NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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Re: *James Cawlo. v. Rose Hill Reserve Homeowners Association, Inc. et al.*,
Case No. CL 2019-11702 (consolidated with CL 2019-11700, CL 2019-11704 and CL 2019-11705)

Dear Counsel,

This letter addresses Defendant Adam Wingo's ("Wingo") demurrer to a consolidated amended complaint. The Court previously sustained Wingo's demurrer to an initial complaint that

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came before this court as a consolidation of four separate lawsuits and granted the consolidated plaintiffs leave to file an amended complaint. Plaintiffs filed an amended consolidated complaint and Wingo filed a second demurrer.

The unusual procedural posture of the consolidated actions pending before this court will be addressed at the end of this letter opinion and under a separate order. This letter will first address the second demurrer, in which Wingo argues the complaint fails to state a cause of action because the facts stated do not impose upon him a legal duty necessary to maintain an action in tort.

Material Facts as Alleged Under the Complaint

The following facts are drawn from the Amended Consolidated Complaint and taken in the light most favorable to the plaintiffs:

Plaintiffs James and Rana Cawlo are parents of twin [redacted]-year-old daughters, [redacted] and [redacted]. The Cawlo family lives in the Rose Hill Park subdivision of Alexandria, Virginia. The subdivision boarders the Rose Hill Reserve subdivision. A conservation easement exists as a buffer between the two subdivision, which Rose Hill Reserve owns and manages. The Cawlo's backyard directly abuts the conservation easement.

The landscape plan for the conservation easement requires Rose Hill Reserve to plant and cultivate trees, erect tree-protection fencing, regularly inventory and inspect the tress, and remove dead, dying decaying, rotting, and/or otherwise hazardous trees as needed.

Rose Hill Reserve Homeowners Association ("HOA") contracted with Adam Wingo d/b/a Out On A Limb in August of 2017 to perform tree inspections in the conservation easement area. The HOA retained Out On A Limb to assess all trees within striking distance of any foreseeable human activity and to identify trees that were dead, dying, decaying, or otherwise presenting a threat of harm to others, including the Cawlo's property.

In the five years leading up to the accident of July 2018, the Rose Hill Reserve and its management company had received numerous notices from Rose Hill residents of imminent danger presented to surrounding property owners and their families from weak, dying, or otherwise structurally compromised trees that inhabited the conservation easement. On or about August 25, 2017, Out On A Limb performed an inspection, identified dangerous and structurally unsound trees, including those directly behind the Cawlo property, and recommended the removal of certain trees. Out On A Limb did not identify the tree that later fell and injured the Cawlo family.

Almost a year later, on July 18, 2018, while Mr. Cawlo and his two daughters were playing in their backyard, they were struck and seriously injured when an oak tree fell from the conservation easement into their backyard. The tree was at least 40 feet long, 1.5 feet in diameter, and had a rotting and decaying root system that caused the tree to uproot and fall.

Mr. Cawlo and his daughters filed separate lawsuits against the Reserve HOA, the management company, and Wingo d/b/a Out On A Limb for the injuries they suffered. Mrs. Rana

Cawlo filed her own lawsuit seeking damages for the deprivation of the use of her property. Their four separate lawsuits have been consolidated into one amended consolidated complaint.

The gravamen of the lawsuit against Wingo is that he negligently performed his duty in failing to identify and recommend the removal of the tree at issue. Therefore, as a result of his alleged negligent performance, he then caused or contributed to the injuries the Cawlos suffered.

Duty of Care for Dead, Dying, and Decaying Trees

Trees in their natural state, as with all living organisms, eventually die. Dying or dead trees fall, either in pieces or as a single, uprooted tree. When falling trees are heavy and substantially intact, they can cause great damage, such as the damage that single oak tree inflicted upon the Cawlo family. When harm befalls a family, especially when children are injured, there is a natural inclination to hold someone responsible, particularly those who potentially could have prevented such harm. The removal of the tree before it fell would have prevented harm to the Cawlos.

Before holding any person legally responsible, that person must first be found to have a legal duty or obligation to the injured party. The issue of whether a legal duty exists is a pure question of law. *See Yuzefovsky v. St. John's Wood Apts.*, 261 Va. 97, 106 (2001). The question of liability for negligence does not arise until a duty is shown to exist. *See Tingler v. Graystone Homes, Inc.*, 298 Va. 63, 79 (2019) (*citing Dudely v. Offender Aid & Restoration of Richmond, Inc.*, 241 Va. 270 (1991)).

The controlling question here is whether Wingo owed a legal duty to the Cawlo family. The answer, after reviewing the pleadings, arguments of counsel, and recent Virginia case law, is no. Under the facts and circumstances alleged in the amended complaint, Wingo does not owe a legal duty in tort. While his contract defines duties to the management company, those duties do not allow recovery in tort for the Cawlos.

Plaintiffs assert that Wingo owed them a duty of care in tort and breached his duty by failing to detect the hazardous tree. The complaint describes negligence by omission or nonfeasance, not by misfeasance. Under the law concerning hazardous trees, the distinction is critical.

The Supreme Court of Virginia defined the duty of a property owner as it relates to falling trees in *Cline v. Dunlora South, LLC,* 284 Va. 102 (2012). In *Cline*, a "dead, dying, and/or rotten" tree fell from Dunlora's property onto Cline's car while he was driving on a highway abutting the property. *Id.* at 104. Cline said the tree had been in a hazardous state for many years and that Dunlora should have known the hazard was present. That the tree eventually fell and injured a passing motorist was alleged to have been foreseeable. The Circuit Court nonetheless sustained a demurrer to the complaint and dismissed the case.

On appeal, the Supreme Court of Virginia concluded that a property owner does not owe a duty to others who are harmed outside the property due to the "natural conditions" of a tree falling when it is "dying, dead and/or rotten." *Id.* at 105. A duty of care does not exist despite the open and obvious distress of the tree, the alleged fact that the defendant in *Cline* knew or should have

known of the tree's condition, and the hazard posed to the approximately 25,000 vehicles that passed underneath the tree every day. *Id.*

Cline reiterated the common law principle that a "landowner owe[s] no duty to those outside the land with respect to natural conditions existing on the land, regardless of their dangerous condition." *Id.* (*citing Driggers v. Locke,* 323 Ark. 63 (1996)); *see also Giles v. Walker*, [1890] 24 Q.B.D. 656 (Eng.); W. Page Keeton, et al., Prosser & Keeton on Torts 390 (5th ed. 1984). *Cline* further extended this principle, concluding that a property owner owes no duty to those who make use of adjoining land and to inspect and remove sickly trees that may fall on a public roadway, injuring others. *See Cline,* 284 Va. at 108-109. The safety of public highways remained the province of government authorities and the Court emphasized that "the duty owed by adjoining property owners is to refrain from engaging in any act that makes the highway more dangerous than in a state of nature or in the state in which it has been left." *Id.* at 109.

An act that makes a condition more dangerous is an act of misfeasance rather than an act of nonfeasance. A dangerous condition discovered as such and left alone, even when to ignore it would amount to neglect, does not trigger the application of a duty of care to adjoining property owners. There is no legal generalized duty to all of mankind. All an individual has a duty to do is refrain from acting to place another in peril. *See Overstreet v. Security Storage & Safe Deposit Co.*, 148 Va. 306 (1927). This concept that there is an overarching duty to protect from both misfeasance and nonfeasance has been rejected as recently as in the 2019 case of *Tingler v. Graystone Homes, Inc.*, 298 Va. 63 (2019).

Plaintiffs have not alleged how Wingo made the tree more dangerous than it was in its natural state. The tree remained in its same natural condition from the time Wingo inspected the easement area to when it eventually fell – nearly a year after Wingo's presence at the site. Wingo also did not assume the duty to remove hazardous trees from the easement but observed and made recommendations.

Further, any harm the plaintiffs allege Wingo caused fails an imminence test. The tree fell nearly a year after Wingo's presence on the property. Any duty he is alleged to have had was not everlasting, absent a special relationship, but would have been to protect against an imminent danger. *See Dudas v. Glenwood Golf Club, Inc.*, 261 Va. 133 (2001). Not only were the plaintiffs unintended beneficiaries of Wingo's contract, but Wingo neither caused imminent harm nor had a duty to protect against imminent harm – in fact the harm that occurred was not "imminent" in temporal relation to Wingo's actions.

Black's Law Dictionary defines "imminent" as, "[n]ear at hand; mediate rather than immediate; close rather than touching; impending; on the point of happening; threatening; menacing; perilous." The temporal relationship between Wingo's presence at the easement and the tree falling was not imminent because when Wingo left the scene the tree was not "on the point of" falling, or was "perilous" – nothing harmful occurred for almost a year.

While there is no duty to protect the public from natural conditions existing on land, liability does attach when the defendant creates artificial conditions. *See RGR LLC v. Settle,* 288 Va. 260 (2014). The death of trees is not an artificial condition. When dead trees fall – as they will

inevitably do – that is the result of a natural, non-artificial, and reoccurring condition. Property owners must treat their land in a way that avoids *creating dangerous conditions* and harming others who are within reach of their negligence, but a tree falling statically does not create the danger that will subject the property owners to liability. *See Quisenberry v. Huntington Ingalls Incorporated,* 296 Va. 233 (2018) (emphasis added).

Following *Cline,* the above holdings were further explained under the well-reasoned Circuit Court decision in *Zook v. City of Norfolk,* 87 Va. Cir. 47 (Norfolk 2014) (Fulton, J.) In *Zook,* a tree fell on a passing motorist. The motorist sued three parties: the City of Norfolk, the Commonwealth of Virginia, and a private entity. The court's decision addressed only the City's and the Commonwealth's demurrers.

The tree at issue allegedly sat on property the City of Norfolk owned. The City was ultimately found to have a duty of care under the existing City Charter and the rule that municipalities are liable when failing to keep streets in proper order. *Id.* (*citing Clark v. City of Richmond,* 83 Va. 355, 388 (1888)). Relying on decisions from other states, the trial judge concluded that a public authority given notice of a hazardous tree has a duty to exercise reasonable care to prevent the hazard from injuring the public. *Id.*

As for the Commonwealth, the trial court first determined that although the highway was on property belonging to the City of Norfolk, the Commonwealth still had a general duty to remove and trim trees along it. *Id.* The court recognized, however, that sovereign immunity exists for the Commonwealth, and can only be waived consistent with the Virginia Torts Claims Act (VTCA). Under the VTCA, the Commonwealth is liable for injuries its employees' negligence causes "if a private person, would be liable for such damage, loss, injury or death." *Id.* The Circuit Court, relying on *Cline,* concluded that because a private landowner does not owe a duty to protect travelers on an adjoining public roadway from the natural conditions on the landowner's property, the Commonwealth's sovereign immunity was not waived under the VTCA.

Two years after *Zook* was heard, the Supreme Court of Virginia issued an unpublished opinion regarding Mr. Cline's lawsuit, at first blush reaching a conclusion apparently contradicting *Zook.* The Court determined that the Commonwealth was potentially liable when a motorist is injured by a falling tree while traveling along a highway. *See Cline v. Commonwealth,* No. 151037, 2016 WL 4721393 (Va. 2016) ("Cline II"). In Cline II, the Supreme Curt concluded that the facts stated were sufficient to allege that the Commonwealth had assumed a duty of care when one of its employees had specifically visited another person's property "to inspect the trees and remediate dangerous conditions" consistent with the Commonwealth's duty to maintain the safety of the highways.

The Cline II decision turned upon the analysis of whether the tree remediation program was a legislative function subject to sovereign immunity. More importantly, the complaint alleged the tree sat on property belonging to the Commonwealth. The Commonwealths' duty to the general public to maintain the safety of travelers combined with the tree's location on its property and the assumption to engage in a remediation program gave rise to sufficient facts to allow the case to continue. Those facts distinguish Cline II from this case.

While the Commonwealth had an obligation to the traveling public in Cline II, the difference here is the obligations of private individuals. In Cline II, the Commonwealth owed a duty after sending an employee to inspect a tree for public safety purposes, and that tree was on Commonwealth land. Here, the location of the tree had no relation to Wingo and Wingo did not intend to exercise care specifically to the Cawlos. Wingo was merely a hired contractor to observe trees for the HOA, not to consider the welfare of the public. His source of duty does not arise from laws establishing governmental responsibilities; His source of duty springs from his contract with the HOA's management company.

With respect to the issue of duty here, although the amended consolidated complaint alleged that the HOA had a duty to remove and remediate dangerous conditions, the contract upon which Wingo worked did not require him to remove dangerous trees. Unlike the Commonwealth in Cline II, a duty for Wingo was not established in contract nor in tort to the plaintiffs. Unlike the Commonwealth, Wingo does not owe a duty of ensuring safety to the public.

Most recently, the Supreme Court of Virginia in *Tingler v. Graystone Homes, Inc.*, 298 Va. 63 (2019) delineated when there is a lack of duty of care in tort versus in contract for service providers, addressing the "source of duty rule." The Court concluded that when a contract does not exist between two parties, and when no intended third-party beneficiary claim is pled, there cannot be recovery in tort for what is an act of nonfeasance. *Id.* at 75, 82.

Reciting familiar principles found in *Richmond Metro. Auth. v. McDevitt St. Bovis, Inc.*, 256 Va. 553, 558 (1998), the *Tingler* decision, 298 Va. at 81-82, restated the principle:

> If the cause of complaint be for an *act of omission or non-feasance* which, without proof of a contract to do what was left undone, would not rise to any cause of action (*because no duty apart from contract to do what is complained of exists*) then the action is founded upon contract, and not upon tort. If, on the other hand, the relation of the plaintiff and the defendants be such that a duty arises from the relationship, irrespective of the contract, to take due care, and the defendants are negligent, then the action is one of tort.

Tort liability cannot arise as a result of a party failing to do what he is contracted to do and "there is no tort liability for nonfeasance . . . in the absence of a duty to act apart from the promise made." *Id.* at 84 (citation omitted).

There is no relationship between the plaintiffs and Wingo, by contract or otherwise. Under the initial complaint, the plaintiffs had once alleged that Wingo had a duty to recommend a more extensive inspection program for the conservation easement, thereby rewriting the contact that had been in place between the parties. This excessive reach is an extension of the source of duty rule to place such duty upon a service provider solely because of the nature of the services rendered. One may question why a hired arborist need not exercise his expertise to ensure public safety, even when acting exceeds contract terms. Common law does not require every person to consider the welfare of mankind in general, particularly when abiding by limited contract terms, because each

individual in their professional capacity is not the insurer of the public safety, as is the case here when Wingo engaged in his work as an arborist.[1]

The Assumption of a Duty of Care

To circumvent the common law absence of a tort duty between Wingo and the plaintiffs, the plaintiffs argue that Wingo had assumed a duty of care when he accepted the contract from the management company to inspect for remediation the condition of trees, their proximity to adjoining property, and potential hazard they present.

To establish a claim of negligence based upon an assumption of a duty, the complaint must allege facts sufficient to show an agreement, promise, or express intent to undertake a duty to the particularly identified plaintiffs. *See Terry v. Irish Fleet, Inc.*, 296 Va. 129, 137 (2018). More importantly, the assumption of a duty requires the assumption be for the benefit of an identified party or be from conduct that increases the risk of harm or assumes a duty owed to another. *See Kellerman v. McDonough*, 278 Va. 478, 489-90 (2009); *see also Burns v. Gagnon*, 283 Va. 657, 672 (2012).

In *Kellerman*, the parents of a 14-year-old entrusted their daughter's care and supervision to the parents of the child's friend. The defendants, who lived in Henrico County, Virginia, had asked the 14-year-old, who was then living with her parents in North Carolina, to spend the weekend with them in Virginia.

The child's father drove up from North Carolina and, at a midway point, delivered his daughter to the defendants. The father emphasized that his daughter was not to be in a car with any inexperienced drivers or young male drivers, and that there were to be "no boys with cars." *Id.* at 485. Mrs. McDonough, one of the defendants, agreed and expressly said to the father "don't worry, I promise we'll take good care of her." *Id.* Later that day, Mrs. McDonough dropped the friends off at a mall and left them unsupervised. A young man stopped by the mall and offered to drive the girls home. Mrs. McDonough gave directions that the girls should go home with the boy – in direct contravention of the promise she had made to the girl's father. The 14-year-old tragically died due to the boy's reckless driving. Her parents sued the McDonoughs.

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[1] Plaintiffs mistakenly rely on the general propositions of common law duties announced under the Fairfax decision of *Orange v. Berkshire Prop. Advisors, LLC*, 83 VA. Cir. 234 (Fairfax 2011). The decision is published in two parts, with the first letter opinion sustaining a demurrer with leave to amend and a second letter opinion following the first – several months later when the same judge sustained the second demurrer with prejudice. In *Orange*, the question presented was whether a company hired expressly for the purpose of performing background checks should be liable for the murder of a tenant by a person whose criminal history should have made him ineligible for his hire as a building superintendent. As superintendent, he had unfettered access to the tenant's apartment. Like the harm caused by a falling decayed and diseased tree, the horrific crime committed against the tenant in *Orange* was equally foreseeable and avoidable. Although there are aspects of the *Orange* case that distinguish it from this case, the result is the same with respect to whether a service provider performing a service on behalf of one client assumes the responsibility of safety to the public at large. A duty does not arise absent a special relationship or if the assumption of a duty is made expressly on behalf of an identifiable beneficiary.

The Court determined that because Mrs. McDonough had expressly confirmed her assumption of duty to provide safe transportation, while also directing the children to ride home with the boy, she was liable for breaching her assumed duty. Therefore, the defendants together were found liable for breaching the duty of care.

In *Burns,* a high school vice principal learned about a fight that was to occur between the plaintiff and unnamed persons. When the vice principal was informed of the planned fight, he agreed to follow up and let security know, ensuring that measures would be taken to prevent the fight. The assumption was specific and directed toward the identified plaintiff who was ultimately injured when the vice principle failed to follow through with his promise. Therefore, the vice principle was found liable for breaching the duty of care he assumed.

The Second Restatement of Tort's requirement that a specific party be identified for a duty to be assumed is similar to the requirements for pleading third-party beneficiary claims under contract. In the current matter, Wingo did not expressly assume any duty of care to the Cawlos. In fact, there is no indication that he ever interacted with the Cawlos. Without express assumption, a duty cannot be found in contract.

The concept of refraining from acting to render a condition more dangerous is found under the Restatement (2d) of Torts, §324A. That Section provides:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care . . . if
>
> (a) his failure to exercise reasonable care increases the risk of such harm, or
> (b) he has undertaken to perform a duty owed by the other to the third party; or
> (c) the harm is suffered because of reliance of the other or the third person on the undertaking.

Mr. Wingo did not contract with the Cawlos but contracted with the HOA and the management company. He did not assume a duty to the Cawlos or understood them or the public at large who gain access to that part of the property to be intended third-party beneficiaries. Without an express assumption of duty to the plaintiffs, they cannot recover under what is essentially a breached contract claim between Wingo and the HOA's management company.

Mr. Wingo inspected the property as he was contracted to do. He allegedly failed to identify the hazardous tree that ultimately fell. A year later that tree fell and injured the plaintiffs. It is clear from the facts pled that Mr. Wingo did not increase the danger or create an imminent danger. Plaintiffs seek to hold Wingo accountable for what he failed to do. Absent an express assumption to the named Plaintiffs as evidenced in *Kellerman* and *Burns,* Wingo operated under no common law or statutory law duty of care that would subject him to tort liability brought by the owners and occupants of an adjoining property. For reasons stated, the demurrer must be sustained because Mr. Wingo's inaction does not allow recovery for personal injuries.

Amended Consolidated Complaint

By agreement, the parties to this action created a consolidated complaint, which this court entered in separate orders. The undersigned judge notes, however, that the consolidation of the actions was improper.

Ordinarily, where several actions have been filed with common issues of fact and law, the Court will consolidate for pre-trial and trial each of the separate cases and identify one case as the lead case for the consolidated cases. Here, the Cawlo family appropriately filed four separate lawsuits that should be consolidated. Due to the recent pleadings, the three cases that are not the lead case have incomplete records as explained further below:

(1) *Rana Cawlo v. Rose Hill Reserve Homeowners Association, Inc. et. al.,*
Case No. CL 2019-11700 (No Order on record entered for Consolidation)

(2) *James Cawlo v. Rose Hill Reserve Homeowners Association, Inc. et. al.,*
Case No. CL 2019-11702 (Order of Consolidation entered on May 28, 2020).

(3) [redacted] *Cawlo (by her next friend) v. Rose Hill Homeowners Association, Inc. et. al.,*
Case No. CL 2019-11704 (No Order on record entered for Consolidation)

(4) [redacted] *Cawlo (by her next friend) v. Rose Hill Homeowners Association, Inc et. al.,*
Case No. CL 2019-11705 (No Order entered on record for Consolidation)

The inherent authority of trial courts allows for the consolidation of cases. *See Clark v. Kimnach,* 198 Va. 737, 745 (1957). In filing the motion for consolidation, the plaintiffs misinterpreted the consolidation of actions as also inviting the joinder of the parties in one pleading and one case. The authority to consolidate cases or claims does not allow for the consolidation of the parties. The joinder of multiple plaintiffs in a single action remains a misjoinder. *See Juan Ortiz v. Ronald E. Barrett,* 222 Va. 118, 125-26 (1981); *see also Tingler*, 298 Va. at 73.

Under Virginia's Multiple Claimant Litigation Act, Va. Code § 8.01-267 *et. seq.*, several parties with similar claims can be consolidated if there are *six or more* plaintiffs. There are only four plaintiffs in this action. The Multiple Claimant Litigation Act was presumably enacted to govern cases similar to this case and to avoid unnecessary duplication. While the General Assembly has the authority to create procedures that will allow for the joinder of six or more parties, the court does not have the authority to do the same with the joinder of less than six parties absent a rule of court.

Virginia did not adopt the equivalent of Rule 42(a)(2) of the Federal Rules of Civil Procedure where consolidation of actions is authorized by rule of court and where actions can include multiple and different plaintiffs. Plaintiffs in Virginia's state courts seeking to proceed with multiple parties under a single complaint must qualify under the Act.

A misjoinder typically requires the dismissal of the other plaintiffs, but dismissal here would improperly place form over substance. All plaintiffs here originally filed separate lawsuits.

The record needs to reflect that the cases are what is consolidated, and the parties have agreed to continue the litigation with a combined filing for judicial economy purposes. Although any errors to the procedural posture of this action have been expressly waived by all parties, it is important for the record to reflect the consolidation properly.

Presently, this court's files for the other three plaintiffs, aside from Mr. Cawlo, include no new filings after April 23, 2020, with an order allowing for the withdrawal of a demurrer and filing of a second amended complaint. *See* Rana Cawlo (CL 2019-11700), [redacted] Cawlo (No. CL 2019-11704), and [redacted] Cawlo (CL 2019-11705). There are no further pleadings reflected in the separate files. Therefore, in the unlikely event that any of the other three plaintiffs seek to take an appeal of their case separate from James Cawlo, the last pleading that would constitute the record of their case would be the April 23, 2020 Order.

The present status of the cases is that the James Cawlo case is a complaint that contains misjoined plaintiffs by order of the court and the other three cases are incomplete. The procedural posture of the case should be corrected by the entry of an order amending the prior orders of consolidation and alerting the clerk's office that it is the cases that are consolidated and not the actions. The parties have agreed to proceed with consolidated pleadings and for judicial economy, the court will continue to allow unified pleadings in his matter. The parties should make an effort under the unified pleadings to list the case number for each of the separately filed lawsuits. The full caption does not have be used as long as the case numbers will alert the clerk's office to copy and populate the other files to ensure that each file has a complete record of these proceedings. The court entered a separate order of correction under which all the cases are captioned. The parties may rely on the numbers without repeating the captions.

Counsel for Wingo should draft and circulate an order sustaining the second demurrer. If Plaintiffs ask for leave to amend, they may be given an additional ten (10) days to file a second amended consolidated complaint directed only to defendant Wingo. If Plaintiffs do not seek leave to amend, the order should dismiss the consolidated cases.

The case will be placed on the court's Friday, December 4, 2020 at 9:00 a.m. for status only.

Sincerely,

[redacted]

John M. Tran
Judge, Fairfax Circuit Court