Trees—A Unique Branch of Law

By Kathleen K. Law

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If a tree falls in a forest and no one is around to hear it, does it make a sound? Although this question might be an interesting conversation starter at a party of intellectuals, a more practical question might be, If a tree in my yard falls onto my neighbor's property, am I liable for damages? Or, May I eat fruit from my neighbor's tree if the branches holding the fruit overhang my property? This article will address many of these questions commonly asked of real property practitioners. Naturally, a practitioner should consult the law in the state in which he practices before advising a client asking these or similar questions.

Who Owns a Tree?

Ownership of a tree is determined by the location of the tree trunk. If the main tree trunk is located entirely on a party's real property, that party is the owner of the tree. A "boundary line tree" is a tree in which the property line between or among properties passes through the tree's trunk. All owners with part of a tree's trunk on their properties share ownership of that boundary line tree as tenants in common. Subsequent sections of this article will clarify that establishing the ownership of a tree is crucial to determine the rights, responsibilities, and potential liabilities of the owner of the tree and the neighboring landowner.

If a Neighbor's Tree Might Damage or Already Has Damaged My Property, What Rights, Responsibilities, and Liabilities Do the Neighbor and I Have?

This question is addressed in the context of both encroachments and storm damage.

Encroachments

One common concern for a landowner arises when a neighbor's tree branch hangs over the property line and above the landowner's house or personal property, especially if it appears that the branch might fall. Another dispute among neighbors that can occur is the encroachment of tree roots onto a neighbor's property. Encroaching roots can not only kill vegetation but also can destroy underground structures such as septic tanks. So what options does a landowner have when these situations arise? One remedy that courts have uniformly agreed on is self-help, which permits a landowner to cut back the "encroaching branches, roots, and other growth to the property line." *Lane v. W.J. Curry & Sons*, 92 S.W.3d 355, 360 (Tenn. 2002). Beyond self-help, the measures a landowner may take vary from state to state; however, most states have adopted one of the following approaches: Massachusetts rule, Restatement rule, Virginia rule, and Hawaii rule.

Under the Massachusetts rule, a landowner's sole remedy is self-help. *Michalson v. Nutting*, 175 N.E. 490, 490–91 (Mass. 1931). Furthermore, a landowner has no liability to neighbors for damage caused by its encroachments onto another's property. *Herring v. Lisbon Partners Credit Fund, Ltd. P'ship*, 823 N.W.2d 493, 496–97 (N.D. 2012). The burden is placed entirely on each landowner to make sure its property is not damaged by any encroachments from neighbors' vegetation. Although this rule is praised for its simplicity and certainty, it has been criticized for its lack of fairness in depriving "deserving plaintiffs of any meaningful redress when their property is damaged." Id. at 500. Jurisdictions such as Florida, Kentucky, Massachusetts, Maryland, and the District of Columbia have adopted the Massachusetts rule.

The Restatement rule, which has been adopted only in a few jurisdictions, imposes an obligation on a landowner to control its "artificial" vegetation, but not its "natural" vegetation. *Lane*, 92 S.W.3d at 361. Therefore, if the tree was planted or artificially maintained, the landowner might be liable for damages when the tree causes harm to an adjoining property; but, if the tree grew naturally, there would be no liability imposed on the landowner. See Restatement (Second) of Torts §§ 839–40. The "unworkable" distinction between natural and artificial vegetation has resulted in very few jurisdictions adopting the Restatement rule. *Melnick v. C.S.X. Corp.*, 540 A.2d 1122, 1136 (Md. 1988).

The Virginia rule holds that an encroachment of vegetation from a neighbor's plantings that are "not noxious in nature" and cause no "sensible injury" is not actionable at law, leaving the landowner limited to the remedy of self-help. *Flancher v. Fagella*, 650 S.E.2d 519, 521 (Va. 2007) (quoting *Smith v. Holt*, 5 S.E.2d 492 (Va. 1939)). But, "when it appears that a sensible injury has been inflicted by the protrusion of roots from a noxious tree or plant onto the land of another, he has, after notice, a right of action at law for the trespass committed." Id. Courts have struggled with the distinction between vegetation that is noxious and that which is not. See *Melnick*, 540 A.2d at 1137 (stating that confusion exists over whether a tree or plant is noxious merely because it causes injury, or whether it must be inherently injurious or poisonous). As a result, most jurisdictions, including Virginia, have abandoned the Virginia rule. See *Flancher*, 650 S.E.2d at 521 (abandoning the Virginia rule and adopting the Hawaii rule).

Lastly, the Hawaii rule holds that while "living trees and plants are ordinarily not nuisances, [they] can become so when they cause actual harm or pose an imminent danger of actual harm to the adjoining property. *Lane*, 92 S.W.3d at 362. The Hawaii Court of Appeals held:

> [W]hen overhanging branches or protruding roots actually cause, or there is imminent danger of them causing, sensible harm to property other than plant life . . . the damaged or imminently endangered neighbor may require the owner of the tree to pay for the damages and to cut back the endangering branches or roots, and if such is not done within a reasonable time, the damaged or imminently endangered neighbor may cause the cutback to be done at the tree owner's expense.

Whitesell v. Houlton, 632 P.2d 1077, 1079 (Haw. Ct. App. 1981).

Several jurisdictions—including Hawaii, Illinois, Indiana, Kansas, Minnesota, New Mexico, New York, Ohio, Oklahoma, and others—have adopted the Hawaii rule because of its realistic application and the fair results it produces.

Storm Damage

Another common problem between neighbors arises when a storm knocks down a landowner's tree, causing damage to a neighbor's property. The party responsible for the cost of repair in these situations depends on whether a duty is imposed on the tree owner to prevent this type of damage from occurring. Two separate factors will likely determine whether the court imposes a duty on the tree owner: (1) whether the tree appeared to be unhealthy or otherwise likely to cause damage before the storm and (2) whether the accident happened in a rural or urban area.

The general rule adopted by most jurisdictions is that a tree owner will be held to a reasonable person standard in preventing damage to a neighbor's property. See *Klein v. Weaver*, 593 S.E.2d 913, 914 (Ga. Ct. App. 2004). The court in *Klein v. Weaver* summarized this general rule when it stated"[t]he owner of a tree is liable for injuries from a falling tree only if he knew or reasonably should have known the tree was diseased, decayed or otherwise constituted a dangerous condition." Id. (quoting *Willis v. Mal-oof*, 361 S.E.2d 512, 513 (Ga. Ct. App. 1987)). The court further stated that "[a] landowner who knows that a tree on his property is decayed and may fall and damage the property of an adjoining landowner is under a duty to eliminate the danger." Id. (quoting *Cornett v. Agree*, 237 S.E.2d 522, 523 (Ga. App. 1977)). Also, "a landowner does not have a duty to consistently and constantly check all trees on his property for nonvisible rot; 'the manifestation of decay must be visible, apparent, and patent.'" Id.

Therefore, if a visibly decayed tree is knocked down during a storm, the owner of the tree will be liable for any damages created by the fall because the owner knew or should have known that the decayed tree would be dangerous if confronted with a storm. If, however, the tree is healthy and is knocked down solely because of the storm, no liability will be imposed on the tree owner. See *Lewis v. Krussel*, 2 P.3d 486, 492 (Wash. Ct. App. 2000). Tree owners are under no duty to remove healthy trees merely because the wind might knock them down in a storm. See id.

Some courts differ on the standard of care required of landowners in rural areas. Some courts have stated that to require a rural landowner to inspect all trees on its property would be unduly burdensome and impractical. *Mahurin v. Lockhart*, 390 N.E.2d 523, 524–25 (Ill. App. Ct. 1979). These courts typically do not impose a duty on a rural landowner to prevent harm to others outside its land caused by naturally growing trees. See *Barker v. Brown*, 340 A.2d 566, 569 (Pa. Super. Ct. 1975). Yet, because of increasing rural development and the blurring of the urban versus rural distinction, many courts such as those in California, Iowa, New Jersey, New York, and Ohio now impose a duty of reasonable care in both rural and urban areas.

Other variations of the law arise as different jurisdictions determine what constitutes reasonable care. The most common standard of care imposed on a landowner is a reasonable inspection for visible decay and, if a landowner has or should have reason to know of the dangerous tree, to eliminate the danger. *Cornett v. Agee*, 237 S.E.2d 522, 523 (Ga. Ct. App. 1977). But there has been some deviation from this

standard, as a Washington, D.C., court imposed the higher duty of an expert inspection for a tree that had previously been subjected to surgery. *Dudley v. Meadowbrook, Inc.*, 166 A.2d 743 (D.C. 1961). In addition, a Pennsylvania court has stated that, while "the reasonable care standard encompasses, at least, a duty to make a visual inspection[,] [u]nder some circumstances it may encompass more." *Barker*, 340 A.2d at 569.

What If a Neighbor Damages or Kills My Tree?

Another dispute that arises between neighbors occurs when one neighbor wrongfully removes or damages a tree without the tree owner's permission. When this occurs, most states give the tree owner the statutory right to sue for damages and, in instances of willful or malicious conduct, allow for recovery of treble damages. See, e.g., 740 Ill. Comp. Stat. 185/2; Iowa Code § 658.4; Minn. Stat. § 561.04; N.Y. Real Prop. Acts. Law § 861; Vt. Stat. Ann. tit. 13, § 3606. Although some statutes may not require willful or malicious conduct for the tree owner to recover treble damages, courts likely may impose such a requirement. See *Salazar v. Matejcek*, 199 Cal. Rptr. 3d 705, 715–16 (Ct. App. 2016) (imposing standard of willful or malicious conduct to recover treble damages despite its absence in statute). In other states a much lower threshold is set to award treble damages. In Vermont, treble damages will be awarded for cutting down a neighbor's tree near the property line unless the cutter shows "such reason as would lead a man while in the exercise of ordinary care and prudence" to commit the same error in cutting down the tree. *Pion v. Bean*, 833 A.2d 1248, 1257 (Vt. 2003). This implies that ordinary negligence will still result in the payment of treble damages.

Whether trebled or not, in assessing the measure of damages, the tree owner is typically entitled to "the difference in the fair market value of the property before and after the injury or the cost of restoring the property, whichever is the lesser amount." *Smith v. Woodard*, 15 S.W.3d 768, 773 (Mo. Ct. App. 2000). In addition, some jurisdictions also allow additional damages to be awarded to compensate for the loss of the tree's special value. See *Bangert v. Osceola County*, 456 N.W.2d 183, 191 (Iowa 1990) (recognizing that intrinsic value of a tree may be compensable); *Lucas v. Morrison*, 286 S.W.2d 190, 191 (Tex. App. 1956) (awarding owner of dairy cattle damages for intrinsic value of tree that shaded cows); *Woodburn v. Chapman*, 379 A.2d 1038, 1040 (N.H. 1977) (awarding additional damages because the tree had special value as a boundary marker).

Fruit from Branches of Neighbor's Tree That Hang over Adjacent Property

As stated earlier in this article, a tree is owned by the owner of the land within which the trunk is located. The tree owner owns all of the fruit its tree bears on its branches, even if some branches encroach into a neighboring landowner's yard. Steve Pihlaja & Lorrie Stromme, *In the Shade of a Tree: Analyzing the Tree-Related Legal Problem*, 59 Bench & B. Minn. 21 (Mar. 2002). Generally, the tree owner may not trespass onto the neighbor's property to pick the fruit, however. Id. at 22. This presents a logistical problem in which the tree owner owns the fruit but cannot pick it. Courts consider each landowner's rights in deciding whether a tree owner can pick the fruit from branches encroaching into a neighbor's yard. For example, courts tend to highly value a commercial orchard owner's right to the fruit of his or her tree over the right of a neighboring landowner, especially in states with favorable laws for orchards such as California and Massachusetts. See Jedediah Mannis, *Neighbors and Fruit Trees*,

www.nolo.com/legal-encyclopedia/neighbors-fruit-trees.html (last visited Dec. 26, 2016). If the tree owner desires to pick the fruit on branches overhanging a neighbor's property, the best practice is for the tree owner to talk with the neighboring landowner to get permission to pick the fruit.

Fruit from Boundary Tree

With boundary trees owned jointly, as tenants in common, all of the fruit is owned by both landowners. Jedediah Mannis, *Neighbors and Fruit Trees*, www.nolo.com/legal-encyclopedia/neighbors-fruit-trees.html (last visited Dec. 26, 2016). The tree owners should come up with a plan for how the fruit will be divided. One solution is to allow each tree owner to pick the fruit on his or her side of the property line so neither trespasses, and another is to pick fruit from the whole tree together and divide the produce evenly.

Can the Neighboring Landowner Keep Fallen Fruit from Encroaching Branches?

Likely, yes, because fallen fruit has little value and the tree owner is likely not able to retrieve it without trespassing. Pihlaja & Stromme, supra, at 22. Courts are divided, however, regarding fallen fruit ownership. Although they tend to favor an orchard or commercial grower's interest in fallen fruit on a neighbor's land, courts tend to allow a landowner to keep fruit that fell from a noncommercial grower's tree.

If My Neighbor's Leaves Blow into My Yard, Can I File a Successful Nuisance Claim?

A landowner will probably not be successful in a nuisance claim stemming from leaves blowing from a neighbor's tree into his or her yard, because the landowner likely does not have a legal remedy under any of the four rules states have adopted regarding tree liability. See *Herring*, 823 N.W.2d at 496–97. The Massachusetts rule provides only for a self-help remedy; the Hawaii rule provides for tree-owner liability only when encroaching branches cause harm or create imminent danger; the Restatement rule distinguishes between a natural or artificial nuisance; and the Virginia rule distinguishes between noxious and non-noxious trees. *Herring*, 823 N.W.2d at 496. Under any one of these rules, normal leaves blowing into a landowner's yard from a neighbor's tree likely do not impose any liability on the tree owner. But, if the leaves, such as poisonous leaves, create harm or imminent danger, the Hawaii rule could apply. In the same vein, if the tree leaves were artificially blown into the landowner's yard, such as by a tree owner using a leaf-blower to blow them into the landowner's yard or collecting them and depositing them into the landowner's yard, the landowner potentially can establish a nuisance claim in states that have adopted the Restatement rule.

Aside from the above, the most practical advice a lawyer might want to impart to his client who is facing these issues is to talk to the neighboring landowner and come to some type of understanding over the trees near or on the property line between the two properties. n