While the Christmas lights Affixed to the Fence Between the Properties Are Not, for the Freedom From Discomfort and Annoyance to Constitute an Actionable Nuisance It Must Be Significant and of a Kind That Would Be Annoying to a Normal Person in the Community

Maintaining exterior lighting in a manner that interferes with the sleep of adjoining landowners can be an actionable nuisance. *See Bowers,* 244 Va. at 148 (finding "severe" sleep deprivation from lights shining into bedrooms and noise, actionable for nuisance damages); *see also Bellamy v. Husbands*, 13 Va. Cir. 433 (1972) (enjoining the

[3] Here, there was evidence that Ms. Willems trimmed back the bamboo and removed the rhizomes at various times. But, due to the nature of bamboo, there were likely a series of trespasses, namely every time the bamboo regrew and encroached onto Plaintiffs' land.

maintenance of two mercury vapor lights illuminating defendant's property but disturbing the sleep of plaintiffs in that case even with curtains drawn). The lighting complained of in the instant case is certainly nowhere near the scale of the problem identified in *Bowers*; however, unlike in *Bowers*, the lighting here is not tied to the operation of a business, but rather to the illumination of trees along the rear of the Defendants' property line. The nuisance lighting here is easily abatable.

The spotlight in this case is also not of the brightness described in *Bellamy*; however, like in *Bellamy*, "the light produced not only disturbs . . . the complainants but goes beyond the reasonable needs" of the Defendants. *See Id.* Defendants' same purpose of illuminating Plaintiffs' trees from the back of Defendants' property can be easily accomplished with slight alteration of the positioning of the spotlight so that it does not shine directly at the windows of Plaintiffs' bedroom. It is of little question that a "normal person in the community" would find the pointing of such a light at a bedroom window, discomforting and an annoyance, and therefore injunctive relief lies, particularly in light of the minimal burden of compliance on Defendants. See *Id.* at 145.

Conversely, the same may not be said with respect to the Christmas lights adorning Defendants' fence. Here, there may not be agreement among the personal tastes and sensibilities of the parties. While it may be a bit unusual that Defendants keep their lights lit for approximately six months of the year, this illumination is not of such a nature that the Court can find this display and duration, a nuisance.[4]

[4] The Court's ruling is not to be interpreted to give the Defendants license to affix new lights or other objects onto their fence *which protrude beyond the width of such fence* onto the property of the Plaintiffs.

IV. While the Statute of Limitations of Actions Under Virginia Code § 8.01-243 Generally Applies to Claims of Trespass and Nuisance, in the Instant Case, Because the Relief Sought by Plaintiffs Is Solely Equitable, Pursuant to Virginia Code § 8.01-230, the Statutory Limitation Periods Do Not Apply to Plaintiffs' Claims, and the Defense of Laches Instead Delimits the Period Within Which the Actions Had to Be Brought, and Plaintiffs' Claims Are Not Barred in Application Thereof

The parties present the Court with a matter of apparent first impression: whether the statute of limitations or the equitable defense of laches is the governing principle limiting the time within which Plaintiffs had to bring their trespass and nuisance claims. In a previous opinion, this Court held that, with respect to trespass and nuisance claims, the statute of limitations and the equitable defense of laches are not coextensive, that is, that

> [w]ith respect to a statute of limitations, "*equity follows the law.*" *Coles' Adm'r v. Ballard*, 78 Va. 139, 149 (1883) (emphasis in original). The doctrine of laches can thus not operate to defeat the intent of the General Assembly expressed in Code § 8.01-243(B), to provide a time window within which litigants may bring their trespass and nuisance claims.

Rustgi v. Webb, 105 Va. Cir. 199 (2020). What is left unanswered in *Rustgi*, however, is the question whether the applicable authority as to when a claim may be foreclosed based on the expiration of time depends upon the nature of the remedy sought by the complainant. Defendants maintain the statute of limitations always applies to claims for trespass and nuisance. Nevertheless, in an abundance of caution, the Defendants also wisely pled laches in addition to the statute of limitations, should the Court disagree with their first contention. Plaintiffs maintain that in this instance, because they seek only injunctive relief rather than a legal remedy, the statute of limitations is inapplicable.

"Every action for injury to property . . . shall be brought within five years after the cause of action accrues." Va. Code § 8.01-243(B). Plaintiffs have brought trespass and nuisance claims, but although money damages may be asserted in such claims where

appropriate, Plaintiffs seek only injunctive relief to abate the same. *See Forest Lakes v. United Land Corp.,* 293 Va. 113, 124 (2017) (an award for past, present, and future damages may be available in such instances). The Supreme Court of Virginia has commented that "[a] potent cause of confusion as to the meaning and scope of private nuisance lies in the failure to distinguish the action at law from the suit for injunction in equity." *Id.* at 134 n. 17 (quoting Restatement (Second) of Torts § 822 cmt. d (1979)). The Court further identified the potential distinction in the accrual of a claim when damages are sought for trespass as opposed to when the claims involve "equitable remedies, such as injunctive relief, the doctrine of laches, [and] Code § 8.01-230 (recognizing the "solely equitable" exception for accrual)." *Id.*

> *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, when the breach of contract occurs in actions ex contractu and not when the resulting damage is discovered, *except where the relief sought is solely equitable* or where otherwise provided under § 8.01-233, subsection C of § 8.01-245, §§ 8.01-249, 8.01-250 or other statute.

Va. Code § 8.01-230 (emphasis added). "A *right of action* is a legally recognized remedial right to enforce a *cause of action*, which is simply the set of operative facts that causes a claimant to assert his claim." *Kerns v. Wells Fargo Bank, N.A.,* 296 Va. 146, 155-156 (2018) (citations and quotation marks omitted) (emphasis in original). A plain reading of § 8.01-230 denotes that equitable remedies are not circumscribed by the statute of limitations because the words "in every action for which a limitation period is prescribed" are qualified by the words "except where the relief sought is solely equitable." *Id.*

Plaintiffs seek injunctions against four alleged offending conditions comprising claims of nuisance and trespass. The Court addresses each of these conditions in turn in the context of laches. With respect to the claim of trespass as it concerns Defendants' fence located on Plaintiffs' property, it is clear that Plaintiffs were unaware of the trespassory nature of the fence until recently, and thereafter took legal action within reasonable proximity of the time when they became aware of the claim.

With respect to claims of nuisance as to the spotlight and the Christmas lights, there was testimony supporting the inference that a new claim accrued each time those conditions were reinstituted by human agency. In the case of the spotlight for example, it was moved and then turned back to its original position in or after 2017, constituting a new cause of action within reasonably proximate time from suit.

With respect to Christmas lights, because the Court has found these not to be a nuisance on the merits, the Court need not consider whether the defense of laches forecloses the associated nuisance claim, except to note that the testimony was that the lights are displayed continuously for periods of about six months out of the year, which reillumination likely therefore reset any applicable period for the accrual of the claim.

With respect to the nuisance and trespass claims concerning the bamboo intrusion, inasmuch as only an injunction is sought and the condition is continuing, the statute of limitations is inapplicable. In addition, application of laches is no bar to such claims, because the continual conditions of the invasion of the bamboo have "been gradual and cumulative in their character." *See Face v. Cherry,* 117 Va. 41, 45 (1915) (the doctrine of laches is not a bar in a case of continuing nuisance).

Moreover, the Defendants have not proven the requisite element of prejudice to maintain their defense. "Laches has been defined as an omission to assert a right for an unreasonable and unexplained length of time, under circumstances prejudicial to the adverse party." *Finkel Outdoor Prods. v. Bell*, 205 Va. 927, 933 (1965). "Lapse of time, standing alone, does not give rise to laches," but is applicable instead where there is "*prejudicial delay in asserting a right*, by one who is knowledgeable of his rights or has means of knowing his rights." *Rustgi*, 105 Va. Cir. 199 (quoting *Klackner v. Willis,* 15 Va. Cir. 67 (1988)) (emphasis added). In sum, Defendants have failed to prove their defense of laches as to Plaintiffs' nuisance and trespass claims.

V. While the Fence Is Trespassory, the Defendants Can Procedurally Maintain and Have Proven Adverse Possession as an Affirmative Defense Thereto, and the Court Finds That the Boundary Line Between the Parties Properties Is Now Constituted by the Fence Installed by Defendants in Excess of Fifteen Years Prior to This Suit

Plaintiffs have asserted a claim of trespass encompassing the fence Defendants installed more than fifteen years prior to the institution of the instant suit. Defendants prayed an affirmative defense of adverse possession. Plaintiffs respond that adverse possession may not be addressed as an affirmative defense, but rather can only be established by a counter-claim for relief, which was not prayed.

The Supreme Court of Virginia has both explicitly and implicitly addressed that adverse possession is an available affirmative defense. *Sutherland v. Gent*, 121 Va. 643, 645 (1917) (approving the text of a jury instruction given on adverse possession as an affirmative defense); s*ee Howard v. Ball*, 289 Va. 470, 474 (2015) (commenting how defendant failed to assert the affirmative defense of adverse possession); *see also Smith*

v. Woodlawn Construction Co., 235 Va. 424, 430 (1988) (noting defendant had the burden of proving the affirmative defense of adverse possession). "[I]n Virginia, adverse possession requires proof, by clear and convincing evidence, of possession that is: 1) actual, 2) hostile or adverse, 3) exclusive, 4) visible or open and notorious, 5) continuous for a period of 15 years, and 6) under a claim of right." *Quatannens v. Tyrrell*, 268 Va. 360, 371 (2004). "Hostile" does not mean "angry" but rather "visible possession without permission." *Id.*, 268 Va. at 372.

> [W]hen a claimant mistakenly believes that a particular "line on the ground" represents the extent of his or her own land and treats all the land within the line on the ground as his or her own in a manner that satisfies the other requirements of adverse possession—particularly actual, exclusive, and visible possession—then the hostility requirement is generally satisfied.

Id. For there to be a claim of right, "the possessor must profess, through words or actions, a belief that he is entitled to use the land and prevent others from using it in a manner that precludes the legal owner from exercising his rights over the property." *Id.*

> Use and occupation of property, evidenced by fencing the property, constitutes proof of *actual* possession. *LaDue v. Currell*, 201 Va. 200, 207, 110 S.E.2d 217, 222 (1959). One is in *hostile* possession if his possession is under a claim of right and adverse to the right of the true owner. *See Virginia Midland R. Co. v. Barbour*, 97 Va. 118, 123, 33 S.E. 554, 556 (1899). One's possession is *exclusive* when it is not in common with others. *See Providence F. Club v. Miller Co.*, 117 Va. 129, 132-33, 83 S.E. 1047, 1048-49 (1915). Possession is *visible* when it is so obvious that the true owner may be presumed to know about it. *See Turpin v. Saunders*, 73 Va. (32 Gratt.) 27, 34 (1879). Possession is *continuous* only if it exists without interruption for the statutory period. *See Hollingsworth v. Sherman*, 81 Va. 668, 674 (1885); *Stonestreet v. Doyle*, 75 Va. 356, 371 (1881).

Grappo v. Blanks, 241 Va. 58, 62 (1991) (emphasis in original).

Here, the evidence supports the erection and continual maintenance of the fence, and exclusive use of the area it encloses by Defendants for in excess of fifteen years prior

to the institution of this suit. Defendants' have met their burden of proof of their affirmative defense of adverse possession by clear and convincing evidence, and the Court finds the base[5] of the fence thus delineates the new boundary line between the parties' adjacent lands.

CONCLUSION

The Court has considered Plaintiffs' claims charging trespass regarding Defendants' bamboo and fence adjoining the boundary line separating the parties' properties, and alleging nuisance as to said bamboo, a spotlight pointed in the direction of Plaintiffs' bedroom windows, and Christmas lights festooning the fence, and the Defendants' countervailing affirmative defenses of statute of limitations, laches and adverse possession.

The Court holds as follows: 1) the spread of bamboo into Plaintiffs' property is a nuisance, inasmuch as it has previously damaged the roof of their shed and is substantially impairing the occupants' comfort, convenience, and enjoyment of their property, causing a material disturbance or annoyance in use of the realty, and must be controlled by Defendants in application of a relative balance of the equities test; 2) the bamboo is trespassory for it involves the human agency of planting the same in close proximity to Plaintiffs' property and in a way reasonably predictable to intrude upon their property, and though each increment of trespass is trivial or the damage is trifling,

[5] The fence has leaned in the direction of the shed over time so that parts of it may be under the roof line of the shed. As it is unclear when the fence began to lean, the new property line between the parties all along the fence is measured solely at the base of the fence not at its height, meaning that the entire roof of the shed likely remains on Plaintiffs' property.

because past damage to Plaintiffs' shed informs renewed damage is foreseeable from the uncontrolled spread of the bamboo, and in application of a relative balance of the equities test also pertaining to nuisance, in order to avoid a multiplicity of actions at law, Defendants must undertake reasonable efforts to permanently abate the trespass; 3) the spotlight pointed in the direction of Plaintiffs' bedroom windows is a nuisance while the Christmas lights affixed to the fence between the properties are not, for the freedom from discomfort and annoyance to constitute an actionable nuisance it must be significant and of a kind that would be annoying to a normal person in the community; 4) while the statute of limitations of actions under Virginia Code § 8.01-243 generally applies to claims of trespass and nuisance, in the instant case, because the relief sought by Plaintiffs is solely equitable, pursuant to Virginia Code § 8.01-230, the statutory limitation periods do not apply to Plaintiffs' claims and the defense of laches instead delimits the period within which the actions had to be brought, but Plaintiffs' claims are not barred in application thereof; and 5) while the fence is trespassory, the Defendants can procedurally maintain and have proven adverse possession as an affirmative defense thereto, and the Court finds that the boundary line between the parties' properties is now constituted by the fence installed by Defendants.

Consequently, Defendants are ordered to take permanent measures to control the bamboo in the area where it is currently planted proximate to Plaintiffs' shed in such a manner that it does not grow under or over ground past the boundary of Defendants' property nor contact the roof of Plaintiffs' shed, even in times of wind, ice or snow. Defendants are further permanently enjoined from positioning the spotlight complained of

so as to allow it to shine towards Plaintiffs' bedroom windows. The Court in addition holds the boundary line between the parties' properties is determined to be the location of the fence, and that Defendants' Christmas lights affixed to the fence between the properties are not deemed to be a nuisance.

The Court shall enter a separate order incorporating its ruling herein and until such time, this cause continues and is not final.

Sincerely,

[redacted]

David Bernhard
Judge, Fairfax Circuit Court