VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 30th day of July, 2020.

Present: All the Justices

RWW 34, LLC, et al., Appellants,

against Record No. 181662
Circuit Court No. CL17000463-00

Hash Group, LLC, Appellee.

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

Roger Woody, Barbara Woody, and RWW 34, LLC appeal the circuit court's decision to dismiss their complaint against Hash Group, LLC with prejudice on the basis of res judicata. Because RWW 34, LLC and the Woodys (collectively "RWW") have not challenged the circuit court's adequate, independent ground for dismissing the complaint, we affirm.

I.

In 1993, the Woodys purchased a tract of land containing approximately 42 acres in the Town of Christiansburg. Located behind a shopping center, the Woodys' tract had no road frontage. To provide access to the nearest public street, the deed conveyed a 50-foot-wide easement (recorded in 1975) over an adjacent parcel that would come to be owned by Hash Group's predecessor, Daniel G. Kamin Christiansburg, LLC ("Kamin"). Kamin later purchased an additional, adjoining parcel on which a Food Lion grocery store was constructed. Food Lion has used and allegedly continues to use a portion of the additional parcel (including the area over which the Woodys' easement runs) for customer access and parking.

In 2003, Hash Group purchased the original Kamin parcel subject to the recorded easement.[1] In 2008, the Woodys filed a declaratory judgment action against Kamin individually

[1] The appellate briefs in this case all identify Hash Group as the current owner of the servient estate. At oral argument on appeal, counsel for RWW stated that Hash Group had sold

and in his capacity as director and trustee in liquidation of his corporation, against Hash Group, and against the Town of Christiansburg. Food Lion was later added as a defendant.

The circuit court adopted the recommended disposition of a commissioner in chancery, who had found (on the matters pertinent to the present appeal) that the Woodys are entitled to a nonexclusive, 50-foot easement for ingress and egress across Kamin's original tract and are entitled to unobstructed use of that easement. The court's final order approved the commissioner's conclusion that "[a]ny encroachments within this 50-foot right of way placed there by Food Lion or other parties must be removed," R. at 48 (commissioner's report). *See id.* at 89 (approving the commissioner's report).

The Woodys transferred their property to RWW 34, LLC in 2009 during the pendency of the declaratory judgment action. Noting that fact, the commissioner's report concluded: "Reference[s] herein to Woody either apply to Woody or RWW34, LLC as the circumstances dictate." *See id.* at 48-49. The circuit court later denied as untimely a motion by the Woodys to add RWW 34, LLC as a party to the declaratory judgment action. The court entered final judgment on the action in 2012.

In 2014, RWW filed a new complaint solely against Hash Group. Hash Group filed a plea of res judicata based upon the prior declaratory judgment action. RWW moved to nonsuit the case, and the circuit court granted the motion.

In 2017, RWW refiled the suit that is the basis of the present appeal. The complaint sought compensatory and punitive damages against Hash Group and alleged that Hash Group, along with Kamin and his related entities, had completely destroyed and obstructed the easement, leaving RWW's property landlocked and valueless. The complaint added that the Town had denied Roger Woody's request for an entrance permit to access Roanoke Street, the exit point of the easement.

Hash Group again filed a plea of res judicata, arguing among other things that claim preclusion principles required the dismissal of the newly filed damages claim because those

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this tract just days before oral argument. Counsel added that he had recently filed a separate petition for appeal contesting a circuit court order directing him to withdraw a lis pendens that he had previously filed against the servient estate. *See* Petition for Appeal, *RWW 34, LLC v. Hash Group, LLC*, Record No. 200519 (Va. filed Apr. 15, 2020). This order in the present appeal, Record No. 181662, addresses only the facts and issues as presented in the briefs before us. We will address the petition for appeal in Record No. 200519 when it becomes ripe for decision.

damages had been asserted but never actually pursued in the earlier declaratory judgment action. The circuit court agreed, issuing a letter opinion and final order noting "that no specific dates were alleged in the plaintiffs' claim for damages and, therefore, it was impossible to determine when the alleged damages occurred." *Id.* at 209; *see also id.* at 207. The court then inferred that most of the damages had to have occurred prior to the final judgment in the declaratory judgment action given the allegations of damages caused by Kamin or his related entities, who had not owned the property since 2003, and that such damages, therefore, "would be barred by the princip[le] of res judicata." *See id.* at 207, 209.

The court also ruled, however, that a separate and independent ground existed for dismissing the complaint. In doing so, the court reiterated a finding from its letter opinion:

> The court *further* noted that the purpose of the right-of-way in issue is for the dominant property, the plaintiffs herein, to have a right-of-way for ingress and egress across the servient property to U.S. Route No. 11, (Roanoke Street). The plaintiffs do not have access to Roanoke Street due to the fact that the Town of Christiansburg has denied the plaintiffs an entrance onto Roanoke Street at the terminal of the right-of-way. *Further*, the court reasoned that the plaintiffs must show the ability to reach the ultimate destination of the right-of-way for them to establish damages resulting from actions of the defendant which it cannot do because the plaintiffs do not have access for ingress and egress because of the denial by the Town of Christiansburg.

Id. at 209 (emphases added); *see also id.* at 207. The final order concluded:

> Based on the foregoing and the fact that the plaintiffs do not claim damages to the land and the right-of-way which occurred after December 27, 2012, the plaintiffs' action is barred by the doctrine of the princip[le] of res judicata and it is accordingly ORDERED that this cause be dismissed with prejudice and further ORDERED that this cause be stricken from the docket of the court.

Id. at 209.[2]

[2] We interpret the "foregoing" analysis to refer to the separate rationales of res judicata and inadequately pleaded damages, which the circuit court addressed separately in its letter opinion and later final order, *see* R. at 206-10. Both contain clear statements that RWW failed to adequately plead damages, unconnected to any concern regarding res judicata. On appeal, RWW did not dispute this interpretation either on brief or in oral argument. *See* Appellants' Br. at 2-4 (treating the damages holding as a separate ruling).

II.

On appeal, RWW advances three assignments of error in support of its argument that the circuit court erred in dismissing RWW's most recent complaint. The first two challenge the court's application of res judicata. The third asserts that the court "erred in its ruling that the Appellants did not have access to their easement because the Town of Christiansburg would not grant an entrance permit, which was contrary to the previous rulings of the [c]ourt." Appellants' Br. at 4. RWW's opening brief addresses the first two assignments of error (which contest the res judicata ruling) but does not address the third assignment of error (which contests the court's ruling that RWW had not pleaded any damages because of the Town's denial of an entrance permit).[3]

In response, Hash Group's lead argument in its brief asserts: "The circuit court's dismissal of the Complaint on grounds that RWW . . . could not prove damages — an independent holding that cannot be decided on appeal — is dispositive of the appeal." Appellee's Br. at 10. Among other reasons, Hash Group concludes that the circuit court's no-damages ruling "cannot be decided on appeal," *id.*, because RWW has waived appellate review under Rule 5:27(d) by failing to present any "argument at all in the Opening Brief addressing the third assignment of error," Appellee's Br. at 13. RWW elected not to file a reply brief.

A.

Rule 5:27(d) required RWW to include in its opening brief "[t]he standard of review, the argument, and the authorities relating to each assignment of error." "As we have often said, '[l]ack of an adequate argument on brief in support of an assignment of error constitutes a waiver of that issue.'" *Coward v. Wellmont Health Sys.*, 295 Va. 351, 367 (2018) (citation omitted); *see also Palmer v. Atlantic Coast Pipeline, LLC*, 293 Va. 573, 580 (2017); *John Crane, Inc. v. Hardick*, 283 Va. 358, 376, *modified on reh'g on other grounds*, 284 Va. 329 (2012). "[I]t is not the role of the courts, trial or appellate, to research or construct a litigant's case or arguments for him or her, and where a party fails to develop an argument in support of his or her contention or merely constructs a skeletal argument, the issue is waived." *Coward*, 295 Va. at 367 (citation omitted).

[3] RWW's opening brief includes an argument heading entitled "Plaintiffs are Entitled to Equitable Relief." *Id.* at 21. RWW's complaint, however, sought only an award of compensatory and punitive damages, not injunctive relief or any other equitable remedy.

In this case, RWW assigns error to the circuit court's ruling that RWW did not plead damages because the Town had denied RWW's request for an entrance permit at the exit point of the easement. *See* Appellants' Br. at 4. Inexplicably, however, RWW fails to present any argument on brief in support of that assignment of error. The brief contains no legal reasoning, no citation to authority, and no argument of any kind on this issue. Even after Hash Group had pointed out this omission, RWW chose not to file a reply brief (attempting to refute Hash Group's waiver argument)[4] or to seek leave to file an amended opening brief (attempting to cure the waiver). "At the risk of stating the obvious, the Rules of the Supreme Court are rules and not suggestions; we expect litigants before this Court to abide by them." *Coward*, 295 Va. at 367 (citation omitted). By failing to make even a "skeletal argument," *id.* (citation omitted), in support of its third assignment of error, RWW has waived any challenge to the circuit court's holding that the complaint failed to allege a prima facie claim for damages because of the Town's denial of an entrance permit. We thus offer no opinion on this issue.

B.

An appellant's failure to properly challenge on appeal a separate and independent basis for a lower court's judgment precludes the appellate court from reversing on any *other* basis that the appellant properly challenges on appeal. "Otherwise, 'an appellant could avoid the adverse effect of a separate and independent basis for the judgment by ignoring it and leaving it unchallenged.'" *Manchester Oaks Homeowners Ass'n v. Batt*, 284 Va. 409, 422 (2012) (alteration omitted) (quoting *Johnson v. Commonwealth*, 45 Va. App. 113, 116-17 (2005)).[5] To be a "separate and independent basis for the judgment," the alternative holding must be "one that (when properly applied to the facts of a given case) would legally constitute a freestanding basis in support of the lower court's decision." *Id.* (alteration and citation omitted). However, "in making that evaluation, we do not examine the underlying merits of the alternative holding —

[4] We do not mean to imply that a reply brief could have cured RWW's Rule 5:27(d) violation. *See Palmer*, 293 Va. at 580 (refusing to consider an argument made for the first time in the appellant's reply brief); *Whitley v. Commonwealth*, 223 Va. 66, 79 n.2 (stating that the Court "will not notice a non-jurisdictional question raised for the first time in a reply brief filed in this Court"), *cert. denied*, 459 U.S. 882 (1982).

[5] *See also Commonwealth v. Lambert*, 292 Va. 748, 758 (2016) (acknowledging that "in some cases, failure of a party to address an alternative holding of the trial court may necessitate affirmance on appeal"); *Ferguson v. Stokes*, 287 Va. 446, 452-53 (2014) (reiterating the rule from *Manchester Oaks Homeowners Ass'n*).

for that is the very thing being waived by the appellant as a result of his failure to assign error to it on appeal." *Id.* (alterations and citation omitted).

RWW's complaint in this case did not request injunctive relief to enforce the circuit court's earlier order in the declaratory judgment action, which had approved the commissioner's finding recognizing the easement. The complaint only sought an award of compensatory and punitive damages for Hash Group's and Kamin's alleged destruction and obstruction of the easement (though Kamin was not a defendant). The circuit court ruled, as a matter of law, that the complaint established that RWW could not prove damages because of the Town's denial of an entrance permit. That holding doomed any request for compensatory or punitive damages. With few exceptions (none of which are relevant here) one cannot recover the latter without recovering the former. *See Syed v. ZH Techs., Inc.*, 280 Va. 58, 74-75 (2010); Kent Sinclair, Sinclair on Virginia Remedies § 3-4[A], at 3-47 (5th ed. 2016).

In short, the circuit court's holding that damages were legally unrecoverable ends this appeal. It does not matter whether the circuit court misunderstood the res judicata issue as RWW contends.[6] Even if the res judicata holding were in error, we cannot review that or any other holding because RWW has not properly challenged the alternative, no-damages holding, which is a legally sufficient basis for the circuit court's final order dismissing the complaint. In a practical (though not doctrinal) sense, the res judicata debate is moot. When a lower court's judgment is legally justified on a separate and independent ground, there is no point in addressing the merits of another ground.

III.

We affirm the circuit court's judgment because RWW has waived appellate review of it by not properly challenging the court's holding on damages. Because that holding was an adequate and independent ground for dismissing RWW's complaint, we offer no opinion on the circuit court's res judicata holding.

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

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[6] "All of the ordinary caveats to res judicata apply to Rule 1:6's transactional approach to merger and bar — thus preserving the historic limitations on the doctrine." *Funny Guy, LLC v. Lecego, LLC*, 293 Va. 135, 150 n.15 (2017); *see also D'Ambrosio v. Wolf*, 295 Va. 48, 55-56 (2018) (citing *Winborne v. Doyle*, 190 Va. 867, 871-73 (1950); Restatement (Second) of Judgments § 33 cmt. c (1982)).

JUSTICE GOODWYN, dissenting.

In my opinion, the circuit court's letter opinion and final order do not clearly set up a separate and independent ground for its judgment apart from the res judicata holding. The court may have intended to do so, but the confusing nature of the letter opinion and final order seems to fold the failure to prove damages into the res judicata holding. For this reason, I believe that we should decide the res judicata issue and remand the damages issue for further consideration.

On the res judicata issue, I agree with the majority that "[a]ll of the ordinary caveats to res judicata apply to Rule 1:6's transactional approach to merger and bar — thus preserving the historic limitations on the doctrine," *ante* at 6 n.6 (quoting *Funny Guy, LLC v. Lecego, LLC*, 293 Va. 135, 150 n.15 (2017)); *see also D'Ambrosio v. Wolf*, 295 Va. 48, 55-56 (2018) (citing, inter alia, *Winborne v. Doyle*, 190 Va. 867, 871-73 (1950)).

One such caveat is that a declaratory judgment action that seeks only a judicial declaration of rights (without an accompanying request for damages or injunctive relief) does not bar a later action seeking to enforce those rights. *See* Restatement (Second) of Judgments § 33 cmt. c (1982) ("When a plaintiff seeks solely declaratory relief, the weight of authority does not view him as seeking to enforce a claim against the defendant. Instead, he is seen as merely requesting a judicial declaration as to the existence and nature of a relation between himself and the defendant. The effect of such a declaration, under this approach, is not to merge a claim in the judgment or to bar it."). Virginia law is in full accord with this view. *See D'Ambrosio*, 295 Va. at 55-56; *Winborne*, 190 Va. at 871-73.

The circuit court in this case erred by holding that the 2008 declaratory judgment action, which sought only a declaration of rights, triggered a res judicata bar to RWW's 2017 action that sought compensatory and punitive damages. On this ground, I would reverse the circuit court's judgment and remand the case for further proceedings to address the remaining issues in this case, including the damages issue that the circuit court appears to have left undeveloped.

A Copy,

Teste:

Douglas B. Robelen, Clerk

By:

Deputy Clerk