VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 2nd day of July, 2020.

Present: Goodwyn, Mims, Powell, Kelsey, and McCullough, JJ., and Russell and Millette, S.JJ.

Fred W. Vest, Appellant,

against Record No. 191014
Circuit Court Nos. CL16000816-00 and -01

Mountain Valley Pipeline, LLC, Appellee.

Upon an appeal from a judgment rendered by the Circuit Court of Roanoke County.

Fred W. Vest appeals from a circuit court order awarding summary judgment to Mountain Valley Pipeline, LLC ("MVP"), denying Vest's motion for summary judgment, and dismissing Vest's counterclaim. The counterclaim alleged that MVP's surveyors had trespassed on Vest's property on a date identified in a notice of intent to enter that was "superseded and mooted" by a subsequent letter requesting permission to enter changing the dates of entry. J.A. at 46-47. "*Consequently*," the counterclaim alleged, "MVP had no right to enter upon Mr. Vest's property without his consent." *Id.* at 47 (emphasis added). Approximately three years later, without seeking leave to amend his counterclaim, Vest advocated a different claim of trespass — that the earlier notice of intent to enter was itself invalid, regardless of whether it was superseded. We find no merit in the trespass claim that Vest pleaded in his counterclaim, and we do not address the trespass claim that he failed to properly plead.

I.

MVP is a natural gas company that has been conducting surveys, tests, appraisals, and examinations of properties along the proposed route of a new natural gas pipeline. Because the pipeline's proposed route is "located on or near" Vest's property, MVP sent a letter to Vest on March 23, 2016, requesting permission to enter his property beginning on April 8 "to conduct examinations, tests, appraisals and surveys." *Id.* at 286. The letter stated, however, that MVP would "work with" Vest to schedule "a more convenient time, if necessary." *Id.* The bottom of

the request letter had a signature line and a date line for the landowner to fill out to "authorize MVP to access my property to conduct the pipeline survey activities." *Id.* On the same day, MVP also sent Vest a letter noticing its intent to enter his property to conduct a wetlands survey from April 8-11 but stating that MVP remained willing to work with Vest to schedule a more convenient time. *See id.* at 287.

Vest signed the March 23 request letter on March 29 but crossed out "authorize" and handwrote "Deny" above the authorization line. *Id.* at 138. Vest also included a handwritten letter with the signed form, which stated in part: "Access to my property for a wetland survey is denied and unnecessary" and "Stay off my property!" *Id.* at 139. On March 31, Vest contacted MVP and notified its representative that he would be out of town on April 8-10. Vest suggested that the surveyors come on April 11, but the MVP representative responded that the Army Corps of Engineers would not be available on that date. Vest then suggested that MVP's surveyors come on April 6, to which MVP agreed. "[T]he next day," Vest allegedly called the representative back and revoked his permission for MVP to survey on April 6 and arranged to call MVP back on April 11 to reschedule, *id.* at 257, but the representative had no recollection of this discussion, *see id.* at 269-70.

On March 31, MVP sent Vest a second letter requesting permission to enter Vest's property from April 25-26 to conduct surveys for the proposed pipeline, and without signing the document this time, Vest again crossed out "authorize," handwrote "Deny" above the authorization line, and wrote the date of April 18. *Id.* at 288. On March 31, MVP also sent a second notice of intent to enter Vest's property on April 25 and 26 to conduct various surveying activities. *See id.* at 294. In a letter dated April 1, Vest informed MVP that he was "aware that surveying may be occurring on [his] property in the near future, based on [MVP's] letter dated March 23, 2016," and that he "hereby den[ied] permission to enter [his] property." *Id.* at 148.

According to a contact diary kept by the MVP representative, Vest then called on April 4 and informed the representative that he had "attended an opposition meeting last night and was advised by his attorney not to give permission" for MVP to enter his property, and the MVP representative then informed Vest that the surveyors would be on his property between April 8 and April 11 but that MVP would note Vest's wishes to the contrary. *Id.* at 285. Vest told the representative that he would not interfere with the surveys and instructed MVP not to use motorized vehicles on the property. *See id.* On April 9, MVP's surveyors entered Vest's

property but were told to leave. Several of the surveyors were later charged with criminal trespass.

On April 27, MVP filed a complaint against Vest that requested (1) a declaratory judgment that it had satisfied the requirements to enter Vest's property under Code § 56-49.01, (2) injunctive relief to prevent Vest from further interfering with MVP's surveyors, and (3) $25,000 in damages. *See* J.A. at 5-7. MVP moved for a temporary injunction, and after a hearing on the matter, the circuit court denied the temporary injunction and instead ordered the parties to confer and to select new dates for the surveys. *See id.* at 34-35. The parties selected May 23-27 as the new survey dates, and Vest agreed not to interfere with the surveys. *See id.*

Following this ruling, Vest demurred to MVP's damages claim,[1] filed an answer to MVP's complaint, and asserted a counterclaim seeking compensatory and punitive damages for MVP's alleged trespass upon his property on April 9. Vest's counterclaim contended that MVP's March 31 request letter had "superseded and mooted" the March 23 request and notice letters and that "[*c*]*onsequently*, MVP had no right to enter upon Mr. Vest's property without his consent." *Id.* at 47 (emphasis added). Vest also alleged that MVP had not issued another notice of intent to enter with its March 31 request letter, but MVP later produced a second notice letter dated March 31 in its response to Vest's motions in limine, *see id.* at 146, 294. Based upon these contentions, Vest asserted that MVP had "failed to comply with the requirements of Va. Code § 56-49.01(C)," and thus, "MVP's entry upon Mr. Vest's property was not authorized by § 56-49.01 and was a trespass to his land." J.A. at 47.

MVP filed a motion for summary judgment on Vest's trespass counterclaim, contending that it had complied with Code § 56-49.01 when it had sent the March 23 request and notice letters to Vest and that, as a result, MVP had obtained the right to enter Vest's property on April 9. MVP agreed to voluntarily dismiss its claim for damages against Vest if the circuit court granted its motion for summary judgment.

Vest filed his own motion for summary judgment on his trespass counterclaim and against MVP on its declaratory judgment and damages claims, contending that MVP "did not and could not comply with" Code § 56-49.01(C) "as written." J.A. at 180. Vest had not asserted this trespass claim in his initial counterclaim that was filed nearly three years earlier. This new

[1] The circuit court overruled this demurrer, and that ruling is not before us on appeal.

trespass claim alleged that the March 23 notice of intent to enter was itself invalid — regardless of whether it was superseded by the March 31 notice. Therefore, the April 9 entry by MVP, Vest contended in his brief in support of his motion for summary judgment, was an unlawful trespass because the March 23 notice was an invalid notice.[2] In its memorandum in opposition to Vest's motion for summary judgment, MVP argued that Vest had "changed courses" from the original trespass claim that he had asserted in his counterclaim. *Id.* at 207.

After holding a hearing on the cross-motions for summary judgment, the circuit court granted summary judgment to MVP, denied Vest's motion for summary judgment, dismissed Vest's trespass counterclaim, dismissed MVP's claim for damages based upon MVP's agreement, and dismissed MVP's injunction claim as moot.[3]

II.

On appeal, Vest asserts both of his trespass claims. We find the claim pleaded in Vest's counterclaim to be meritless, and we do not address the claim raised in Vest's motion for summary judgment and its accompanying brief in support because it was not properly pleaded.

A.

The first claim, as pleaded in his counterclaim, asserted that the trespass on April 9 occurred because MVP's March 23 request and notice letters had been superseded by MVP's

---

[2] Vest claimed that it was chronologically impossible for MVP to comply with Code § 56-49.01(C) governing notices of intent to enter because the statute requires the notice of intent to enter to "be made not less than 15 days prior to the date of mailing of the notice of intent to enter." J.A. at 183-84 (emphasis and citation omitted). Vest alternatively argued that the most reasonable interpretation to carry out the statute's legislative intent is that the notice of intent to enter must "be made not less than 15 days [after the date of mailing of the request for permission to enter.]." *Id.* at 184-87 (alteration in original) (emphasis omitted). This interpretation would require a "sequential procedure" in which MVP would first send the request for permission to enter, and if MVP did not receive written permission within 15 days, MVP could then send its notice of intent to enter. *Id.* at 186-87.

[3] Although the circuit court's final order does not expressly dispose of MVP's declaratory judgment claim, neither MVP nor Vest questions the finality of the court's order. Nor do we. MVP's declaratory judgment claim requested a judicial declaration that MVP had satisfied Code § 56-49.01 and was entitled to enter Vest's property to conduct surveys. *See* J.A. at 5. The court granted summary judgment to MVP, thereby dismissing Vest's trespass counterclaim, and the court also denied Vest's motion for summary judgment, thereby rejecting Vest's attack on MVP's "declaratory judgment and damages claims," *id.* at 180, 182, 188. By doing so, the court implicitly ruled that MVP had satisfied the statute and had a right to enter Vest's property — the very judicial declaration that MVP had requested in its declaratory judgment claim.

March 31 request letter specifying new dates of entry on April 25 and 26. The trespass counterclaim did not expressly or implicitly challenge the validity of the March 23 letters. Quite the opposite. The counterclaim was silent on the subject, leaving the implication that had the March 23 request and notice letters not been superseded by the March 31 request letter then no trespass would have occurred. Nothing in the counterclaim would have put MVP on notice that the March 23 letters were allegedly invalid under the statute. Nearly three years after filing his counterclaim, Vest alleged in a motion for summary judgment and its accompanying brief that the March 23 notice of intent to enter was itself invalid under the requirements of Code § 56-49.01(C) and could not justify the April 9 entry by MVP.

We have often said that "[a] litigant's pleadings are as essential as his proof, and a court may not award particular relief unless it is substantially in accord with the case asserted in those pleadings." *Jenkins v. Bay House Assocs., L.P.*, 266 Va. 39, 43 (2003); *see also Ted Lansing Supply Co. v. Royal Aluminum & Constr. Corp.*, 221 Va. 1139, 1141 (1981). "No court can base its decree upon facts not alleged, nor render its judgment upon a right, however meritorious, which has not been pleaded and claimed." *Potts v. Mathieson Alkali Works*, 165 Va. 196, 207 (1935). The rationale behind this rule is that "[e]very litigant is entitled to be told by his adversary in *plain and explicit* language what is his ground of complaint or defense." *Id.* (emphasis added).

> The defendant is supposed to know the plaintiff's grievances only from his statement of them in the [pleading]; and it is to the precise case thus stated, and to that case only, that the defendant can be required to answer; to the case so made the evidence must be confined; and no relief will be granted that does not substantially accord with the case as made in the [pleading].

Stanley v. Mullins, 187 Va. 193, 196 (1948) (emphases omitted) (quoting William Minor Lile, Equity Pleading and Practice § 115, at 62 (2d ed. 1922)). "Hence the importance of accurate knowledge, by counsel, of the facts of his case, and of the law applicable thereto, before he undertakes to present his case in the form of the [pleading]." Lile, *supra*, § 115, at 62. Nonetheless, courts "are liberal in permitting amendments for the purpose of patching up a rickety pleading, or to meet unexpected phases of the proofs, so that a serious defect in the [pleading] is not necessarily fatal to the plaintiff's case." *Id.*; *see also* Rule 1:8 ("Leave to amend shall be liberally granted in furtherance of the ends of justice.").

Vest's counterclaim did not assert in "plain and explicit language," *Potts*, 165 Va. at 207, that the March 23 notice of intent to enter was invalid for any reason.[4] Instead, he pleaded only that the March 31 request letter had "superseded and mooted" the (presumably valid) March 23 notice of intent to enter, and "[*c*]*onsequently*, MVP had no right to enter upon Mr. Vest's property without his consent." J.A. at 47 (emphasis added).[5] Based upon this allegation, the counterclaim concluded that MVP had "failed to comply with the requirements of Va. Code § 56-49.01(C)," and thus, "MVP's entry upon Mr. Vest's property was not authorized by § 56-49.01 and was a trespass to his land." J.A. at 47.

Vest waited nearly three years to assert a different trespass claim based upon the allegedly invalid March 23 notice and never sought or obtained an amendment to his counterclaim. We find unpersuasive Vest's argument on appeal that the trespass claim pleaded in his counterclaim is close enough, so to speak, to the reconstituted trespass claim later asserted in his motion for summary judgment and its accompanying brief. Virginia law takes a pragmatic, but not permissive, view toward pleadings. As Professor Sinclair has explained, "there will be no recovery in a Virginia lawsuit unless the theory upon which a party prevails has been pled," and "the requirement of at least *including* the averment in one's pleadings is not onerous and seems beneficial in helping define issues before trial to permit a fairer and more directed presentation of proofs." Kent Sinclair & Leigh B. Middleditch, Jr., Virginia Civil Procedure § 8.1[A], at 695 (6th ed. 2014) (emphasis in original).[6] This view is in full accord

---

[4] Vest admitted in his answer to MVP's complaint that the statute "allows a natural gas company to survey property for a proposed pipeline *upon compliance with the procedures set out therein*." *Id.* at 38 (emphasis added). That admission presupposes that it is possible to comply with the statute's procedures, which is directly contrary to Vest's new claim that the March 23 notice of intent to enter could never comply with Code § 56-49.01(C) as written.

[5] The counterclaim alleged that MVP had not sent a new notice of intent to enter with the March 31 request letter. In response to Vest's motions in limine, however, MVP produced a second notice of intent to enter dated March 31. *See* J.A. at 146, 294. The counterclaim added that MVP's surveyors had entered his property on April 9 after sending a letter requesting permission to enter that had "reschedul[ed] the proposed survey of his property to begin April 25th." *Id.* at 47.

[6] Federal courts have similarly observed that amending the initial affirmative pleading is necessary for the court to consider alternative theories of recovery. *See, e.g.*, *Foman v. Davis*, 371 U.S. 178, 182 (1962) (finding that "leave to amend 'shall be freely given when justice so requires,'" such as when "the amendment would have done no more than state an alternative

with our precedent. *See Virginia Nat. Gas Co. v. Hamilton*, 249 Va. 449, 454 & n.2 (1995) (holding that the trial court erred in granting partial rescission of an easement based upon a mutual mistake of fact when the complainant had merely pleaded "mistake," not "*mutual* mistake of fact," as a "ground for rescission" (emphasis in original)); *Board of Supervisors v. Miller & Smith, Inc.*, 222 Va. 230, 238 (1981) (rejecting an "alternative argument" because "[t]his position was not set forth in any of the pleadings and is not properly before the court"); *cf. Ted Lansing Supply Co.*, 221 Va. at 1141-42 (holding that the trial court "erred in submitting [counterclaimant's] case to the jury on an implied warranty theory of recovery" when the counterclaim had been based upon a theory of express warranty).

In short, Vest is limited to the "precise case" stated in his counterclaim, and "no relief will be granted that does not substantially accord with th[at] case." *Stanley*, 187 Va. at 196 (emphases and citation omitted). Vest had three years to request an amendment to his counterclaim but failed to do so. The reconstituted trespass claim in Vest's motion for summary judgment and its accompanying brief was substantially different from the original claim asserted in his counterclaim. The former cannot serve as a de facto amendment to the latter. *See* Rule 1:8 (requiring "leave of court" to amend pleadings); *Moore v. Fuller*, Record No. 160585, 2017 WL 1753498, at *3 (Va. May 4, 2017) (per curiam) (unpublished) (finding that "a lesser pleading, such as the motion filed in this case," cannot serve "as an amendment to the initial affirmative pleading without leave of court").[7]

---

theory for recovery" (citation omitted)); *Lanigan v. LaSalle Nat'l Bank*, 108 F.R.D. 660, 662-63 (N.D. Ill. 1985) (permitting amendment of a complaint to add "an alternative theory of recovery based on the same basic fact pattern" and distinguishing such an amendment from one asserting "an entirely new or separate claim," which has been found to be unduly prejudicial). *See generally* 6 Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, Federal Practice and Procedure — Civil § 1474, at 609-10, 614, 617 (3d ed. 2010) (noting that amendments to pleadings are sought "to correct insufficiently stated claims or defenses," such as "mak[ing] an amendment to amplify a previously alleged claim or defense" or "to change the nature or theory of the party's claim").

[7] To be sure, Vest does not even argue on appeal (either in his briefs or at oral argument) that he would have amended his counterclaim if given the opportunity to do so or that he was not given an opportunity to amend. Instead, Vest argues that he "was not required to allege every legal argument supporting [his] cause of action" and that he "satisfied the notice pleading requirements." Reply Br. at 1-6 (emphasis omitted) (altering capitalization).

B.

Turning to the trespass claim that Vest did properly plead below — that MVP had waived its right to enter Vest's property on April 9 because the March 31 request letter had superseded the March 23 request and notice letters — we agree with MVP that the circuit court did not err by dismissing this claim. "In an appeal from a circuit court's decision to grant or deny summary judgment, this Court reviews the application of law to undisputed facts de novo." *Erie Ins. Exch. v. EPC MD 15, LLC*, 297 Va. 21, 27 (2019) (citation omitted). "Waiver is the voluntary and intentional abandonment of a known legal right, advantage, or privilege," and "[w]aiver of a legal right will be implied only upon clear and unmistakable proof of the intention to waive such right for the essence of waiver is voluntary choice." *Chawla v. BurgerBusters, Inc.*, 255 Va. 616, 622-23 (1998).

The March 31 request letter does not state or imply MVP's intent to waive any right to enter Vest's property on the earlier dates listed in the March 23 letters. The March 31 letter does not even reference the earlier March 23 letters. While the parties did initially agree to a different date of entry than the dates listed in the March 23 letters, Vest admitted that he had later revoked his permission for the agreed-upon date after attending an opposition meeting regarding the pipeline. *See* J.A. at 257, 262-65. The contact diary of MVP's representative confirmed that Vest had called and had communicated his revocation of permission, and the entry further noted that MVP's representative had explained that MVP's surveyors would be on Vest's property between April 8-11 as originally noted in the March 23 letters and that Vest had agreed not to interfere. *See id.* at 285.

In *Chaffins v. Atlantic Coast Pipeline, LLC*, we found that additional notices of intent to enter sent by the natural gas company did not supplant the original notices of intent to enter because "[t]he additional notices in no way repudiate[d] the original notices." 293 Va. 564, 572 (2017). Code § 56-49.01 does not limit the number of surveys that a natural gas company may perform on a landowner's property, and thus, multiple notices may be necessary to perform all of the surveys required for the project, *see Chaffins*, 293 Va. at 571 n.1. The same is true here. Because the March 31 letter does not expressly or impliedly repudiate the March 23 letters,[8] Vest

[8] On appeal, Vest argues that MVP intended to reschedule the wetlands survey listed on the March 23 notice because it listed a wetlands survey again on the March 31 notice among a longer list of surveys and tests that it intended to perform. *See* Appellant's Br. at 26-27.

has failed to demonstrate by "clear and unmistakable proof," *Chawla*, 255 Va. at 623, that MVP intended to waive any right that it had to enter Vest's property on April 9, and thus, the circuit court did not err in awarding summary judgment to MVP.

III.

In sum, the circuit court correctly dismissed the trespass counterclaim, which alleged that MVP had waived any right to enter the property on April 9 by issuing on March 31 a "superseding" letter requesting permission to enter on later dates. Because Vest did not properly plead the trespass claim alleged in his motion for summary judgment and its accompanying brief in support (which claimed that the March 23 notice of intent to enter was itself invalid regardless of whether it was superseded), we affirm the circuit court's final judgment without addressing the merits of this claim.

This order shall be certified to the Circuit Court of Roanoke County.

A Copy,

Teste:

Clerk

Compare J.A. at 287, *with id.* at 294. We cannot find that this fact demonstrates MVP's voluntary and intentional waiver of its right to enter Vest's property under the terms of the March 23 notice letter because "[w]aiver of a legal right will be implied only upon clear and unmistakable proof of the intention to waive such right," *Chawla*, 255 Va. at 622-23. Without further evidence regarding the number or type of surveys that MVP needed to perform on Vest's property, the fact that the March 31 notice letter listed a wetlands survey again is not clear and unmistakable proof that MVP intended to waive its right to perform the wetlands survey noticed in the March 23 letter. Moreover, Vest failed to allege in his counterclaim that the March 31 notice evidenced any intent by MVP to waive its right to enter on the dates in the March 23 notice because the counterclaim erroneously alleged that MVP had failed to send a "new Notice of Intent to Enter" at all on March 31. J.A. at 47; *see supra* note 5.