VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 23rd day of June 2022.

Present: Goodwyn, C.J., Powell, Kelsey, McCullough, and Chafin, JJ., and Millette, S.J.

McDiarmid Associates, Appellant,

against Record No. 210282
Circuit Court No. CL20-3116

Khachik Yevdokimov, Appellee.

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

McDiarmid Associates ("McDiarmid") filed an interlocutory appeal,[1] challenging the circuit court's decision to overrule in part its demurrer to Khachik Yevdokimov's complaint.[2] Yevdokimov alleges that McDiarmid's negligence caused his injuries when a tree on McDiarmid's property fell on Yevdokimov's car as he drove past the property on an adjoining public highway. McDiarmid argues that Yevdokimov insufficiently pleaded negligence because he did not allege that McDiarmid had engaged in any affirmative act that altered the tree from its natural state and caused the highway to be more dangerous than in a state of nature. Agreeing that the allegations in the complaint were insufficient to plead a negligence cause of action, we reverse and remand.

I.

Yevdokimov was driving his car down a public highway when a tree on McDiarmid's property, located less than 10 feet from the sidewalk next to the highway, fell and crushed his

[1] We accepted this interlocutory appeal upon certification of the issue by the circuit court under former Code § 8.01-670.1, which has now been repealed effective January 1, 2022, *see* 2021 Acts ch. 489, at 1501 (Spec. Sess. I). As of January 1, 2022, interlocutory appeals certified by the circuit court are appealed to the Court of Appeals under Code § 8.01-675.5. *See* 2021 Acts ch. 489, at 1504-05 (Spec. Sess. I).

[2] The circuit court sustained without leave to amend McDiarmid's demurrer to the nuisance count, and that decision has not been appealed by Yevdokimov. Thus, the issue of nuisance is not before us.

car. As a result, Yevdokimov has been severely injured and is now permanently and totally disabled. Yevdokimov filed a personal-injury suit against McDiarmid, asserting that McDiarmid's negligence resulted in the tree falling on his car and caused his injuries.

Yevdokimov avers in his complaint that the tree "was heavily diseased and dying . . . with a large accumulation of vines" along its trunk and that "[t]he top branches of the tree were leafless during the growing season." J.A. at 1-2. The tree's "roots were shallow, and its growth, health and safety severely compromised by an inadequate footprint and topography for nourishment by surface waters due to the construction of buildings, roadways, sidewalks and other structures." *Id.* at 2. The tree's "root structure was similarly compromised by construction materials which lay under the surface of the soil," which were "remnants of the construction of the structure located" on McDiarmid's property. *Id.* Additionally, "[u]tility easements crossed its root structure and utility cables had been cut through the zone containing its roots." *Id.*

Yevdokimov alleges that "[u]pon information and belief McDiarmid had been involved in the design, construction, and development of the premises, including the layout of the structures, parking facilities and landscaping" and that "McDiarmid was responsible for the care, inspection, servicing, and/or maintenance of the subject diseased and dying tree." *Id.* at 3. Yevdokimov further alleges that McDiarmid knew or should have known of the tree's condition because "[t]he subject tree had been dead, dying, or rotten for many years and exhibited visible signs of decay, which were open, visible and/or obvious." *Id.* In pleading negligence, Yevdokimov asserts that McDiarmid had the duty "to exercise reasonable care to care for, inspect, maintain, and/or service the trees and other vegetation" on its property and "to remove or make safe such trees, including the subject tree, which presented a hazard to passing motorists and/or pedestrians." *Id.* at 4.

McDiarmid argues in its demurrer that it did not owe Yevdokimov a duty to inspect or to cut down sickly trees and that Yevdokimov failed to allege that McDiarmid had "engaged in any affirmative act that caused the property to be different than in its natural state or different from the condition which it was left when the road was built," which is required to allege a duty pursuant to this Court's decision in *Cline v. Dunlora South, LLC*, 284 Va. 102 (2012). J.A. at 14-15. Without a sufficient pleading that McDiarmid owed Yevdokimov a duty, McDiarmid asserts, the negligence count cannot stand. The circuit court overruled McDiarmid's demurrer as to the negligence count. McDiarmid then filed a motion to certify the matter for an interlocutory

appeal, which the court granted.

II.

On appeal, we review a circuit court's decision on demurrer by accepting as true all factual allegations in the complaint if they are "made with 'sufficient definiteness to enable the court to find the existence of a legal basis for its judgment.'" *Squire v. Virginia Hous. Dev. Auth.*, 287 Va. 507, 514 (2014) (citation omitted). "Two important limitations on this principle, however, deserve emphasis." *Doe ex rel. Doe v. Baker*, 299 Va. 628, 641 (2021) (quoting *Coward v. Wellmont Health Sys.*, 295 Va. 351, 358 (2018)).

> First, while we also accept as true unstated inferences to the extent that they are *reasonable*, we give them no weight to the extent that they are *unreasonable*. The difference between the two turns on whether "the inferences are strained, forced, or contrary to reason," and thus properly disregarded as "arbitrary inferences." Second, we must distinguish allegations of historical fact from conclusions of law. We assume the former to be true *arguendo*, but we assume nothing about the correctness of the latter because "we do not accept the veracity of conclusions of law camouflaged as factual allegations or inferences." "Instead, we review all conclusions of law de novo."

Id. (emphases in original) (quoting *Coward*, 295 Va. at 358-59). These observations arise from the "'sufficient definiteness' requirement" that "has long anchored our application of notice-pleading principles." *A.H. ex rel. C.H. v. Church of God in Christ, Inc.*, 297 Va. 604, 613 n.1 (2019) (collecting cases).

"In Virginia, 'the question of liability for negligence cannot arise at all until it is established that the man who has been negligent owed some duty to the person who seeks to make him liable for his negligence.'" *Tingler v. Graystone Homes, Inc.*, 298 Va. 63, 79 (2019) (alteration and citation omitted). The question whether a duty exists is one that this Court reviews de novo. *Id.* As this Court has previously recognized, "[a]t common law, a landowner owed no duty to those outside the land with respect to natural conditions existing on the land, regardless of their dangerous condition." *Cline*, 284 Va. at 106 (citing, inter alia, *Giles v. Walker* (1890) 24 QBD 656 (Eng.)).[3]

[3] The import of the 1890 English case *Giles v. Walker*, which was relied upon in *Cline* for this proposition, is doubtful given that it was decided well after the adoption of English common law in Virginia under both the 1776 ordinance and the 1792 reception statute, *see White v. United States*, 300 Va. 269, 277 n.5 (2021). Also concerning is that the broad reliance upon

As for the public highways and streets, "[t]he duty of the public entity that maintains the highway is to perform a positive act in the preparation and preservation of a sufficient traveled way," and "[t]he duty of others," including adjoining property owners, "is to abstain from doing any act by which any part of the highway would become more dangerous to the traveler than in a state of nature, or than in the state in which the public entity that maintains the highway has left it." *Id.* at 109 (alterations omitted) (quoting *Price v. Travis*, 149 Va. 536, 542 (1927)). To state a claim under this standard, the complaint must contain allegations that the property owner performed an "*affirmative act* that caused the property adjoining the property to be different than in its natural state or different from the condition in which it was left when the road was built." *Id.* at 109-10 (emphasis added).[4]

While we agree with Yevdokimov that McDiarmid may have owed him a duty if McDiarmid or its agent had engaged in an "affirmative act," *id.*, that changed the natural state of the tree and thus made the highway more dangerous *because* of that act,[5] no such allegation has been sufficiently alleged in the present complaint. Yevdokimov's only allegation that touches on an action of McDiarmid is that "McDiarmid had been involved in the design, construction, and

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Giles for the rule of non-liability as to natural conditions has been heavily criticized. *See, e.g.*, W.V.H. Rogers, Winfield and Jolowicz on Tort 409 (11th ed. 1979); A.L. Goodhart, *Liability for Things Naturally on the Land*, 4 Cambridge L.J. 13, 17-18, 26-27, 30-31 (1930); W.T.S. Stallybrass, *Dangerous Things and the Non-Natural User of Land*, 3 Cambridge L.J. 376, 396 (1929). Even so, "despite considerable bombardment by judicial dicta and a furious cannonade" from a leading critic, "the rule in *Giles v. Walker*" had "remained impervious to all attack." D.M. Harris, Comment, *Nuisance, Negligence and Dangers Arising Naturally on Land*, 25 Cambridge L.J. 24, 24 (1967). Neither party in this case has asked us to reverse or expand the holding in *Cline* or its reliance on *Giles*. We will not consider doing either sua sponte.

[4] Even if the existence of a duty and a breach of that duty are alleged, a prima facie case of negligence also requires an allegation of causation — that McDiarmid's "negligence was a proximate cause, a direct, efficient contributing cause of the accident," *AlBritton v. Commonwealth*, 299 Va. 392, 404 (2021). In other words, Yevdokimov must allege that it was reasonably foreseeable that McDiarmid's affirmative acts would alter the natural state of the tree in such a way as to contribute to the acceleration of the tree's death and decay and to cause its premature fall onto the public highway.

[5] *See* William L. Prosser & W. Page Keeton, Prosser and Keeton on the Law of Torts § 57, at 390-91 (Dan B. Dobbs et al. eds., 5th ed. 1984) (recognizing that "if the occupier has himself altered the condition of the premises," such as by "weakening rocks by the construction of a highway" or "planting a row of trees next to the highway," then "the condition is no longer to be regarded as a natural one, and he will be held liable for the damage resulting from any negligence").

development of the premises, including the layout of the structures, parking facilities and landscaping" and that the tree's roots were "severely compromised" because of the construction and the remnants of construction materials left under the surface. J.A. at 2-3. The word "involved," *id.* at 3, does not have "sufficient definiteness," *Squire*, 287 Va. at 514, to allege that either McDiarmid or its agent committed any affirmative act that resulted in an alteration of the tree's natural state. "Involved" could be an action as simple as paying for the construction, ordering the construction to be performed, or agreeing to the overall building plan. Any inference that "involved" encompasses a more direct action by McDiarmid or its agent, which altered the natural state of the tree, is an unreasonable interpretation.

Yevdokimov's allegation that "utility cables had been cut through the zone containing [the tree's] roots," J.A. at 2, suffers a similar fate. The passive verb phrase "had been cut" makes clear that Yevdokimov is not alleging with definiteness that McDiarmid or its agent laid or directed the laying of these utility cables, which compromised the tree's roots. Because of the passive nature of the verb phrase, the allegation does not name the actor of the cutting at all, and if a utility company acting as an independent contractor had laid the cables, McDiarmid would not be vicariously liable.[6]

Beyond the allegations that are insufficiently definite as to who performed the affirmative acts contributing to the alteration of the natural state of the tree, the remaining allegations in the complaint merely assert McDiarmid's failure to inspect, maintain, and care for the tree. McDiarmid's failure to perform an action at best constitutes nonfeasance, for which "there is no tort liability . . . in the absence of a duty to act," *Tingler*, 298 Va. at 84 (alteration and citation omitted). Only if McDiarmid or its agent had caused the alteration of the tree's natural state through an act of misfeasance (performing a lawful act in a wrongful manner) or malfeasance (performing an act wrongful in itself) would there be tort liability, *see id.* We have explained that this distinction "has a centuries-old provenance" and is necessary because "[t]here is a fundamental difference between doing something that causes physical harm and failing to do something that would have prevented harm." *Id.* at 84-85 (citation omitted). Applying this distinction to the present case, Yevdokimov has not alleged that McDiarmid or its agent

[6] The general rule is that "one who employs an independent contractor is not liable for injuries to third parties resulting from the contractor's negligence." *MacCoy v. Colony House Builders, Inc.*, 239 Va. 64, 69 (1990).

committed an affirmative act constituting either misfeasance or malfeasance with regard to altering the natural state of the tree.

Because the complaint insufficiently pleaded allegations to sustain a negligence cause of action under *Cline*, the circuit court erred in overruling McDiarmid's demurrer to the negligence count. Given that this case comes to us on interlocutory appeal, the question whether Yevdokimov should have been granted leave to amend the complaint was never addressed in the circuit court. We will thus limit our discussion of this point by observing that on remand any such motion "should be liberally granted," Rule 1:8, unless the circuit court concludes it would be unjust to do so. *See, e.g.*, *AGCS Marine Ins. v. Arlington Cnty.*, 293 Va. 469, 487 (2017) (summarizing exceptions to Rule 1:8's presumption in favor of granting leave to amend).

III.

In sum, the circuit court erred in overruling McDiarmid's demurrer to the negligence count because Yevdokimov failed to sufficiently plead that McDiarmid had engaged in an affirmative act that altered the tree from its natural state and caused the highway to be more dangerous than in a state of nature. Being vaguely "involved" in the actions of others, *supra* at 4-5, does not satisfy the "affirmative act" requirement for the imposition of a legal duty of care, *Cline*, 284 Va. at 109-10. For these reasons, we reverse and remand for further proceedings consistent with this order.

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

A Copy,

Teste: 

Clerk