Circuit Court for Howard County
Case No. 13-C-13-094319

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0805

September Term, 2020

DAVID J. MARC, ET AL.

v.

RICHMOND AMERICAN HOMES OF MARYLAND, INC., ET AL.

Fader, C.J.,
Arthur,
Kenney, James A., III
(Senior Judge, Specially Assigned),

JJ.

Opinion by Fader, C.J.

Filed: January 18, 2022

The underlying subject of this litigation is the effect of the stormwater management system for a newly constructed housing development on an adjacent, downhill property. The primary issue in this appeal, however, does not concern the merits of that dispute. Instead, this appeal concerns whether the appellants, David J. and Deborah A. Marc (the "Marcs"): (1) were precluded from pursuing a claim for injunctive relief against some or all of the appellees after a prior decision of this Court; and (2) if not precluded, chose a viable path to pursue such a claim.

After this Court last remanded this case to the Circuit Court for Howard County, the parties presented differing interpretations of our mandate, which led to a fundamental disconnect as to what should have occurred next. The ensuing procedural confusion significantly complicated the issues that were presented to the circuit court and the issues now presented on appeal. Ultimately, we: (1) agree with the circuit court that the Marcs could not pursue a claim for injunctive relief by either (a) a motion filed in a case that had been fully resolved or (b) a complaint that did not clearly state a new cause of action and allege facts to support the elements required for their request for injunctive relief; (2) hold that the Marcs were not precluded by res judicata or laches from pursuing their claim for injunctive relief to the extent that it was based on events occurring after the conversion of a silt pond to a stormwater management pond; and (3) hold that the circuit court should have provided the Marcs leave to amend their complaint against some, but not all, of the appellees. Accordingly, we will affirm the circuit court's denial of the Marcs' motions to reopen, for a new trial, and for a post-remand injunction; affirm in part, vacate in part, and reverse in part the court's dismissal of the complaint and summary judgment rulings; and

remand for further proceedings. We will also reverse an award of sanctions against the Marcs.

BACKGROUND

The Parties

The Marcs, the plaintiffs below, own a five-acre property situated at 6145 Old Washington Road in Elkridge on which they built their home. Much of the Marcs' property is subject to a conservation easement in favor of the Rockburn Land Trust, Inc., which contains significant restrictions on the Marcs' use of the property. The purpose of the easement "is to maintain the significant conservation features [of the property] . . . and the dominant scenic, cultural, rural, agricultural, woodland and wetland characteristics of the Property, and to prevent the use or development of the Property for any purpose or in any manner that would conflict with these features and characteristics and the maintenance of the Property in its open-space condition."

Richmond American Homes, Inc. ("Richmond"), an appellee and a defendant below, is the developer of the Augustine Valley Development, a seven-acre housing development situated uphill from the Marcs' property. Richmond is the successor-in-interest to Emily's Delight, LLC, the original developer of the land.

Augustine Valley Homeowners Association, Inc. (the "HOA"), an appellee and a defendant below, is a homeowners association created for the Augustine Valley Development. The HOA is the owner of certain portions of the Augustine Valley Development, including "Lot 4," the lot in the development on which certain stormwater management features that are central to the present dispute are located.

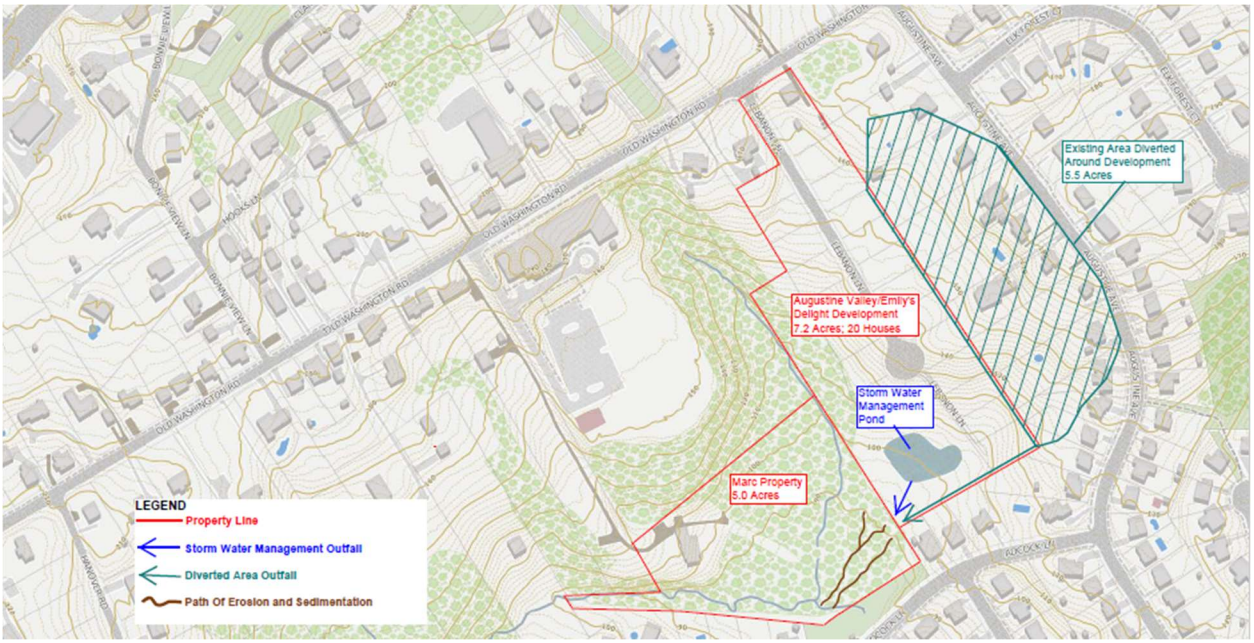
In addition to Richmond, Emily's Delight, and the HOA, the Marcs also named as defendants more than 30 present and former owners of the 20 homes located in the Augustine Valley Development (the "Individual Homeowners"). All of the Individual Homeowners were members of the HOA at the time they owned homes in the Augustine Valley Development. Several of the Individual Homeowners no longer owned homes in the Augustine Valley Development at the time they were named as defendants in the Marcs' sixth amended complaint, which is the operative complaint for purposes of this appeal.

Howard County, Maryland (the "County") has ownership of and responsibility for the manmade aspects of the stormwater management features that are at issue in this appeal. Pursuant to a Developer Agreement and a Maintenance Agreement, both dated May 17, 2011, and Howard County Code § 18.504(b), the County agreed to accept future storm drains, stormwater management facilities, and landscaping that together made up the stormwater management system for the Augustine Valley Development into the County's system of publicly operated and maintained facilities. On October 24, 2019, the County officially assumed ownership of, and operation and maintenance responsibility for, the facilities. As noted, the HOA continues to own Lot 4, on which the facilities are located.

Factual Background

Emily's Delight initiated the development of the Augustine Valley Development in 2011. Richmond took over the project in late 2012 and built 20 homes, which were subsequently sold to and occupied by the Individual Homeowners. As part of the project, Emily's Delight and Richmond cleared and regraded the land and then constructed a

stormwater management system with two features that the Marcs contend were the source of excessive stormwater runoff onto their property through April 2016. First, Richmond constructed a "riprap channel" around the border of the development, which diverted runoff coming from uphill properties around the development and onto the Marcs' property at a specific point.[1] Second, Richmond constructed a "silt pond" on Lot 4 to collect runoff that landed on the development and then directed it onto the Marcs' property at a point near where the riprap channel also deposited runoff. A depiction of the properties and those features, which the Marcs introduced at trial, is below:



As we will explain, around the time of the September 2016 trial of this matter, Richmond converted the silt pond into a stormwater management pond.[2]

[1] The riprap channel is alternately referenced in the parties' briefs and in the record as a "diversion swale." For simplicity, we will refer to it in this opinion as a riprap channel.

[2] Silt ponds and stormwater management ponds are both used to capture stormwater runoff. A silt pond is a temporary structure that is typically built during the construction phase of a development "to stop sediment flow that results from disruption and

Procedural Background

The Marcs filed their initial complaint in March 2013. By the time the matter proceeded to trial in September 2016, the operative complaint was the Marcs' three-count fifth amended complaint, which they filed in February 2016. In Count I, the Marcs alleged that the appellees collectively had altered the natural course of surface water over the Augustine Valley Development in such a way as to cause runoff onto their property "in inordinate amounts," that doing so had created a nuisance, and that their property suffered resulting damage in the form of flooding, sediment deposition, "erosion, loss of trees and a general degrading of the natural habitat." The Marcs sought damages in excess of $75,000. In Count II, the Marcs alleged that the intruding water constituted a trespass on their property, which resulted in the same damages as the nuisance, for which the Marcs also sought damages in excess of $75,000. In Count III, the Marcs alleged that the

earthmoving during construction." *Richmond American Homes of Maryland, Inc. v. Marc*, No. 2692, Sept. Term 2016, 2019 WL 2913976, at *2 (Md. App. July 8, 2019) ("*Marc II*"); *see also* COMAR 26.17.01.01 – 26.17.01.11 (enumerating requirements for erosion and sediment control plans). By contrast, "a stormwater management pond is a permanent structure meant to manage stormwater after construction has concluded." *Marc II*, 2019 WL 2913976, at *2 (emphasis removed); *see* COMAR 26.17.02.01 – 26.17.02.11 (setting forth requirements for stormwater management plans). According to the State's official manual on sediment control, the removal of temporary sediment control measures and the installation of "final" stormwater management measures should "be integrated . . . to address these different stages of plan development." Maryland Dep't of the Env't, 2011 Maryland Standards and Specifications for Soil Erosion and Sediment Control A-14 (Dec. 2011), *available at* https://perma.cc/5AWG-FUDN (last accessed Dec. 23, 2021). Just before the 2016 trial, as Richmond completed the development, it excavated the silt pond and converted it into a stormwater management pond. As described by the Marcs, the conversion involved the "planting of grass, removing silt from the bottom of the pond to increase its capacity, inserting a different orifice to control the amount of flow out of the pond, and installing some pipes."

increased water runoff interfered with their "use and occupancy of their property," "[wa]s causing continuous and progressive damage to [their] property," and that they were "without an adequate remedy at law to abate the continued physical degradation of their property[.]" The Marcs sought "an injunction prohibiting Defendants from the continuing diversion of excessive and unreasonable water run-off onto Plaintiffs' property and direct[ing] Defendants to abate and cure these conditions."

After conducting a three-day bench trial in September 2016, the circuit court: (1) found that all the defendants had "engaged in creating a nuisance on Plaintiffs' land"; (2) found that Richmond and Emily's Delight had "engaged in trespass onto [the Marcs'] property through the intrusion of silt and storm water runoff"; (3) awarded nominal damages of $1.00 for each of Counts I and II, because the Marcs had failed to prove any measurable financial harm; and (4) entered an injunction against Richmond and the HOA. The injunction prohibited Richmond and the HOA "from allowing or causing concentrated flow of storm water runoff from Defendants' property or storm water management structures onto [the Marcs'] property in an amount that causes soil erosion or other damage when rainfall is Five Point Two (5.2) inches or less in a twenty-four (24) hour period at the location of Defendants' property[.]"[3]

Although the circuit court acknowledged that the runoff onto the Marcs' property was coming from two concentrated flows, it did not differentiate between damage coming

[3] The circuit court initially entered an injunction against the Individual Homeowners as well, but agreed to enter the injunction against only Richmond and the HOA after the HOA passed a resolution to assume responsibility for the liability of the Individual Homeowners "in the event of a violation of the injunction."

from one source or the other in reaching its conclusion that the runoff flow was unreasonable. Instead, the court identified the problem as the unreasonable flow of runoff generally. Reflective of that conclusion, the court acknowledged that the conversion of the silt pond to a stormwater management pond might have solved the problem, expressed hope that "there would [be] no further damage" to the Marcs' property as a result of that conversion, but concluded that it was not possible to know whether that was the case. The court issued the injunction.

Marc II

Richmond, the HOA, and the Individual Homeowners filed an appeal in which they challenged only the circuit court's issuance of the injunction. In an unreported opinion, this Court reversed the injunction without disturbing any other aspect of the circuit court's judgment. *Richmond American Homes of Maryland, Inc. v. Marc*, No. 2692, Sept. Term 2016, 2019 WL 2913976, at *3 (Md. App. July 8, 2019) ("*Marc II*").[4] Our opinion concluded that the injunction was unsustainable because of the conversion of the silt pond to a stormwater management pond around the time of trial. *Id.* Because the silt pond was no longer in place, we held that an injunction could not be issued with respect to the future flow of water from it; and because no evidence was (or could have been) presented at trial that the stormwater management pond was not adequate to control the flow of stormwater

[4] We refer to this Court's July 2019 opinion as *Marc II* because there was an earlier appeal that was resolved in an unreported opinion, *Marc v. Richmond American Homes of Maryland, Inc.*, No. 1476, Sept. Term 2014, 2015 WL 7443185 (Md. App. Nov. 12, 2015). Because that first appeal has no bearing on the issues involved here, we will not discuss it further.

onto the Marcs' property, the record did not support issuance of an injunction with respect to it either. *Id*. We therefore remanded the case to the circuit court "to dissolve its permanent injunction." *Id*.

The opinion in *Marc II* concluded with the following passage, which led to significant controversy on remand:

> We qualify, however, that this resolution is without prejudice to the right of the Marcs to seek injunctive relief for any unreasonable runoff experienced subsequent to the conversion of the runoff management structure from a silt pond to a stormwater management pond. Because there was no evidence before the trial court to suggest that the stormwater management pond was not functioning properly, such a request for a new injunction would not be barred by res judicata. *See Eberly v. Balducci*, 61 Md. App. 80, 84-88 (1984) (holding that a second petition for injunctive relief could not be barred as res judicata because the "substantive issues of th[e] dispute ha[d] not been decided" in the original hearing).

Id. In a footnote following that passage, we added that "if a new injunction is sought, the injunction must address Howard County's role in maintaining the structural elements of the stormwater management pond to comply with Maryland Rule 15-502(e)."[5] *Id.* at *3 n.5.

The Marcs moved for reconsideration on the ground that by focusing the opinion in *Marc II* exclusively on the silt pond and stormwater management pond, this Court had

[5] Rule 15-502(e) provides:

> Form and Scope. The reasons for issuance or denial of an injunction shall be stated in writing or on the record. An order granting an injunction shall (1) be in writing (2) be specific in terms, and (3) describe in reasonable detail, and not by reference to the complaint or other document, the act sought to be mandated or prohibited.

failed to address the separate damage that the circuit court had found was being caused by the riprap channel. In response, the appellees pointed out that the circuit court had not identified separate damage from the riprap channel and had posited that the stormwater management pond might have solved the problem. This Court denied the motion for reconsideration without comment. Neither party sought further review of this Court's decision by the Court of Appeals.

The Circuit Court's Decision on Remand

On remand to the circuit court, the Marcs filed a Motion to Re-Open the Case and/or for a Post-Remand New Trial, along with a Motion for Post-Remand Injunctive Relief, in which they sought a new injunction. In opposing both motions, the appellees argued that the Marcs were not entitled to any remedy based on the 2016 trial because the claims at issue in that trial had been fully resolved, none of the evidence presented at trial related to the stormwater management pond, and the claims that were resolved could not be reopened based on res judicata. The appellees also argued that the motion was deficient because the Marcs had not included the County as a party and still sought relief against all the original homeowners. At a hearing on February 4, 2020, the court agreed with the appellees and ordered the Marcs to file a new complaint.

The Marcs filed their sixth amended complaint on February 20, 2020. The new complaint named all of the original defendants, added the County and 11 new individual homeowners as defendants, repeated verbatim the allegations contained within the three counts of the fifth amended complaint, and added a new Count IV for "post remand injunctive relief." In the new Count IV, the Marcs added basic allegations about the new

individual homeowners, largely repeated allegations about the past actions of the appellees, and added allegations that the stormwater management pond had "not abated the unreasonable and damaging flow of water from what was previously the silt pond" and was continuing to cause damage to the Marcs' property. The Marcs also alleged that the flow of water "has continued and will continue to cause future erosion and damage to the Marc property" in the absence of an injunction prohibiting the appellees from continuing to divert runoff onto their property and requiring the appellees "to capture the storm water runoff from both the stormwater management pond and diversion swale outfalls and convey the flow through [the Marcs'] property . . . by Defendants' installing an underground pipe or such other alternative, reasonable methods to ameliorate the condition[.]"

The appellees filed three motions to dismiss or in the alternative for summary judgment: one by the County; a second by Steve Sirianni, a former homeowner; and a third by all other appellees. After a hearing, the circuit court granted all three motions. The court agreed that the sixth amended complaint failed to state a claim on which relief could be granted because it did not identify a cause of action and instead sought injunctive relief apparently tethered only to previously resolved claims from the fifth amended complaint. Addressing the summary judgment motions, the court also ruled that: (1) res judicata barred claims related to the riprap channel; (2) claims based on the construction of the stormwater management pond were barred by laches; (3) the Marcs could not pursue injunctive relief because it was possible to identify the monetary cost required to prevent the harm they alleged; and (4) the claims against the County failed because the Marcs had not alleged any wrongdoing by the County, any such claims were barred by laches, and the

County was protected by the public duty doctrine. The court also awarded sanctions against the Marcs under Rule 1-341 based on their joinder of all the Individual Homeowners, but awarded only $1,600 in legal fees sought by Mr. Sirianni, the only such homeowner who had incurred attorney's fees because he was separately represented.

The Marcs timely appealed.

DISCUSSION

Our primary task is to untangle the parties' divergent views of this Court's mandate in *Marc II* to determine whether the Marcs chose a viable path to pursue their claim for injunctive relief on remand. As we will discuss below, we conclude that the circuit court correctly ruled that the Marcs had improperly pursued an injunction by filing a motion to reopen the case that was litigated in 2016, and the court also correctly dismissed the Marcs' subsequently filed sixth amended complaint for failure to state a claim.

We disagree, however, with the court's rulings that (1) the Marcs were precluded by res judicata and laches from pursuing an injunction to the extent that their claim was premised on events occurring after the conversion of the silt pond to the stormwater management pond; (2) the appellees were entitled to summary judgment based on an absence of irreparable harm; and (3) the public duty doctrine applied to the County's role in this case. As a result, the court should have permitted the Marcs to amend their complaint with respect to claims against the appellees other than the Individual Homeowners. We also conclude that, under the circumstances, the circuit court abused its discretion in awarding sanctions against the Marcs for pursuing litigation against the

Individual Homeowners. Accordingly, we will affirm the court's rulings in part, reverse in part, vacate in part, and remand for further proceedings.

I. THE REMAND

The procedural history of this matter following *Marc II* reflects the confusion resulting from the parties' differing understandings of the status of the case upon remand. We will, therefore, begin by clarifying that status.

The fifth amended complaint contained three counts. Counts I and II, for nuisance and trespass, were resolved in favor of the Marcs as to liability, although they received only nominal damages of $1.00 on each count. Because no party appealed any issue related to those two counts, the circuit court's resolution of them was final and was not disturbed by the subsequent appellate proceedings.

In Count III, the Marcs sought injunctive relief, which the circuit court awarded. This Court held that the circuit court had erred in awarding injunctive relief and remanded the case "with instructions to the Circuit Court for Howard County to dissolve its permanent injunction." *Marc II*, 2019 WL 2913976, at *3. We did not remand for a new trial or for the circuit court to consider imposition of a new injunction based on the existing trial record. Indeed, our holding precluded the possibility that the trial record could support an injunction. *Id.* The circuit court's dissolution of the then-existing permanent injunction therefore constituted a full and final resolution of Count III of the fifth amended complaint. Once the injunction was dissolved, the action was concluded, with nothing more to be done.

In arguing to the contrary, the Marcs rely on the statement, noted above, toward the conclusion of the opinion in *Marc II* that our "resolution is without prejudice to the right

of the Marcs to seek injunctive relief for any unreasonable runoff experienced subsequent to the conversion of the runoff management structure from a silt pond to a stormwater management pond." *Id.* When read in the context of the rest of the opinion, that passage reflects merely that the opinion in *Marc II* does not foreclose a future claim for an injunction based on damages incurred after the creation of the stormwater management pond. The passage does not suggest that a claim for injunctive relief could be made on remand premised on the fully resolved fifth amended complaint.[6] To the contrary, such relief would necessarily have to be predicated on a new cause of action arising out of the new factual circumstance of runoff emanating, at least in part, from the stormwater management pond.

Finally, to the extent that the Marcs argue that the circuit court could have imposed injunctive relief on remand based on the evidence and findings from the first trial related to the riprap channel alone, we disagree. In *Marc II*, this Court held that the circuit court erred in issuing injunctive relief and ordered that the injunction be dissolved. *Id.* In their motion for reconsideration, the Marcs argued that this Court's opinion had not fully

[6] The Marcs also claim support for their position in this Court's citation in *Marc II* to *Eberly v. Balducci*, 61 Md. App. 80, 84-88 (1984). Notably, however, the parenthetical included with the citation is limited to the *Eberly* Court's holding that res judicata could not bar a second petition for injunctive relief where the substantive issues in the dispute had not been decided. *See Marc II*, 2019 WL 2913976, at *3. This Court did not cite *Eberly* for the proposition that a new request for injunctive relief could be brought on remand in the same case. In that respect, it is noteworthy that *Eberly* arose in a much different procedural posture than this case's posture following *Marc II*. In *Eberly*, the trial court had never properly adjudicated the merits of the original dispute. Here, by contrast, the fifth amended complaint was fully and finally adjudicated once the circuit court dissolved the permanent injunction on remand.

accounted for the circuit court's findings concerning the riprap channel, which they contended could independently support injunctive relief. This Court disagreed and so denied the motion for reconsideration. The Marcs did not seek further review in the Court of Appeals. Accordingly, all matters involving the fifth amended complaint were fully and finally resolved.[7]

II. THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE MARCS' MOTIONS TO REOPEN THE CASE, FOR A NEW TRIAL, AND FOR INJUNCTIVE RELIEF, AND INSTEAD REQUIRING THE MARCS TO FILE A NEW COMPLAINT.

The Marcs first challenge the circuit court's denial of their motions to reopen the case, for a new trial, and for injunctive relief. We discern no abuse of discretion in the circuit court's decision and, accordingly, will affirm it.

The standard of review applicable to rulings on motions to reopen, for a new trial, and for an injunction is abuse of discretion. *See Syed v. State*, 236 Md. App. 183, 219 (2018), *rev'd on other grounds*, 463 Md. 60 (2019) (motion to reopen); *Williams v. State*, 462 Md. 335, 344 (2019) (motion for new trial); *Ademiluyi v. Egbuonu*, 466 Md. 80, 93 (2019) (issuance of injunction).

[7] As we will explain, we do not agree with the appellees that the resolution of the claims made in the fifth amended complaint bars the Marcs from bringing future claims for damages caused by the flow of runoff from the riprap channel and the stormwater management pond together. In *Marc II*, the prior panel treated the injunction as addressing the flow of runoff from two sources—the riprap channel and the no-longer-extant silt pond—and concluded that trial evidence could not support an injunction because the factual circumstance litigated in the trial no longer existed. That ruling does not bar a claim that a new factual circumstance—flow of runoff from the riprap channel and the stormwater management pond—could support a cause of action giving rise to a right to injunctive relief.

The Marcs' motions to reopen the case, for a new trial, and for injunctive relief all were premised on the understanding that this Court's decision in *Marc II* had remanded the case to the circuit court to consider issuing a new injunction based, at least in part, on the claims in the fifth amended complaint. As discussed above, that is not so. This Court's decision in *Marc II* fully and finally resolved the issues presented in the fifth amended complaint, subject only to the at-that-point ministerial task of the circuit court dissolving the permanent injunction. All the relief that was available based on the claims presented in that complaint had been awarded. Under the circumstances, the circuit court did not abuse its discretion in ruling that the Marcs needed to file a complaint stating a new cause of action to pursue a new claim for injunctive relief.[8]

III. THE CIRCUIT COURT DID NOT ERR IN DISMISSING THE SIXTH AMENDED COMPLAINT BUT SHOULD HAVE GRANTED THE MARCS LEAVE TO AMEND.

A. The Circuit Court Did Not Err in Dismissing the Sixth Amended Complaint.

The Marcs next argue that the circuit court erred in dismissing the sixth amended complaint.[9] At the outset, we must identify the nature of the court's ruling. Although the

[8] The Marcs assert that they should not be required to go back to "square one" to litigate a new cause of action. Because of the effect of collateral estoppel with respect to any facts actually litigated and resolved in the 2016 trial, they would not be required to do so. *See Dabbs v. Anne Arundel County*, 458 Md. 331, 340 n.9 (2018) ("Collateral estoppel provides that, '[w]hen an issue of fact or law is actually litigated and determined by a valid final judgment, and the determination is essential to the judgment, the determination is conclusive even in a subsequent action between the parties, whether on the same or a different claim.'" (quoting *Cosby v. Dep't of Human Res.*, 425 Md. 629, 639 (2012))).

[9] A different judge ruled on the motions to dismiss or for summary judgment than had ruled on the earlier motions.

court announced that it would treat the appellees' motions as for summary judgment, it used different standards for its multiple rulings. In determining that the sixth amended complaint failed to state a claim on which relief could be granted, the court applied the standard applicable to a motion to dismiss. In ruling on the other arguments made by the appellees, including res judicata and laches, the court applied a summary judgment standard. We will treat the court's rulings accordingly and begin with an analysis of whether the sixth amended complaint stated a claim on which relief could be granted.

"When deciding whether to grant a motion to dismiss a complaint as a matter of law, a trial court is to assume the truth of factual allegations made in the complaint and draw all reasonable inferences from those allegations in favor of the plaintiff." *Nationstar Mortg. LLC v. Kemp*, 476 Md. 149, 169 (2021). "Dismissal is proper only if the alleged facts and permissible inferences, so viewed, would, if proven, nonetheless fail to afford relief to the plaintiff." *Torbit v. Baltimore City Police Dep't*, 231 Md. App. 573, 583 (2017) (quoting *O'Brien & Gere Eng'rs, Inc. v. City of Salisbury*, 447 Md. 394, 403-04 (2016)). "When an appellate court reviews a trial court's grant of a motion to dismiss, the appellate court applies the same standard to assess whether the trial court's decision was legally correct." *Nationstar Mortg.*, 476 Md. at 169. The resolution of a motion to dismiss necessarily turns on a question of law and, accordingly, is reviewed without deference. *Id.*

In accord with the Marcs' view that their request for injunctive relief on remand was simply a continuation of the claims pled in their fifth amended complaint, their sixth amended complaint repeated verbatim nearly all of the allegations in the earlier complaint and tacked on a new Count IV, which sought "post-remand" injunctive relief premised on

the allegations of the fifth amended complaint and new allegations that the continuing harm from the diversions of water had not abated with the implementation of the stormwater management pond. The sixth amended complaint thus included three counts that had already been fully and finally resolved, and a stand-alone count for an injunction.

In determining that the sixth amended complaint did not state a claim for relief, the circuit court first concluded that re-litigation of the first three counts of the complaint was barred by res judicata. The court then observed, correctly, that an injunction—the title the Marcs assigned to their new Count IV—is not a cause of action. Rather, an injunction is a form of equitable relief that a court may award after a plaintiff has proven liability on an underlying cause of action.[10] *See* Paul Mark Sandler et al., *Injunctions, Mandamus, and Declaratory Judgments*, *in* Pleading Causes of Action in Maryland § 7.3 (6th ed. 2018) (stating that where "requests for injunctive relief relate to independent causes of action, such as nuisance, . . . counsel must take care to plead properly and fully the elements of a cause of action which support the request for injunctive relief"); *see also Fare Deals Ltd. v. World Choice Travel.Com, Inc.*, 180 F. Supp. 2d 678, 682 n.1 (D. Md. 2001) ("[A] request for injunctive relief does not constitute an independent cause of action; rather, the injunction is merely the remedy sought for the legal wrongs alleged[.]"). Because Count

[10] In the fifth amended complaint, although Count III was identified as a claim for an injunction, it was premised on the earlier-stated causes of action for nuisance and trespass. Had the court not found that the appellees had committed a nuisance or a trespass, it would not have had any authority to consider imposing an injunction. *See, e.g.*, *Plank v. Cherneski*, 469 Md. 548, 609-10 (2020) (holding that the trial court properly denied injunctive relief to redress alleged wage and hour violations given its finding that no wage violations presently existed).

IV, the only viable count in the sixth amended complaint, was identified as seeking an injunction without identifying an underlying cause of action, the court determined that it failed to state a claim on which relief could be granted and so had to be dismissed.

Notably, however, the dispositive issue in determining whether a complaint states a claim on which relief can be granted is not whether the complaint correctly identifies or names a cause of action. In Maryland, although Rule 2-303(a) requires that "[e]ach cause of action shall be set forth in a separately numbered count," "[n]o technical forms of pleading are required," Md. Rule 2-303(b), and "[a]ll pleadings shall be so construed as to do substantial justice," Md. Rule 2-303(e). The purpose of the complaint is "to provide notice of the plaintiff's claims, establish the facts supporting those claims, and 'define[ ] the boundaries of the litigation.'" *1000 Friends of Md. v. Ehrlich*, 170 Md. App. 538, 546-47 n.8 (2006) (quoting *Scott v. Jenkins*, 345 Md. 21, 27-28 (1997), *superseded by rule*, Md. Rule 5-607, *as stated in Hoile v. State*, 404 Md. 591, 610 (2008)). Thus, "[u]nder our liberal rules of pleading, a plaintiff need only state such facts in his or her complaint as are necessary to show an entitlement to relief." *B & P Enters. v. Overland Equip. Co.*, 133 Md. App. 583, 621 (2000) (quoting *Johns Hopkins Hosp. v. Pepper*, 346 Md. 679, 698 (1997)). "[I]t is not essential for the plaintiff to identify the particular 'legal name' typically given to the claim he has pled. The critical inquiry is not whether the complaint specifically identifies a recognized theory of recovery, but whether it alleges specific facts that, if true, would justify recovery under any established theory." *Higginbotham v. Pub. Serv. Comm'n of Maryland*, 171 Md. App. 254, 272 (2006) (quoting *Tavakoli-Nouri v. State*, 139 Md. App. 716, 730-31 (2001)). The dispositive issue is thus not whether the

Marcs correctly named a cause of action underpinning their request for injunctive relief but whether they set forth such factual allegations as are necessary to establish the elements of a cause of action that would entitle them to such relief.

Here, the Marcs' allegations supporting Count IV of the sixth amended complaint identified facts supporting the basic elements of claims for both nuisance and trespass. A private nuisance is a "nontrespassory invasion of another's interest in the private use and enjoyment of land" that is "substantial and unreasonable." *Echard v. Kraft*, 159 Md. App. 110, 116-17 (2004) (quoting § 821D of the Restatement (Second) of Torts (1979)). The necessary elements for a cause of action for private nuisance are that: "(1) [the plaintiff's] injury was of such 'a character as to diminish materially the value of the property for' use as a dwelling *and* (2) [the defendant's] actions caused 'serious interference with the ordinary comfort and enjoyment' of the [plaintiff's] property." *Echard*, 159 Md. App. at 122 (quoting *Slaird v. Klewers*, 260 Md. 2, 9 (1970)). In Count IV, the Marcs described actions they alleged one or more of the appellees had taken in altering the flow of water onto their property by construction of the riprap channel and, initially, the silt pond, each of which they alleged separately caused "concentrated stormwater flows onto [their] property." The Marcs also alleged that the increased waterflow from the diversions "has interfered with [their] use and enjoyment of their property," that the "increased storm water flow" was continuing as of the date they filed the sixth amended complaint (February 2020), and that it would continue to interfere with their "use and occupancy of their property" and cause progressive damage. They further alleged that the replacement of the silt pond with the stormwater management pond "has not abated the unreasonable and

damaging flow of water," which was "still reaching [their] property in unreasonable and damaging amounts causing erosion[.]"

The elements of a cause of action for trespass are: (1) "interference with a possessory interest" in the plaintiff's property; (2) by "the defendant's physical act or force against that property"; and (3) performed without the plaintiff's consent. *United Food & Com. Workers Int'l Union v. Wal-Mart Stores, Inc.*, 228 Md. App. 203, 234 (2016) (quoting *Royal Inv. Grp., LLC v. Wang*, 183 Md. App. 406, 444-45 (2008)), *aff'd*, 453 Md. 482 (2017). The Marcs alleged in Count IV that the appellees, by their physical actions in diverting storm water in unreasonable amounts onto the Marcs' property, interfered with the Marcs' "use and occupancy of their property," and it is clear from the allegations that the Marcs did not consent to the appellees' actions.

Although these allegations at least arguably constitute "specific facts that, if true, would justify recovery under an[] established theory," *Higginbotham*, 171 Md. App. at 272 (quoting *Tavakoli-Nouri*, 139 Md. App. at 730-31), we nonetheless conclude that the circuit court did not err in granting the motion to dismiss the sixth amended complaint for two reasons. First, in responding to the motion to dismiss, the Marcs did not contend that they had sufficiently pled facts in Count IV to establish unnamed causes of action for nuisance or trespass. Instead, they argued that they did not need to do so, based on their mistaken understanding of the scope of this Court's prior remand. The circuit court was not required to consider an argument the Marcs did not make to avoid dismissing their complaint. Second, the only relief the Marcs sought in Count IV was issuance of an injunction. To obtain a permanent injunction, a plaintiff "must allege and prove facts 'that

it will sustain substantial and irreparable injury as a result of the alleged wrongful conduct.'" *Yaffe v. Scarlett Place Residential Condo., Inc.*, 205 Md. App. 429, 457 (2012) (quoting *El Bey v. Moorish Sci. Temple of Am., Inc.*, 362 Md. 339, 355 (2001)). As the appellees note, the Marcs did not allege in Count IV that the damage to their property resulting from the alleged wrongful conduct would be irreparable. Because the Marcs sought only injunctive relief, their failure to plead facts to support a required element to obtain such relief made dismissal appropriate.[11]

B. The Circuit Court Should Have Granted the Marcs Leave to Amend.

Ordinarily, when a court dismisses a complaint on grounds that may be capable of being remedied, it should grant the plaintiff leave to amend. *See, e.g.*, *Tavakoli-Nouri*, 139 Md. App. at 733 ("Technical pleading defects that do not impede the defendants' right to be informed of the nature of the action against them do not warrant dismissal without leave to amend."); *Gallant v. Bd. of Sch. Comm'rs of Baltimore City*, 28 Md. App. 324, 331 (1975) ("The opportunity to amend should be freely granted 'to the end that cases be tried on their merits rather than upon the niceties of pleading.'" (footnote omitted) (quoting *Hall v. Barlow Corp.*, 255 Md. 28, 39-40 (1969))). We presume that the circuit court did not consider affording the Marcs leave to amend because it went on to decide, using a summary

[11] The Marcs further contend that the circuit court erred in not applying the law of the case, which, in their view, would have "bound [the parties] and barred [them] from challenging the findings and conclusions" of the circuit court insofar as those findings were not disturbed by this Court in *Marc II*. That view, however, is premised on the understanding that this Court had remanded the case for further proceedings on the claims made in the fifth amended complaint. As explained, that is not correct. Nonetheless, as set forth above, principles of collateral estoppel may apply to similar effect.

judgment standard, that their claims were barred, which would have rendered any amendment futile. As we will discuss below, however, we disagree with those summary judgment rulings. We therefore conclude that the court should have provided the Marcs leave to amend their complaint to remedy its defects with respect to the defendants other than the Individual Homeowners.[12]

We reach a different conclusion with respect to the claims against the Individual Homeowners because amending the complaint with respect to those defendants would be futile. Other than bald, conclusory allegations made generically with respect to all defendants, the Marcs did not allege that any of the Individual Homeowners had any role in creating the stormwater management system, have any role in operating it, or own any of the land on which it is located. To the contrary, the developers created the stormwater management system, the County is now responsible for the manmade structures in the stormwater management pond, and the HOA owns the land on which the system is located. Under these circumstances, the Marcs have not identified any authority that would permit the continued assertion of claims for injunctive relief against the Individual Homeowners based on their ownership of land containing impervious soil over which water runoff flows into a stormwater management system they do not own or manage. We will therefore affirm the dismissal of the Marcs' claims against the Individual Homeowners.

[12] We observe that this was not the ordinary situation involving a sixth amended complaint. Ordinarily, six tries would be well more than should be necessary for a plaintiff to set forth a viable claim. Here, however, this was effectively the Marcs' first attempt to state their new claim.

IV. THE CIRCUIT COURT ERRED IN GRANTING SUMMARY JUDGMENT ON THE GROUNDS OF RES JUDICATA, LACHES, AND LACK OF IRREPARABLE HARM.

In addition to concluding that the sixth amended complaint failed to state a claim on which relief could be granted, the circuit court also granted summary judgment against the Marcs on the ground that their claims were: (1) barred by res judicata to the extent the claims concerned damage from the riprap channel; (2) barred by laches to the extent the claims concerned damage from the stormwater management pond; and (3) barred because undisputed facts demonstrate that the Marcs would not suffer irreparable harm. We disagree.

"A circuit court may grant a motion for summary judgment if there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law." *Steamfitters Local Union No. 602 v. Erie Ins. Exch.*, 469 Md. 704, 746 (2020) (citing Md. Rule 2-501(f)). "Evidentiary matters, credibility issues, and material facts which are in dispute cannot properly be disposed of by summary judgment." *Taylor v. NationsBank, N.A.*, 365 Md. 166, 174 (2001). An appellate court reviews a decision to grant summary judgment without deference, "examining the record independently to determine whether any factual disputes exist when viewed in the light most favorable to the non-moving party and in deciding whether the moving party is entitled to judgment as a matter of law." *Steamfitters Local Union No. 602*, 469 Md. at 746. The appellate court's review is generally limited "to the grounds relied upon by the trial court." *Id.* In determining whether a grant of summary judgment was legally correct, we ask "whether a fair minded jury could find for the plaintiff in light of the pleadings and the evidence presented, and

there must be more than a scintilla of evidence in order to proceed to trial[.]" *Sierra Club v. Dominion Cove Point LNG, L.P.*, 216 Md. App. 322, 330 (2014) (quoting *Laing v. Volkswagen of Am., Inc.*, 180 Md. App. 136, 153 (2008)).

A. The Marcs' Claims Arising from the Effect of Water Intrusion Flowing from both the Riprap Channel and the Stormwater Management Pond Following the Prior Trial Are Not Barred by Res Judicata.

The appellees contend that the Marcs' claims related to the diversion of water onto their property from the riprap channel are barred by res judicata because those claims were fully litigated and resolved in the trial on the fifth amended complaint. However, even if a request for injunctive relief premised on a claim of nuisance or trespass based only on water flowing from the riprap channel would be barred by res judicata, the Marcs are not precluded from bringing a claim based on the effect of water intrusion from both the riprap channel and the stormwater management pond following the prior trial.

Res judicata is

> an affirmative defense that precludes the same parties from relitigating any suit based upon the same cause of action because the second suit involves a judgment that is conclusive, not only as to all matters that have been decided in the original suit, but as to all matters which with propriety could have been litigated in the first suit.

Bank of New York Mellon v. Georg, 456 Md. 616, 625 (2017) (quoting *Powell v. Breslin*, 430 Md. 52, 63 (2013)). The elements of res judicata are: (1) the parties in the current action must be "the same or in privity with the parties to the earlier action"; (2) "the claim in the current action [must be] identical to the one in the prior adjudication"; and (3) there must have been "a final judgment on the merits in the previous action." *Georg*, 456 Md.

at 625 (quoting *Powell*, 430 Md. at 63-64). The doctrine "restrains a party from litigating the same claim repeatedly and ensures that courts do not waste time adjudicating matters which have been decided *or could have been* decided fully and fairly." *Att'y Grievance Comm'n of Maryland v. Sperling*, 472 Md. 561, 585 (2021) (quoting *Anne Arundel County Bd. of Educ. v. Norville*, 390 Md. 93,107 (2005)) (emphasis in *Norville*).

Here, we are concerned only with the second element of res judicata, as the parties now are largely the same as before,[13] and the prior judgment was a final judgment on the merits. The primary question in deciding the second element of res judicata is whether the two claims were part of the same transaction. *See Daughtry v. Nadel*, 248 Md. App. 594, 630 (2020). To make that assessment, we often rely on the factors described in the Restatement (Second) of Judgments, which include "whether the facts are related in time, space, origin or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage." *Georg*, 456 Md. at 669-70 (quoting *FWB Bank v. Richman*, 354 Md. 472, 493 (1999)).

The Marcs' original—now fully litigated—claim was premised on damage coming from two separate flows of water that hit their property at two points in close proximity to each other. Notably, however, the Marcs' fifth amended complaint did not bring separate claims for nuisance and trespass for each of the two flows of water, nor did they ask the

[13] Although the Marcs added new defendants in their sixth amended complaint, the only one that was at least arguably not in privity with prior defendants is the County. We will address the claims against the County below.

circuit court to determine whether each independently constituted a nuisance or a trespass. To the contrary, they asserted a single claim for nuisance and a single claim for trespass, sought damages based on the combined intrusion, and sought "an injunction prohibiting Defendants from the continuing diversion of excessive and unreasonable water run-off onto Plaintiffs' property and direct[ing] Defendants to abate and cure these conditions." The circuit court, accordingly, determined that the combined effect constituted a nuisance and a trespass and awarded undifferentiated, nominal damages.

For our purposes, it is particularly noteworthy that the circuit court did not distinguish between the effect of water flowing from the riprap channel and the silt pond in its award of injunctive relief. Instead, the court imposed an injunction prohibiting Richmond and the HOA "from allowing or causing concentrated flow of storm water runoff" to enter the Marcs' property from the property of any of the defendants in amounts sufficient to cause erosion or damage when rainfall is less than that associated with a ten-year storm. That the court was focused on the combined effect of stormwater flows was made even clearer in its observation that the transition from a silt pond to a stormwater management pond, and the projected resulting reduction in flow of stormwater, might have solved the problem already. Reflecting that same understanding of the Marcs' claims and the circuit court's analysis, this Court also focused on the combined flow of stormwater in *Marc II*.

In sum, although the Marcs identified two separate sources of the concentrated stormwater flowing onto their property, their claim was neither made nor understood by the courts as premised on the independent operation of either of those sources. As a result,

in *Marc II*, this Court emphasized that the Marcs would not be precluded from pursuing "injunctive relief for any unreasonable runoff experienced subsequent to the conversion of the runoff management structure from a silt pond to a stormwater management pond." 2019 WL 2913976, at *3. Contrary to the appellees' claims, that language was plainly targeted to unreasonable runoff generally resulting from the appellees' actions, not from the stormwater management pond alone.[14]

To the extent that the Marcs contend that the flow of stormwater from the riprap channel and the stormwater management pond together constitutes a nuisance and a trespass on their property, that is not the same claim as the one previously litigated. Indeed, the entire basis of our decision in *Marc II* was that the facts litigated in the prior trial could not justify the injunction the court issued because the facts had changed. And because of when the facts changed, the new set of facts could not have been litigated during the first trial. As a result, the claims in the sixth amended complaint were not the same as the claims previously adjudicated and res judicata does not bar the Marcs from pursuing a claim for injunctive relief premised on nuisance or trespass arising from the concentrated flows of water onto their property from both the riprap channel and the stormwater management pond following the prior trial.

[14] In the immediately following sentence in *Marc II*, the Court stated that res judicata would not bar a subsequent claim due to the lack of evidence "to suggest that the stormwater management pond was not functioning properly[.]" 2019 WL 2913976, at *3. The appellees interpret that statement as indicating that any future claim would necessarily be limited to runoff flowing from the stormwater management pond alone. To the contrary, we interpret that sentence to simply acknowledge the circuit court's conclusion that a properly functioning stormwater management pond might have sufficiently diminished the *overall* flow of stormwater runoff to have alleviated the problem.

B. The Circuit Court Erred in Determining, on Summary Judgment, that Undisputed Facts Establish that the Marcs' Claims Are Time-Barred.

The appellees contend that the circuit court correctly concluded that the Marcs' claims are barred by laches to the extent that they relate to the flow of stormwater from the stormwater management pond. The appellees argue that the applicable limitations period is three years. Treating the stormwater management pond as a permanent nuisance, they contend that the Marcs' claims are time-barred because the sixth amended complaint was not filed until more than three years had elapsed since they were first aware of the stormwater management pond. The circuit court agreed with the Marcs on the ground that the stormwater management pond constituted a permanent nuisance and not "continuing successive acts."

The Marcs respond that their claims are not time-barred because their cause of action is just a continuation of their original cause of action and, alternatively, that their current cause of action relates back to the original. For the reasons we have already discussed, we reject those arguments.[15] The Marcs also respond that the circuit court

[15] An amendment to a pleading relates back to a prior complaint and is therefore excluded from operation of an intervening limitations period, "'so long as the operative factual situation,' stated in the amended pleading, remains 'essentially the same' as that alleged in the prior pleading. . . . [A] 'new cause of action' is not introduced by an amendment which merely sets forth 'a new theory' or invokes 'different legal principles.'" *Youmans v. Douron, Inc.*, 211 Md. App. 274, 290-91 (2013) (quoting *Crowe v. Houseworth*, 272 Md. 481, 485-86 (1974)). As we have discussed, the Marcs' cause of action on remand is not the same as the cause of action previously litigated to conclusion. If it were, it would be barred by res judicata.

wrongly concluded that the stormwater management pond is a permanent nuisance and that, as a temporary nuisance, the limitations period runs from each new intrusion of water.

As an initial matter, we clarify that the three-year statute of limitations applicable to a civil action at law contained in § 5-101 of the Courts and Judicial Proceedings Article governs our analysis. Although the relief sought in the sixth amended complaint is exclusively equitable, the claims on which that request for relief is based are for trespass and nuisance. Courts routinely apply the three-year statute of limitations to claims for trespass and nuisance, regardless of whether the plaintiff is seeking legal or equitable relief, *see, e.g.*, *Litz v. Maryland Dep't of Env't*, 434 Md. 623, 643 (2013); *see also id.* at 640 ("Counts for negligence, trespass, and inverse condemnation are subject to the statute of limitations[.]"), because where concurrent legal and equitable remedies are available for a cause of action, the statute of limitations governs notwithstanding the remedies the plaintiff pursues, *see Frederick Rd. Ltd. P'ship v. Brown & Sturm*, 360 Md. 76, 117 (2000) ("When a case involves concurrent legal and equitable remedies, 'the applicable statute of limitations for the legal remedy is equally applicable to the equitable one.'" (quoting *Schaeffer v. Anne Arundel County*, 338 Md. 75, 81 (1995))); *see also State Ctr., LLC v. Lexington Charles Ltd. P'ship*, 438 Md. 451, 604 (2014) ("[I]n most cases involving an exclusively equitable remedy, we refer to the limitations period for the cause of action at law most analogous to the one in equity." (quoting *Schaeffer*, 388 Md. at 81)); *Daughtry*, 248 Md. App. at 625-28 (describing the historical relationship between laches and statutes of limitations).

In applying the statute of limitations to the Marcs' nuisance claim relating to the stormwater management pond, the parties agree that the critical question is whether the flow of stormwater from the pond constitutes a temporary or a permanent nuisance. That is because "[a] claim for a permanent nuisance must be brought within three years of the date when 'the permanency of the conditions causing the reduction in the market value of the land bec[omes] manifest to a reasonably prudent person,'" whereas a claim for a temporary nuisance permits "successive actions [to] be brought for damages for each invasion of the plaintiff's land until the period of prescription has elapsed[.]" *Litz*, 434 Md. at 643-44 (quoting *Goldstein v. Potomac Elec. Power Co.*, 285 Md. 673, 689, 690 n.4 (1979)).

In Maryland, the difference between a permanent and temporary nuisance is not whether the structure giving rise to the nuisance is permanent or removable but whether the harm from the nuisance is abatable. *See Hoffman v. United Iron & Metal Co.*, 108 Md. App. 117, 143 (1996) ("[A] 'temporary' nuisance . . . can be abated, while a permanent nuisance will be presumed by its character and circumstances to continue indefinitely." (quoting *Moy v. Bell*, 46 Md. App. 364, 371 (1980))).[16] In assessing whether a nuisance is

[16] We recognize that some states take other approaches. The Texas Supreme Court summarized: "Most states define nuisances by looking at the structure of the source or the possibility of stopping it. . . . Others define a temporary nuisance as one that can be abated by injunction, and a permanent nuisance as one that cannot. Still others balance several factors in making the determination." *Schneider Nat'l Carriers, Inc. v. Bates*, 147 S.W.3d 264, 271 (Tex. 2004), *holding modified by Gilbert Wheeler, Inc. v. Enbridge Pipelines (E. Texas), L.P.*, 449 S.W.3d 474 (Tex. 2014) (footnotes omitted). As that court later held, describing the Texas approach: "[A]n injury to real property is considered temporary if (a) it can be repaired, fixed, or restored, *and* (b) any anticipated recurrence would be only

permanent or temporary, a court must be concerned not only with "the possibility of abatement but rather its likelihood." *See Hoffman*, 108 Md. App. at 144 (emphasis removed) (quoting *Moy*, 46 Md. App. at 371).

Here, the circuit court did not expressly state its rationale for concluding that the stormwater management pond presented a permanent nuisance, but it seems to have accepted Richmond's argument that the nuisance was permanent because it would continue into the future and because the Marcs purportedly conceded that it was permanent in their complaint. On the first point, the permanency of the harm *if unabated* does not speak to whether it is abatable. Indeed, the appellees elsewhere argue strenuously that the harm is entirely abatable. On the second point, we find no concession by the Marcs that the harm is permanent. To the contrary, the Marcs have argued consistently that the harm is abatable, and that they want the court to force the appellees to abate it.

Although the parties dispute whether there is ongoing harm from a concentrated flow of stormwater onto the Marcs' property, they all appear to agree that any such harm is abatable. There is general agreement that the natural flow of stormwater coming from the Augustine Valley Development and points above it is across the Marcs' property to a stream that lies on the opposite side of that property. The Marcs' claims of harm do not relate to the stormwater traveling across their property generally or even to the amount of that stormwater. Instead, the Marcs' claims relate to the fact that stormwater from a large area is collected and then deposited onto their property at a specific area in concentrated

occasional, irregular, intermittent, and not reasonably predictable, such that future injury could not be estimated with reasonable certainty." *Gilbert Wheeler*, 449 S.W.3d at 480.

flows. As a result, Mr. Marc testified, based on his training as an engineer, that there was a way to re-channel the flow of stormwater from the pond and the riprap channel, and he presented a proposed plan for doing so. The appellees have not contested that assertion. To the contrary, they rely on it for their argument, addressed below, that the Marcs cannot sustain their burden of proving irreparable harm in light of Mr. Marc's testimony that there is a fix that would alleviate the harm. Because the summary judgment record contains evidence that the nuisance is abatable,[17] the circuit court erred in determining that it is permanent as a matter of law.[18]

To the extent the Marcs' claim is premised on trespass, similar concerns apply. As this Court has said, "actions of trespass, negligence, and nuisance, though distinct from one another in their constituent elements, all derive in this instance from the correlative rights (and obligations) of neighboring landowners[.]" *Mark Downs, Inc. v. McCormick Props.,*

[17] If the nuisance is temporary, the Marcs would nonetheless be barred from seeking damages incurred more than three years before the date on which they filed their sixth amended complaint. *See Litz*, 434 Md. at 646 ("Although an action for a continuing tort may not be barred by the statute of limitations, damages for such causes of action are limited to those occurring within the 'three year period prior to the filing of the action.'" (quoting *Shell Oil Co. v. Parker*, 265 Md. 631, 636 (1972))). However, the Marcs did not make any claim for damages in their sixth amended complaint.

[18] We observe that the summary judgment record also does not establish when after the conversion of the silt pond to the stormwater management pond the Marcs would have been aware that it did not halt the concentrated stormwater flows sufficient to cause damage to their property. Concentrated flows of stormwater presumably come only with rain of a certain volume. The record does not reveal the date on which a flow sufficient to cause damage to the Marcs' property first occurred following the conversion and would have caused a reasonable person to conclude that the stormwater management pond had not had its intended effect. For that reason as well, the appellees were not entitled to summary judgment on limitations grounds based on the existing summary judgment record.

Inc., 51 Md. App. 171, 181 (1982). "When a claimant brings a cause of action for continuing acts of negligence or trespass, we apply the same principle as with a temporary nuisance claim[.]" *Litz*, 434 Md. at 646. Accordingly, the appellees were also not entitled to summary judgment on the issue of whether the Marcs' trespass claims were barred by the statute of limitations.

C. The Circuit Court Erred in Granting Summary Judgment on Irreparable Harm.

To issue an injunction, a court must find that the plaintiff will suffer irreparable harm absent such protection. *See Yaffe v. Scarlett Place Residential Condo., Inc.*, 205 Md. App. 429, 457 (2012). Here, the circuit court decided that the Marcs could not demonstrate irreparable harm because they "acknowledged that the circumstance that they complain of could be . . . corrected by virtue of an easement with installing a pipeline. The only question therefore would be the cost, which would be fairly easily obtained." However, the relevant question for injunctive relief is whether the damage flowing from the appellees' actions would be irreparable.

The general rule is that an injunction may not be granted unless the plaintiff has established a threat of substantial and irreparable injury, which must be well-pled and requires that money damages be either inadequate or hard to ascertain. *See El Bey v. Moorish Sci. Temple of Am., Inc.*, 362 Md. 339, 355-56 (2001) (internal citations omitted) (adding that the proffered injury "need not 'be beyond all possibility of compensation in damages, nor need it be very great'" (quoting *Maryland-Nat'l Cap. Park & Plan. Comm'n v. Wash. Nat'l Arena*, 282 Md. 588, 615 (1978))). Elaborating on when money damages

would be inadequate, this Court has stressed the underlying equitable interests. "[A]n injury is irreparable . . . where, from the nature of the act, or from the circumstances surrounding the person injured, or from the financial condition of the person committing it, it cannot be readily, adequately, and completely compensated for with money." *Davidson v. Seneca Crossing Section II Homeowner's Ass'n, Inc.*, 187 Md. App. 601, 629 (2009) (quoting *Coster v. Dep't of Pers.*, 36 Md. App. 523, 526 (1977)). That includes situations where the alleged injury is not primarily financial in nature. *See, e.g.*, *Maryland-Nat'l Cap. Park & Plan. Comm'n*, 282 Md. at 616 (explaining that the injury was the act of a party appealing a property tax assessment, and not the underpayment itself, because the appeal violated the lease's noncontestability clause).

In determining whether harm from a defendant's tortious conduct is irreparable, the focus is on the nature of the harm inflicted and the possibility that, if inflicted, it would be compensable with readily ascertainable monetary damages. Here, the circuit court did not make a finding concerning whether the harm the Marcs allege is occurring to their property is irreparable. The Marcs' purported ability to perform work to obviate that harm does not address whether the harm itself is irreparable. *See, e.g.*, *Beane v. Prince George's County*, 20 Md. App. 383, 399-400 (1974) (holding that the trial court erred in failing to enter a mandatory injunction ordering County to install a water pipe to avoid damage to a landowner's property from excessive flow of water, and considering the cost of abatement only in determining whether the County's cost in complying with such an injunction was excessive "in proportion to the continuing damage suffered by the [landowner] as a result of this unnatural discharge of water"). We therefore conclude that the court erred in

granting summary judgment as a matter of law on the ground of an absence of irreparable harm.

D. The Circuit Court Erred in Awarding Summary Judgment in the County's Favor.

In *Marc II*, this Court ruled that "if a new injunction is sought, the injunction must address Howard County's role in maintaining the structural elements of the stormwater management pond." 2019 WL 2913976, at *3 n.5. In their sixth amended complaint, the Marcs named the County as a defendant without making any affirmative claims against it, asserting that it was adding the County as a party only because of this Court's statement in *Marc II*. The circuit court granted the County's motion for summary judgment because the Marcs had not alleged any wrongdoing by the County and because the public duty doctrine would bar a suit against it.[19]

The circuit court was correct in concluding that the Marcs did not state a cause of action against the County in the sixth amended complaint. Indeed, in that complaint, the Marcs did not even attempt to state a cause of action against the County. Notably, however, the County plays a different role here from the other parties. Pursuant to the 2011 Developer and Maintenance Agreements, the County agreed to accept the manmade features of the stormwater management system into the County's system of publicly operated and maintained facilities. The County formally assumed ownership and operation and maintenance responsibility for the facilities on October 24, 2019. As a result, it appears

[19] The court also held that the Marcs' claims against the County were time-barred, which we reject for the same reasons already identified above.

that the County may be, at a minimum, a necessary party with respect to any claim for injunctive relief that might affect the components of the stormwater management system for which the County has responsibility. Indeed, the County conceded as much in oral argument. On remand, if the Marcs file an amended complaint for injunctive relief, the County may be a proper defendant as a necessary party to such a claim.[20]

The County also argues that the public duty doctrine precludes the Marcs' claims against it, but that doctrine does not apply in these circumstances. "[U]nder the public duty doctrine, when a statute or common law 'imposes upon a public entity a duty to the public at large, and not a duty to a particular class of individuals, the duty is not one enforceable in tort.'" *Muthukumarana v. Montgomery County*, 370 Md. 447, 486 (2002) (quoting Dan B. Dobbs, The Law of Torts § 271 (2000)). For example, absent a special relationship, a police officer's general duty to protect the public cannot support a tort claim by a member of the public whom the officer did not protect. *See Howard v. Crumlin*, 239 Md. App. 515, 522 (2018). Here, at least with respect to the claims in the sixth amended complaint, the Marcs did not allege that the County owed them a duty at all. Instead, pursuant to this Court's direction in *Marc II*, the Marcs named the County as a necessary party to their

[20] On appeal, the Marcs argue that the County could also be directly liable to them despite playing no role in creating the stormwater management system, because it voluntarily took ownership of a known nuisance. However, the sixth amended complaint contained no such claim against the County. As a result, we do not consider whether a claim against the County on that basis could have survived a motion to dismiss if it had been made. *See Rounds v. Maryland-Nat'l Cap. Park and Plan. Comm'n*, 441 Md. 621, 656 (2015) (stating that appellate review of a ruling on a motion to dismiss "is limited to the universe of facts and allegations contained in [the operative complaint]" (quoting *Litz*, 434 Md. at 642)). If the Marcs make such a claim on remand, the court will need to address it in the first instance.

claim for injunctive relief based on its ownership and maintenance responsibilities for the stormwater management system. As such, the public duty doctrine is not applicable.

V. THE COURT ABUSED ITS DISCRETION IN FINDING A LACK OF SUBSTANTIAL JUSTIFICATION UNDER RULE 1-341.

We turn to the court's grant of sanctions against the Marcs in the form of an award of attorney's fees in favor of Mr. Sirianni. Rule 1-341(a) permits a court to award sanctions if it finds that a party has maintained a proceeding "in bad faith or without substantial justification." Substantial justification under Rule 1-341 is "'a reasonable basis for believing that a case will generate a factual issue for the fact-finder at trial[,]' or a position that is 'fairly debatable and within the realm of legitimate advocacy.'" *Major v. First Va. Bank-Cent. Maryland*, 97 Md. App. 520, 531 (1993) (internal quotation marks omitted) (quoting *Inlet Assocs. v. Harrison Inn Inlet, Inc.*, 324 Md. 254, 268 (1991)). But "[t]o impose sanctions under Rule 1-341(a), a court must make an explicit finding that a party conducted litigation either in bad faith or without substantial justification." *URS Corp. v. Fort Myer Constr. Corp.*, 452 Md. 48, 72 (2017). That finding must be "supported by a 'brief exposition of the facts upon which [it] is based.'" *Id.* (quoting *Talley v. Talley*, 317 Md. 428, 436 (1989)). To then award costs and attorney's fees, the court must make a further assessment that the party's behavior merits such a penalty. *See URS Corp.*, 452 Md. at 72; *see also DeLeon Enters. v. Zaino*, 92 Md. App. 399, 414-15 (1992) ("Before meting out the extraordinary sanction of attorney's fees the judge must make two separate findings . . . that the proceeding was maintained in bad faith or without substantial justification, and that the bad faith or lack of substantial justification merits the imposition

of attorney's fees."). We will affirm a finding that a proceeding was maintained in bad faith or without substantial justification "unless it is clearly erroneous or involves an erroneous application of law." *Inlet Assocs.*, 324 Md. at 267. The court's ultimate determination of "whether the party's conduct merits the assessment of costs and attorney's fees . . . will be upheld on appellate review unless found to be an abuse of discretion." *URS Corp.*, 452 Md. at 72.

In finding that the claims against the Individual Homeowners were brought without substantial justification, the court determined that those homeowners were not alleged to have had any part in the construction or control of the stormwater management system, that they were included "for strategic value to try to pressure Richmond . . . into submission," and that it was "somewhat disconcerting that some of these Defendants don't even own property at the site anymore." The court then declined to award any sanctions with respect to most of the Individual Homeowners because they were represented by the same counsel as Richmond and the HOA and any attorney's fees allocable to their defense would be "difficult to parse out." The court thus awarded sanctions of $1,600, which was the amount of attorney's fees incurred by Mr. Sirianni.

We cannot affirm the award of sanctions against the Marcs. As an initial matter, the court did not specify whether it concluded that the award was based on a finding of bad faith, a lack of substantial justification, or both. The parties' briefs also lack clarity concerning the ground on which sanctions were based, which makes the finding more difficult to assess. Regardless, however, we do not see how we could uphold an award of sanctions on either basis in light of the circuit court's 2016 decision holding the Individual

Homeowners liable in nuisance and, at least initially, imposing an injunction against them. Notably, the primary grounds on which the court awarded sanctions in 2020 would have applied equally to the claims the Marcs made against the Individual Homeowners in the fifth amended complaint, and on which they prevailed after a trial on the merits. Even though we have determined above that the claims for injunctive relief against the Individual Homeowners in the sixth amended complaint are unsustainable, under the circumstances presented, we could not uphold a finding of bad faith or lack of substantial justification for bringing claims that are, in relevant part, so similar to those a court had previously found meritorious.[21]

CONCLUSION

In sum, we will:

> (1) affirm the circuit court's denial of the Marcs' motions to reopen, for a new trial, and for a post-remand injunction;
>
> (2) vacate the court's dismissal of the sixth amended complaint to the extent that the court did not provide the Marcs leave to amend with respect to claims against the appellees other than the Individual Homeowners, but otherwise affirm that dismissal;
>
> (3) reverse the court's rulings that the appellees were entitled to summary judgment on the grounds of res judicata, statute of limitations/laches, absence of irreparable harm, and the public duty doctrine;

[21] In their brief, the appellees posit a different basis for upholding the award of sanctions in favor of Mr. Sirianni, which is that he is part of the subset of Individual Homeowners who were no longer homeowners at the time the sixth amended complaint was filed. Although we have some sympathy for that argument, and although the court noted that it "was somewhat disconcerting" that some of the Individual Homeowners named were no longer homeowners, the primary rationale for the circuit court's award of attorney's fees applied to the claims against all the Individual Homeowners. We decline to consider upholding the award of sanctions on a ground different from that primarily relied on by the circuit court.

(4) reverse the award of sanctions; and

(5) remand for further proceedings consistent with this opinion.

JUDGMENT OF THE CIRCUIT COURT FOR HOWARD COUNTY AFFIRMED IN PART, VACATED IN PART, REVERSED IN PART, AND REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID 50% BY APPELLANTS, 40% BY RICHMOND AND THE HOA, AND 10% BY HOWARD COUNTY.