Ohio Tree Law 2018 - Cases and Trends

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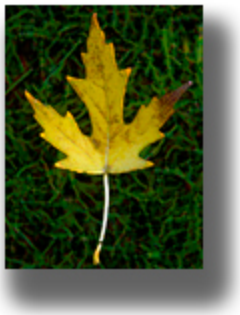

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ADJOINING LANDOWNERS – NUISANCE:

ANGELS WITH DIRTY WINGS

Any fan of the Christmas comedy hit of the 1990s, *Home Alone*, remembers *Angels with Dirty Wings*. It was the *film noir* movie that the kid protagonist played repeatedly, the mobster's taunt – "Keep the change, ya filthy animal" – punctuated with a spray of .45 cal. bullets from a Model 1928 Thompson submachine gun, being used as part of the boy's plot to keep the bad guys at bay.

In this case, the angel is Angel's Path, a developer, and the dirt on its wings slid off a big mound the company put right on its property line as it built houses. The neighbors didn't much like the dirt sliding into their back yard, and weren't big fans of the stagnant water that collected after every rainstorm. But when Angel's Path asked for summary judgment on the trespass and nuisance claims the Peters brought, for some reason they opposed it on the cheap, with an affidavit from Mr. Peters and a bare letter from their engineer.

It's seldom a good idea, saving money at the most crucial moment in the litigation. Better to adhere to the old law school maxim, "too much is not enough." You have affidavits from five experts? Use 'em all. You have five boxes of documents? Attach 'em. Opposing a motion for summary judgment is no time to spare the horses. Here, Mr. Peters should have had an affidavit from his engineer, his own survey done by a registered surveyor and recorded down at the county building, and enough pictures of shifting dirt piles and standing water to start his own Instagram site.

But he didn't. The trial court granted summary judgment to Angel's Path, finding the survey of property lines — showing the dirt piles on its own land — more persuasive than Mr. Peters' affidavit claim that the dirt had sloughed over the line. Peters' affidavit was "self-serving," the trial judge complained.

The Court of Appeals reversed. Sure the affidavit may be a little self-serving, the Court said, but for purposes of summary judgment — a fairly high bar for a defendant to leap — the Court had little problem believing that a property owner knew where his own boundary lay. The

summary judgment test, after all, is whether the evidence, taken in the light most favorable to the party against whom summary judgment is sought, shows there's no material question of fact.

This standard required that the trial court assume that any reasonably detailed facts Mr. Peters raised in his affidavit were true. If after doing this, the court still believes that Peters was not entitled to a judgment, then summary judgment could go for Angel's Path. It was pretty clear that Mr. Peters was going to need a whole lot more persuasion at trial to pull the halo off Angel's Path, but for now – at the summary judgment stage– his showing was enough to stay in the hunt. Just barely.

Incidentally, this case was brought with a companion case from the Kramers, who sued Angel's Path, too. That decision is an interesting study in nuisance and trespass. We'll consider that decision next.

Peters v. Angel's Path, L.L.C., Slip Copy, 2007 WL 4563472 (Ohio App. 6 Dist., 2007). Clarence and Nanette Peters said that Angel's Path, LLC, a developer, damaged their two residential properties. As a result of residential property development by Angel's Path, dirt mounds at the edge of the development property caused water run-off and flooding on their adjacent land. They sought restraining orders to prevent Angel's Path from trespassing on their properties or continuing to alter the natural flow of water, as well as damages.

Angel Path filed a motion for summary judgment, arguing that the earth mounds did not cause run-off to appellants' property or any sinkhole conditions, and therefore, were not a nuisance; and that their surveyor said that the mounds did not encroach upon appellants' property, so no trespass had occurred. The trial court also granted summary judgment against the Peters on both their nuisance and trespass claims. The Peters appealed.

Held: Summary judgment was reversed. A "nuisance" is the wrongful invasion of a legal right or interest. A private nuisance is a nontrespassory invasion of another's interest in the private use and enjoyment of land. In order for a private nuisance to be actionable, the invasion must be either intentional and unreasonable, or unintentional but caused by negligent, reckless, or abnormally dangerous conduct.

If the private nuisance is absolute, strict liability will be applied. By contrast, a qualified nuisance is premised upon negligence, essentially a negligent maintenance of a condition that creates an unreasonable risk of harm. To recover damages for a qualified nuisance, negligence must be averred and proven. A qualified nuisance is a lawful act so negligently or carelessly done as to create a potential and unreasonable risk of harm, which in due course results in injury to another.

Where damage to one property by water run-off from an adjacent property is alleged, Ohio has adopted a reasonable-use rule. A landowner isn't allowed to deal with surface water as he or she pleases, nor is the owner absolutely prohibited from interfering with the natural flow of surface waters to the detriment of others. Instead, each landowner over whose property water flows is allowed to make a reasonable use of the land, even though the flow of surface waters is altered thereby and causes some harm to others. He or she incurs liability only when the harmful interference with the flow of surface water is unreasonable.

In answer to Angel's Path's motion for summary judgment, Mr. Peters provided an affidavit along with photos that claimed the mounds created by Angel's Path had slid across the common property onto his property. Peters' affidavit also said that Angel's Path workers entered onto his property to cut the weeds because the slope of the mounds didn't allow appropriate maintenance without entering onto his land. Finally, the Peters affidavit stated that the back portion of his property now flooded and would not dry out, preventing his use of the land for a rental or for farming. Peters also included as a letter from his expert stating the mounds blocked the natural flow of the water, creating a "permanent pond," and suggesting possible ways to eliminate the problem.

The Court said that Mr. Peters' testimony about the location of his property lines, although perhaps not the best evidence to rebut a commercially prepared survey, was something presumably within the property owner's personal knowledge. Therefore, despite the fact that he had not yet had a separate survey done, the Court would not disregard the affidavit. At the same time, the Court criticized the trial judge for placing too much weight on the fact that Angel's Path plans had been approved by the local county engineers. The Court of Appeals said that while the county engineer and other agencies approved the Angel's Path development plans, including the projected effects that it might have on surrounding properties, "such facts are of little consequence and comfort when examining the real-world results of the construction…"

Here, for the purposes of summary judgment, the Court concluded that the Peters had presented *prima facie* evidence to establish causes of action for private nuisance and trespass. Whether Angel Path's actions were reasonable, intentional, or negligent, the Court said, are decisions to be made in a trial, not on summary judgment.

ADJOINING LANDOWNERS – NUISANCE:

BLINDED BY THE LIGHT

Rare is the opportunity to glean two instructive cases from one malefacting (if that's a word) defendant. However, such is our good fortune with Ohio developer Angel's Path, LLC (and yes, the apostrophe suggests there was only one angel on the path). Previously, we reported on disgruntled Angel's Path neighbor Clarence Peters, who narrowly escaped being thrown out of court because he defended against summary judgment on the cheap. At the time, we promised the tale of the Kramers.

And now, we find out how his neighbors, the Kramers, fared when they went after the same developer because their home was disrupted by noise, dirt and even light from the new home development.

The Kramers claimed the dust and dirt was a public nuisance, and that Angel's Path was causing the light to trespass on their homestead. These arguments were both fairly creative arguments, but one could not escape the feeling that the Kramers were thrashing about, trying their best to find a legal theory that would address the injustice they were experiencing. The developer leveled its legal guns, taking a very legalistic approach: the nuisance couldn't be a public nuisance, it said: a public nuisance has to be affecting the plaintiff differently from the general public, and the general public was eating Angel Path's dust just as badly as were the Kramers. As for the annoying light, Angel's Point contended, there just weren't any cases that said *light* could be a trespasser.

Chief Justice Oliver Wendell Holmes once famously chided a lawyer arguing before him that "this is a court of law, young man, not a court of justice." Fortunately for the Kramers, the Ohio Sixth District Court of Appeals

wasn't having any of that. Often one can tell when a court is stretching to find some way to do justice. Clearly, the appellate judges were disenchanted with the developer, the lawyers for which were essentially telling them that while Angels' Path had done everything the Kramers accused it of, there wasn't anything the law could do about it. *Nyah-nyah* .

But it turned out that there *was* something the Court could do about it. It reinstated the suit, warning the Kramers that they might find it tough to win a trial, but the facts they had alleged suggested several theories they could pursue.

With the case once again headed for a jury of just plain folks who would be unimpressed with Angel Path's legal hair-splitting and probably sympathetic to the sleep-deprived, dust-covered Kramers, one imagines that Angel's Path very quickly recalled another pithy legal aphorism: "A bad settlement is better than a good lawsuit."

Our takeaway from this case is that nuisance actions can be both flexible and powerful means of redressing neighbors' activities that interfere with the legitimate enjoyment of home and hearth.

Kramer v. Angel's Path, LLC, 174 Ohio App.3d 359, 882 N.E.2d 46 (Ohio App. 6 Dist. 2007). William and Patricia Kramer, sued Angel's Path, L.L.C., , alleging that construction in a housing development resulted in blowing dust and dirt tracked onto their street and trespass from a lighted "promotional" sign that lighted the front of the Kramers' residence 24 hours a day. They alleged that Angel's Path's development was a public nuisance because of the dirt and Angel's Path was actually trespassing on their land with the 24-hour lighted sign.

The trial court threw the suit out altogether. The Kramers appealed.

Held: The Kramers could proceed to trial against Angel's Path.

The Court of Appeals held that the Kramers were clearly wrong that the development was a public nuisance, but the facts they had alleged in their complaint, if true, did make out a claim for a private nuisance. The rule is that courts should interpret complaints to do "substantial justice," and it would be unfair to make hyper-technical demands for precision in complaints. The rules only require that a complaint "contain a short and plain statement of the circumstances entitling the party to relief and the relief sought." The factual allegations in the complaint should control whether some legal cause of action has been properly pleaded and supported on summary judgment.

The opinion contains a welcome primer on nuisance law. The Court noted that the law of nuisance "has been described as the most 'impenetrable jungle in the entire law'." Generally, though, nuisance" is defined as "the wrongful invasion of a legal right or interest." It may be designated as "public" or "private." A public nuisance is "an unreasonable interference with a right common to the general public," and arises only where a public right has been affected. To recover damages under a claim of public nuisance, the plaintiff must establish (1) an interference with a public right and (2) that the plaintiff has suffered an injury distinct from that suffered by the public at large.

By contrast, a “private nuisance” is a non-trespass “invasion of another’s interest in the private use and enjoyment of land.” Unlike a public nuisance, a private nuisance threatens only one or few persons. In order for someone to be entitled to damages for a private nuisance, invasion has to be either (a) intentional and unreasonable or (b) unintentional but caused by negligent, reckless, or abnormally dangerous conduct.

To the Kramers, “Blinded by the Light” was more than a Springsteen ditty once covered by Manfred Mann … it was an every-night occurrence.

A nuisance may be “continuing or permanent.” A continuing nuisance arises when the wrongdoer’s tortious conduct is ongoing, perpetually generating new violations. A permanent nuisance, on the other hand, occurs when the wrongdoer’s tortious act has been completed, but the plaintiff continues to experience injury in the absence of any further activity by the defendant.

For a nuisance to be an absolute nuisance, it must be based on intentional conduct or an abnormally dangerous condition that cannot be maintained without injury to property, no matter what precautions are taken. Strict liability is imposed upon an absolute-nuisance finding. When a defendant commits an unlawful act deemed to be an absolute nuisance, he or she becomes an insurer, and will be liable for “loss resulting from harm which may happen in consequence of it to persons exercising ordinary care, irrespective of the degree of skill and diligence exercised by himself * * * to prevent such injury."

Every day seemed like the Dust Bowl to the Kramers …

On the other hand, if the conduct is a “qualified” nuisance, it is premised upon negligence. A qualified nuisance is defined as essentially a lawful act “so negligently or carelessly done as to create a potential and unreasonable risk of harm, which in due course results in injury to another.” Under such circumstances, the nuisance arises from a failure to exercise due care. To recover damages for a qualified nuisance, negligence must be alleged and proven. Whether a party’s actions were reasonable is generally a matter for the trier of fact.

Trespass on real property occurs when a person, without authority or privilege, physically invades or unlawfully enters the private premises of another. The elements of a trespass claim are “(1) an

unauthorized intentional act and (2) entry upon land in the possession of another." A trespass claim exists even though damages may be insignificant. A person can be a trespasser without actually stepping onto another's property. A trespass may be committed by invading the airspace of the property. This principle is based upon the concept that an owner of land owns as much of the space above the ground as he or she can use.

Here, Angel's Path argued that the Kramer's "public nuisance" was undercut by their admission that several neighbors suffered from the same excessive dirt and dust that bothered the Kramers. Therefore, it claimed, the Kramers failed to establish a claim for nuisance, because their injuries were no different that those suffered by the public in general. Angel's Path also argued that the light shining into the Kramer home was not a trespass.

The Kramers countered with an affidavit and photos of the property across from their home and of their home, showing that the dirt and dust blew straight from the Angel's Path property across their land. They even produced Weather Service wind records supporting the claim. As for the light, they contended that the entrance-sign light – directly across from their house – continuously lit up their home "in an annoying and harassing manner," including the three front bedrooms. They had asked Angel's Path turn off the light, nothing changed until after they sued, and took the deposition of an Angel's Path executive.

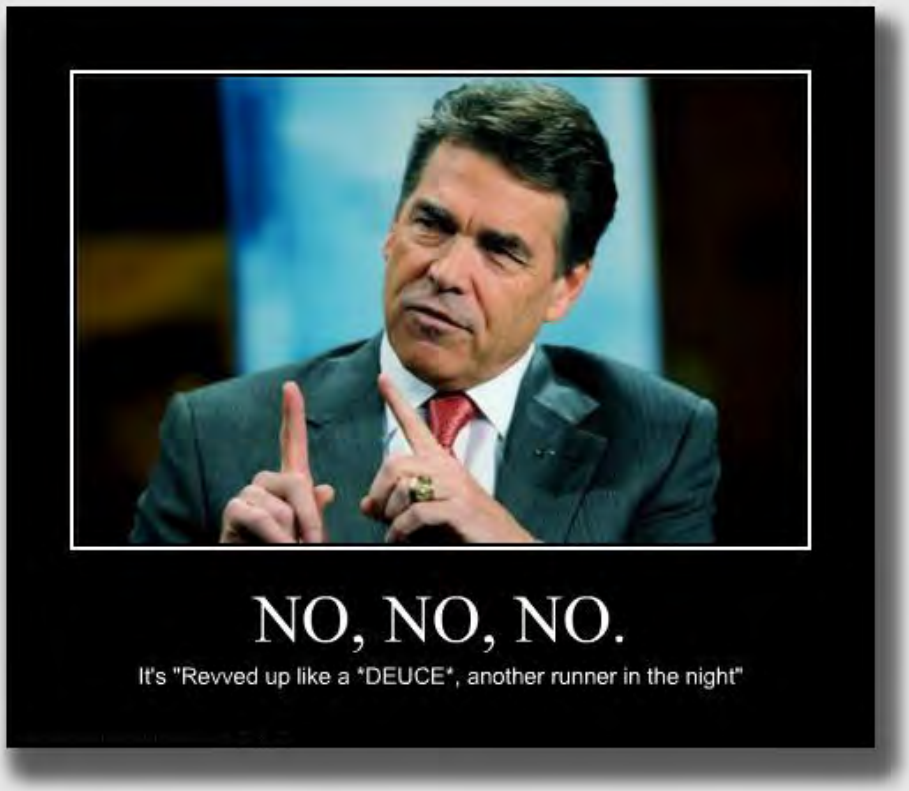
The Kramers showed proof of the dirt in their home, and documented the costs of cleaning it up. They also described the Angel's Path sign – "like a headlight shining into [the] bedroom windows" – and the problems this caused.

The Court of Appeals disagreed with Angel's Path that a claim for "public" nuisance could not be sustained, because too many people apparently suffered the same deprivations. Under this line of reasoning, the Court observed, a person creating a public nuisance could escape liability simply by harming more than one party. Plus, the Court held, even if the Kramers had no public nuisance claim, they may still have a claim for private nuisance. Although Angel's Path construction may be lawful, questions of fact remained as to whether the developer failed to exercise due care and was so negligent "as to create a potential and unreasonable risk of harm" resulting in the Kramers' injuries. Thus, the Court wouldn't through out the suit.

The Court was concerned that light invasion claim was "an unusual and perhaps creative application of trespass law." The Court conceded that arguably, the Kramers could assert that the light physically invaded the airspace over their property. But even if this argument doesn't carry the day, the Court said, genuine issues of material fact remained as to whether the lighted sign may be a public or private nuisance.

ADJOINING LANDOWNERS – NUISANCE:

REVVED UP LIKE A *DEUCE*



None of us really knew what the lyrics were to that great piece of mid '70s music by Manfred Mann's Earth Band (written and first recorded by Bruce Springsteen). You know, Springsteen wrote the second line as "cut up like a deuce." Not until Manfred Mann rewrote the line to be "revved up like a deuce," did the mondegreen of the line famously become a reference to a feminine hygiene product.

But we digress. We're really talking light and soybeans here. Recently, the vigilent treeandneighborlawblog editors read a book review for a new tome on light pollution called "The End of Night." It reminded us how soybeans like the dark, and about the plight of Farmer Smalley.

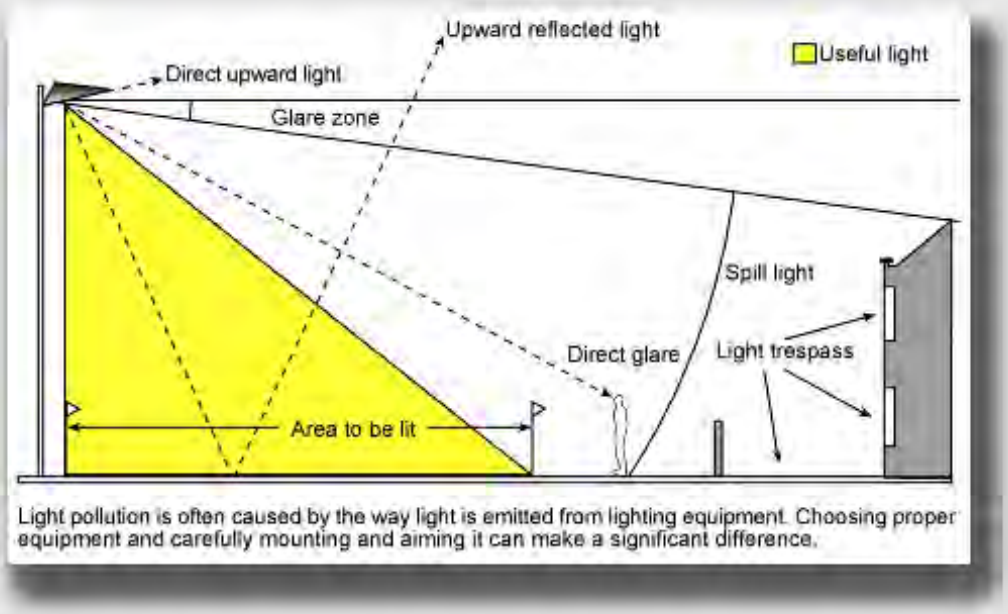
Farmer Smalley raises soybeans in Wyandot County, Ohio. When the Ohio Department of Transportation installed high mast lighting at the US 30/US 23 interchange, Mr. Smalley's soybeans would not flower and flourish under the bright nighttime lights. This is apparently not an unknown effect. He sued the DOT in the Ohio Court of Claims, seeking damages in a self-written complaint.

The Clerk heard the matter administratively, and concluded that the lights were not a nuisance, apparently because of the benefit such lights had for the motoring public. However, the loss of two acres of beans did constitute a constitutional "taking of property" for which he should be compensated. The damages were pretty meager for 2007: $512 plus his $25 filing fee.

Still, the Clerk did not dismiss out of hand the notion that light pollution could constitute a nuisance in some circumstances, those where the social benefit of the light was insignificant next to the interference caused the neighbor.

A few months later, the full Court of Claims reversed the judgment. It held that the Ohio constitution did not permit compensation for consequential damages to property, only for the actual taking of property. Because of that. Farmer Smalley's loss was not compensable.

Even so, both the Court and the Clerk apparently accepted the notion that the light pollution damaged Smalley's property. It was just that the damage, however real, could not be compensated.



Light pollution is often caused by the way light is emitted from lighting equipment. Choosing proper equipment and carefully mounting and aiming it can make a significant difference.

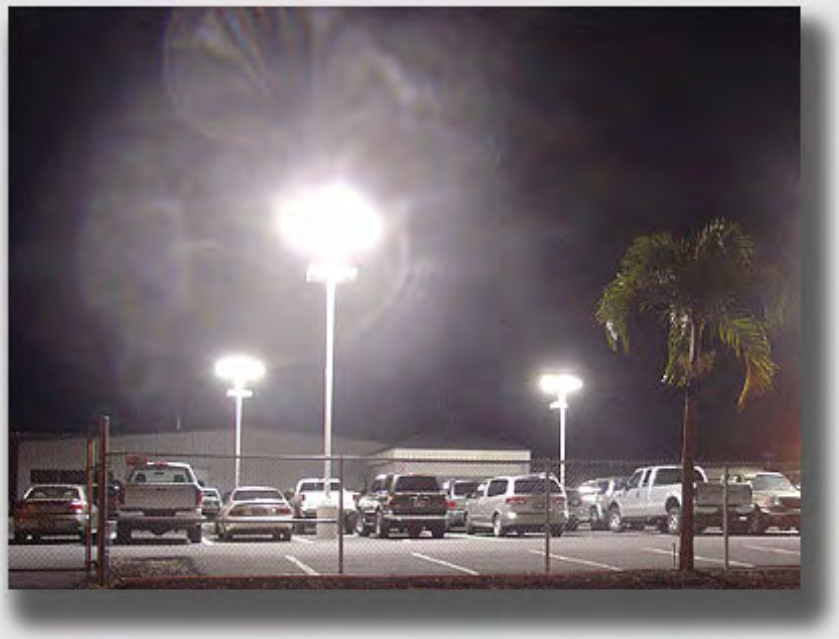
Smalley v. Ohio Dept. of Transportation, 142 Ohio Misc.2d 27, 869 N.E.2d 777, 2007 -Ohio- 1932 (Ohio Ct.Cl., Mar. 15, 2007). Farmer Smalley has a soybean field next to a four-lane highway inter-section. The Ohio Department of Transportation constructed high-mast lighting at the inter-section in 2005, and since then, and Farmer Smalley's soybeans failed to mature during the growing season. Smalley was forced to mow down two acres of failed crop, a failure he attributed to the lighting. He lost about 120 bushels of beans, which — at $6.00 a bushel — were worth $720.

Farmer Smalley sued the DOT in the Ohio Court of Claims. DOT admitted it had installed the mast lighting, which it said was intended to "safely illuminate the expressway." DOT argued the installed lights "are the safest and most efficient lighting source given the traffic flow and lighting required at interchanges." It admitted that light did "occasionally bleed onto adjacent property [and] there is little doubt that defendant's light encroaches upon plaintiff's property." It argued, however, that it could not be held liable for any damage to plaintiff's bean crop caused by its light encroachment. It also argued that Farmer Smalley's cost to raising the beans was $256.47 an acre, reducing his net loss to $512.94.

Held: The Clerk of the Court held that the light pollution was not a nuisance. However, he found that the actual harm suffered by farmer was different in kind from harm suffered by general public, as required to establish a taking under "Takings Clause" of Ohio Constitution.

It appears that farmer Smalley filed his complaint himself, because DOT flailed about in its defense, as if it wasn't sure where the farmer was going. It argued at length that its lighting was not a nuisance, because Smalley had offered no proof that DOT was negligent in erecting the lighting. It asked the Court to weigh the benefit that the high mast lighting gave to thousands of motorists against the harm the lights caused plaintiff in destroying two acres of his bean crop.

The Clerk sagely noted that DOT "… essentially proposed that plaintiff should have to bear a financial burden for his crop loss in a situation where he was legally using his land for a specific valuable purpose and the harm caused was attributable to the acts of DOT."



He defined an absolute nuisance as a distinct civil wrong arising or resulting from the invasion of a legally protected interest, and consisting of an unreasonable interference with the use and enjoyment of the property of another. Such a nuisance was the doing of anything without just cause or excuse, the necessary consequence of which interferes with or annoys another in the enjoyment of his or her legal rights, or the collecting and keeping on one's premises of anything inherently dangerous or likely to do mischief, if it escapes, which, escaping, injures another in the enjoyment of his legal rights. A qualified nuisance, on the other hand, was distinguished from absolute nuisance as being dependent upon negligence consists of anything lawfully but so negligently or carelessly done or permitted as to create a potential and unreasonable risk of harm which, in due course, results in injury to another.

Considering the utility of the high mast lighting to the motoring public, the Clerk correctly concluded that the lighting was neither an absolute nor qualified nuisance. But that didn't mean that Mr. Smalley was out of luck. Under the "Takings Clause," any taking — whether it be physical or merely deprives the owner of an intangible interest appurtenant to the premises — entitles the owner to compensation. In order to establish a taking, a landowner must demonstrate a substantial or unreasonable interference with a property right, and such an interference may involve the actual physical taking of real property, or it may include the deprivation of an intangible interest in the premises. Something more than loss of market value or loss of comfortable enjoyment of the property is needed, to constitute a taking under the "Takings Clause:" governmental activity must physically displace a person from space in which he was entitled to exercise dominion consistent with the rights of ownership. To constitute a taking actual harm suffered by the plaintiff must differ in kind rather than in degree from the general public.

Later, the full court reversed on different grounds, holding that the Ohio Constitution did not permit compensation for less than a full loss of land.

Nevertheless, the notion that light can constitute a nuisance and that a property owner suffering from light shining onto his or her land from another location, appears to be accepted.

ADJOINING LANDOWNERS – NUISANCE:

EVEN THE PARANOID HAVE ENEMIES

Could you say that "it's not paranoia if they're really out to get … your trees?" Put on your tin foil hat, conspiracy enthusiasts! Or not, if you think that's an aluminum industry conspiracy.

In this case, the Riehl family had what could be fairly described as a mania for not trimming their trees and bushes. Their preoccupation with the natural look made the neighbors' use of a common roadway rather tough. As a result, the Riehls were sued in the 1970s, and while the neighbors were found to have an easement, the court didn't force the Riehls to trim the trees.

Some 15 years later, the City of Rossford passed a nuisance ordinance aimed at people who didn't trim their trees along streets. And the odor of conspiracy wafted through the town, spread by black UN helicopters …

Those tin hats really work — it's just that THEY want you to think there's something wrong with wearing 'em …

The City sued the Riehls in 1997, but then cut a deal with them by dismissing the action and trimming the Riehls' trees itself. But in subsequent years, aided no doubt by the Illuminati and Council for Foreign Relations, the City cited the Riehls almost annually, hired contractors to cut the trees down, and then billed the Riehls for the trimming. Finally, the Riehls had had enough, and — proving that a man who acts as his own lawyer has a fool for a client — they filed their own complaint, alleging everything from fraud to contract breaches to infliction of emotional distress to multiple Constitutional law violations. And they sued the City, the prosecutor and all of their neighbors.

The trial court (probably in the pockets of the New World Order) threw out the suit even with respect to defendant who didn't answer. The Court of Appeals agreed, expressing bafflement as to why the neighbors were even named, and finding that the fact that the City made a deal in 1997 didn't mean that it couldn't come back every year after.

Time for the Riehls to raise their own militia … and maybe set them to work trimming the bushes.

Riehl v. City of Rossford, Slip Copy, 2007 WL 2164158 (Ct.App. Ohio, July 27, 2007). This case is the latest installment in the ongoing dispute between property owners in Eagle Point Colony about an undedicated access road/alley commonly known as Thirwal Drive. The Riehls owned property along Thirwal Drive, and their perpetually untrimmed trees and bushes encroached on the road to the detriment of other property owners who use it, as well as delivery and trash truck servicing all of the owners along the road. In 1977, a number of the other residents sued the Riehls seeking to enjoin them from clogging, choking or narrowing the width of Thirwal Drive. The court ruled that the other owners had an easement by prescription over the Riehls' land in the form of Thirwal Drive and permanently enjoined the Riehls from clogging, narrowing, or impeding the use of Thirwal Drive.

But when the neighbors filed a contempt motion because the Riehls weren't cooperating, the trial court determined that the Riehls didn't have the obligation to remove or trim the bushes and trees, or otherwise to repair or maintain the easement.

Thereafter, in 1995, Rossford City Council passed Ordinance No. 94-045, which held that "[e]very occupant of land shall maintain his property so that no brush, trees, bushes or obstructions extend into, on or over any public or private way generally used for the passage of persons or vehicles so as to obstruct or interfere with the passage of such persons or vehicles, or with the ingress and egress of emergency, maintenance, repair or service vehicles or equipment." Pursuant to the ordinance, the City cited the Riehls in 1997 but later dismissed the case. Thereafter, it cited the Riehls virtually every year, trimmed the trees and bushes itself, and billed the Riehls for the cost.

Finally, in 2005, the Riehls sued the City, the prosecutor, and all of the other neighboring property owners. The poorly-drafted complaint alleged the City had breached a contract by passing an ordinance charging the Riehls for the trimming, committed fraud, violated the Riehls' property rights, and retaliated against them by enforcing the nuisance ordinance. The trial court dismissed the action on all counts as to all defendants. The Riehls appealed.

Held: The dismissal was affirmed. The Court said the current litigation, reduced to its essence, was simple: it involved the Riehls' continuing violation of Rossford's nuisance ordinance, which was passed after the 1978 decision. Nothing in the prior decision of the trial court had any effect on the subsequently-passed ordinance. And, the Court held, the Rossford nuisance ordinance had a real and substantial relation to the safety and general welfare of the public and is neither unreasonable nor arbitrary. It seeks to prevent Rossford property owners from obstructing any public or private way that is used for the passage of persons or vehicles, including emergency, maintenance, repair or service vehicles or equipment. The nuisance ordinance applies equally to the Riehls and all other residents of Rossford.

At its heart, the Riehls' complaint alleged that the 1997 judgment granting the city's motion to dismiss the first nuisance action filed against the Riehls, amounted to a *res judicata* determination that the Riehls never again had an obligation to trim their bushes and trees and prevent them from obstructing Thirwal Drive. However, the Court held, a political subdivision or an employee of a political subdivision is immune from liability in a civil action for injury or loss to property when the claims are in connection with the political subdivision's or employee's performance of legislative or quasi-legislative functions, or the enforcement or nonperformance of any law. What's more, the Supreme Court of Ohio has expressly stated that "[t]here are no exceptions to immunity for the intentional torts of fraud and intentional infliction of emotional distress …"

Because the Riehls' claims against the city arose out the city's performance of governmental functions, and because no exceptions to immunity apply with regard to the Riehls' claims against the city for fraud and intentional infliction of emotional distress, the city was entitled to summary judgment on those claims.

The city's immunity doesn't extend to contracts. The Riehls argued that in 1997 the city of Rossford entered in to a settlement agreement with the Riehls approved by Judge Dwight Osterud. They claim that the city agreed to trim the Riehls' bushes and trees that encroached on Thirwal Drive. Nevertheless, in 2003 and 2004, the city of Rossford passed ordinances assessing the costs of trimming against the Riehls' real estate. The Riehls claim that the February 1997 judgment entry amounted to a contract and that through their actions, the governmental defendants breached this contract with the Riehls.

The Court rejected their argument. It held that there was no enforceable plea agreement. The City got no benefit and the Riehls suffered no detriment from the deal. Thus, the Court held, there was no consideration for the contract, and thus there could be no contract. The Riehls also argued that assessing them for trimming their trees constituted an unconstitutional taking of their property without just compensation. But the Ohio Supreme Court has held that the government must pay just compensation for total regulatory takings "except to the extent that 'background principles of nuisance and property law' independently restrict the owner's intended use of the property." That's all that was happening here. There was evidence that the nuisance ordinance had been enforced against other residents, too, so the Riehls' claim of disparate treatment failed as well. Finally, there was no evidence that the city had enforced the tree nuisance ordinance against the Riehls as punishment for their voicing their views pursuant to their First Amendment rights.

Just like everyone else in Rossford, the Riehls must keep their bushes and trees trimmed at their own expense.

ADJOINING LANDOWNERS – ENCROACHMENT:

DOWN ON THE FARM

Donald Trump carried Ohio in the 2016 presidential election by 8 percentage points. Some critics have argued it's because he's favored by an "uneducated and testosterone fueled bunch" of white men. Others contend Ohio took the nation to school, showing the extent of the dissatisfaction of the electorate.

We'll leave politics to the trained professionals, but we think it's high time Ohio takes you all to school, even if it's only about tree law. We have some thinking people here (we think). Just to prove our arboreal mettle, we're going to spend the next three days talking about a single Ohio case, a lengthy decision that's a veritable final exam in tree law.

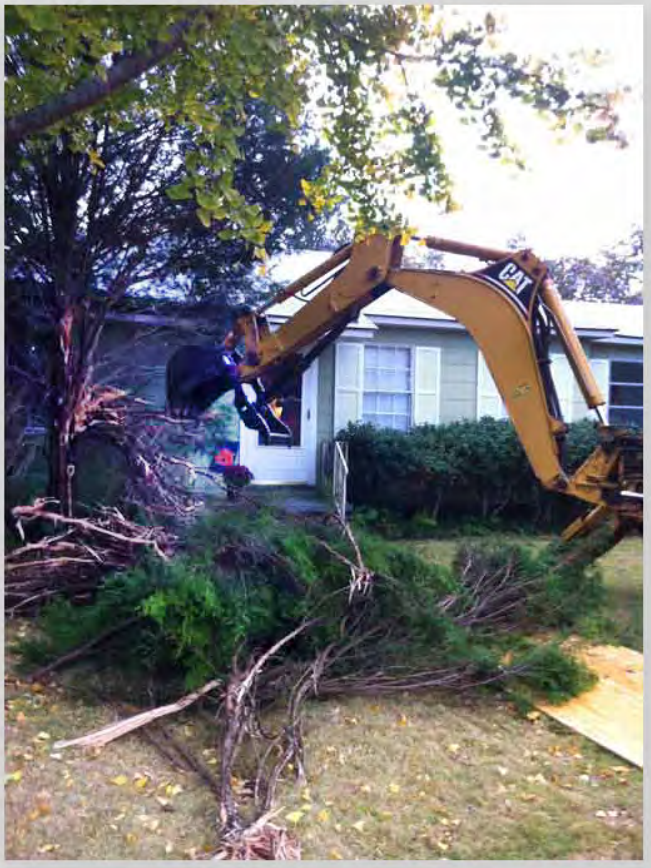
The Ohio appellate court decision answers some tough questions. Such as, if the *Massachusetts Rule* lets me trim encroaching tree branches and roots up to my property line, what duty do I have to the trimmee? Or, how do I maximize my damages (if I'm the plaintiff) or minimize them (if I'm the defendant)? Or, what method do I have to use to trim back to the property line?

Serious questions, indeed. So we'll leave the walls and Russia investigations and immigration reform and tweets to others, and travel to sunny Darke County, where megafarmer Dick Levy has just had one of his farmhands trim a property-line fencerow by ripping down offending branches with a trackhoe. He claims the *Massachusetts Rule* lets him use anything short of tactical nuclear weapons to vindicate his tree-trimming rights. The Court is more cautious…

Next, we'll look at whether farmer Lavy's trespass onto his neighbor's land was negligent or reckless. Then, we get to the question of damages.

Brewer v. Dick Lavy Farms, LLC, 2016-Ohio-4577 (Ct.App. Darke Co., June 24, 2016) In 2007, James Brewer bought about 70 acres of rural property for $180,000. About 30 acres of the land were tillable, and 40 acres were wooded. The only access to the tillable and wooded property was a 25-foot wide lane of about 3,600 feet in length.

The former owner had allowed his neighbor Dick Lavy Farms to farm the property, and the lane had not been used. Brewer cleared the lane of undergrowth in order to access the rest of the property. The lane ran west to east, and had trees on both sides of the lane, with the trees on the south side forming a fencerow between Brewer's property and land owned by Dick Lavy Farms. The trees in the fencerow were a woodland mix; none of the trees were ornamental or unique.



A trackhoe removing a tree… rather a blunt instrument.

In January 2013, Dick Lavy ordered an employee to clear the fencerow between the two properties. At the time, Lavy understood that he could clear brush straight up and down the property line, and that such clearing was important for crop production, yield and safety for farm equipment. Using a trackhoe, which had an arm that could reach about 15 feet in the air, the employee reached up, grabbed limbs, and pulled on them, trying to break them off cleanly. Although the employee tried to keep the track hoe on DLF's side of the property, occasionally a branch would snap off or tear the tree on Brewer's side. Occasionally, a branch would fall on Brewer's side, and the employee would reach over to grab the branch, but he never consciously reached over with the bucket to try and break a branch at the tree trunk on Brewer's side of the property.

When Brewer learned that DLF was clearing the fencerow, he went out to look at the operation, and called the sheriff. At that point, the track hoe was about halfway down the fencerow, destroying trees. A Darke County Sheriffs Deputy told Lavy that a complaint had been made, and expressed his concern that civil or criminal issues could be involved in what he was doing. Lavy said that he had a right to take down any branches that were hanging over his property. In addition, Lavy said he would let Brewer remove the branches if Brewer wanted to do so, but he wanted the branches removed before crop season began in March or April.

The deputy told Brewer that Lavy claimed the right to take tree branches from his side, and that if Brewer did not like the way he was doing it, Brewer could cut them himself. Brewer told the deputy that he was going to have an expert look at the trees. The deputy filed a report with the prosecutor's office, but no charges were brought.

Although the deputy suggested that Lavy obtain legal advice before continuing, Lavy continued clearing the fencerow. Knowing that Brewer was upset, Lavy told his employee not to clean up branches that fell on Brewer's side.

Within days after the damage occurred, Brewer's wife took photos of the damaged trees. Three months later, Brewer and an arborist counted 326 damaged trees.

Brewer sued Dick Lavy Farms, alleging (1) a violation of O.R.C. § 901.51; (2) reckless trespass; and (3) and negligent trespass. Prior to trial, the court held that Brewer was not limited to damages for diminution in value, and the court would apply a standard that allowed recovery of the costs of restoration.

DLF argued that it had a common law privilege to cut off, destroy, mutilate or otherwise eliminate branches from Brewer's trees that were overhanging DLF land. The Farm also argued that if it was liable, the proper measure of damages should be the diminution of Brewer's property value; in the alternative, the court's holding on the issue of damages was against the manifest weight of the evidence. Finally, DLF claimed it had not negligently or recklessly trespassed on Brewer's property.

A chainsaw would have given a cleaner cut, but they are dangerous.

The Court found for Brewer, awarding him $148,350 in damages, including treble damages of $133,515.

Dick Lavy Farms appealed.

Held: The *Massachusetts Rule* is not a license to maim and maul.

DLF argued it had a common law privilege to sever or eliminate Brewer's overhanging branches in any manner that it desired, and that the trial court nullified the privilege by holding that DLF could not cause breakage that impacts the tree on the other side of the property line. DLF argued this holding "emasculates the common law privilege and creates a conflict between R.C. 901.51 and a property owner's constitutional rights."

Section 901.51 of the *Ohio Revised Code* provides that:

> *No person, without privilege to do so, shall recklessly cut down, destroy, girdle, or otherwise injure a vine, bush, shrub, sapling, tree, or crop standing or growing on the land of another or upon public land. In addition to the penalty provided in section 901.99 of the Revised Code, whoever violates this section is liable in treble damages for the injury caused.*

The Court agreed that "a privilege existed at common law, such that a landowner could cut off, sever, destroy, mutilate, or otherwise eliminate branches of an adjoining landowner's tree that encroached on his land." However, the Court said, "even in situations involving common law privilege, a landowner should not act in a manner as to cause damage to the property of an adjoining landowner. Thus, while a privilege exists, it is not absolute."

The appellate panel said "it is a well-recognized principle of common law that a landowner has the right to protect his own land from threatened injury, even though, in doing so, he produces a condition that injures adjoining land, provided he acts with reasonable care. Ohio has recognized the right of a property owner to use self-help in removing encroachments on his property. Other jurisdictions also recognize the right of an owner to remove any encroachment on his property which deprives him of the complete enjoyment of his land."

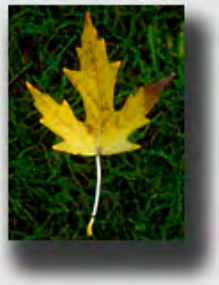
The critical phrase, the Court held, is "reasonable care." DLF's privilege to remove encroachments was limited by the requirement that it use reasonable care not to injure neighboring property. By imposing a standard of recklessness, which requires a higher degree of fault, the Court said, O.R.C. § 901.51 does not interfere with the common law privilege. Owners have an absolute right to destroy any vegetation on their own side of the property. Liability attaches only where the owners' actions create harm on the other side of the property line.

Thus, an owner must use reasonable care when exercising his or her rights under the *Massachusetts Rule*.

We should note that two judges concurred in the judgment, arguing that there is no duty of reasonable care required by a property owner when protecting his or her own property from encroaching vegetation. The dissenters said the owner "may cut, mutilate, decimate, pulverize or obliterate branches or roots which infringe upon her property from a neighbor's trees or plants. Self-help is permitted to remove trees or plants. What she cannot do is intrude into the neighbor's property in doing so. That is why liability is imposed here. Tearing off branches on the DLF property which extended into the Brewer property and which severed the branches at the trunk, or some other point on the Brewer property, constituted an intrusion and the trespass across the property line into the Brewer property, regardless of any degree of care or lack thereof."

Farmer Lavy argued that the Massachusetts Rule meant he didn't have to think.

The dissenters drew "a distinction between removal of encroaching vegetation, where self-help is universally accepted, and removal of structures, building or fences, where self-help is often unacceptable." Curiously, they noted that it "seems likely that a landowner could not chemically treat or poison the roots or limbs that encroach upon her property if that method of destruction will migrate to that portion of the vegetation on the neighbor's yard and destroy the tree or shrub altogether, but that is an issue for another day."



ADJOINING LANDOWNERS – ENCROACHMENT:

RUNNING AMOK WITH A TRACKHOE

Time for more fun down on the farm with Dick Lavy, and his faithful employee, whom we will simply refer to as Sylvester. As you recall, Farmer Lavy told Sylvester to trim the trees along a fencerow that separated one of the Lavy farms (and the opinion suggests Dick Lavy had a lot of farms) from his neighbor, Jim Brewer.

Sylvester did as he was told, but with a trackhoe instead of a chainsaw. He crawled down the Lavy side of the fencerow, smacking down branches with the trackhoe's bucket. It was not a pretty job, but it was effective and cheap.

When Jim Brewer sued, Farmer Lavy argued the *Massachusetts Rule* let him trim overhanging trees any way he liked, Sylvester wasn't negligent or reckless, and the damage – if there even was damage – didn't amount to much. The jury mauled Farmer Lavy as badly as his man Sylvester mauled Jim Brewer's trees, returning a verdict for Jim Brewer in the amount of $148,350.

Previously, we watched the Court of Appeals for Darke County, Ohio, fillet Dick Lavy's argument that the *Massachusetts Rule* was a license to butcher. The Court affirmed a landowner's right to trim encroaching trees and roots to the property line, but held that such trimming had to be done in a reasonable manner so as not to injure the adjoining owner's trees. Now, the Court looks at whether Sylvester acted reasonably in chewing up the fencerow.

What's interesting about the Court's analysis is its reliance on expert testimony as to the prevailing custom for fencerow trimming in Darke County, the higher cost of using a chainsaw and bucket truck relative to trackhoes, and the dangers of alternative methods of trimming. As for recklessness, the Court was satisfied to learn that a sheriff's deputy told Farmer Lavy that his neighbor was unhappy, but Lavy bullheadedly went forward without talking to the neighbor or at least checking with his lawyer to be sure what he was doing was legal. The lesson there is that when you're on notice but choose to ignore it, you may be judged harshly.

After this installment, you'd be reasonable to think that Jim Brewer will probably collect that $148,350 in damages. Next, we'll finish Brewer v. Dick Lavy Farms, and you may be surprised.

A trackhoe – a blunt instrument for tree trimming.

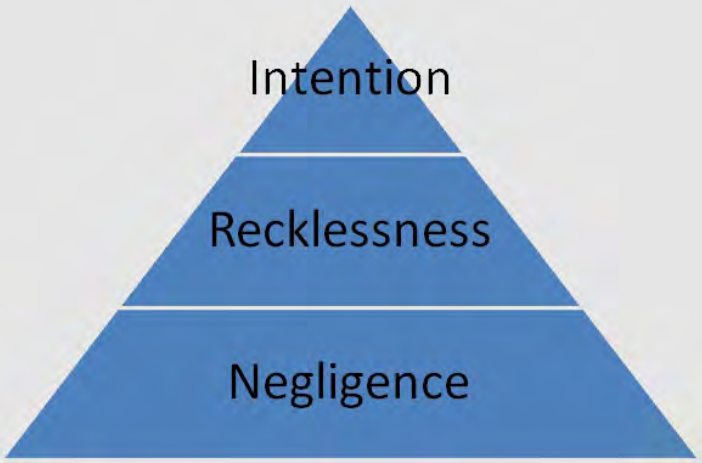
Brewer v. Dick Lavy Farms, LLC, 2016-Ohio-4577 (Ct.App. Darke Co., June 24, 2016).

Held : Previously, we studied the Court's holding that exercise of the *Massachusetts Rule* right to trim vegetation that encroaches on an owner's property is constrained by the requirement that the trimming be done with reasonable care so as not to damage the neighbor's property.

Now, the Court considers whether DLF had exercised such care, and unsurprisingly found that it did not.

In his complaint. Brewer claimed a violation of O.R.C. § 901.51, negligent trespass, and reckless trespass. A common-law trespass to real property occurs when a person, without authority or privilege, physically invades or unlawfully enters the private premises of another, causing damage, even insignificant damage. The act of nonconsensual entry may be intentional or negligent.

The Court admitted the case was unusual, because the DLF worker did not actually trespass on Brewer's land other than when clearing off brush that had fallen or on one occasion when he was lost control the bucket of the trackhoe. In fact, the worker said he never consciously reached over to snap off a branch at the tree trunk that was on Brewer's property. The action of clearing debris, the Court said, would not have harmed Brewer, but would actually have benefitted him.

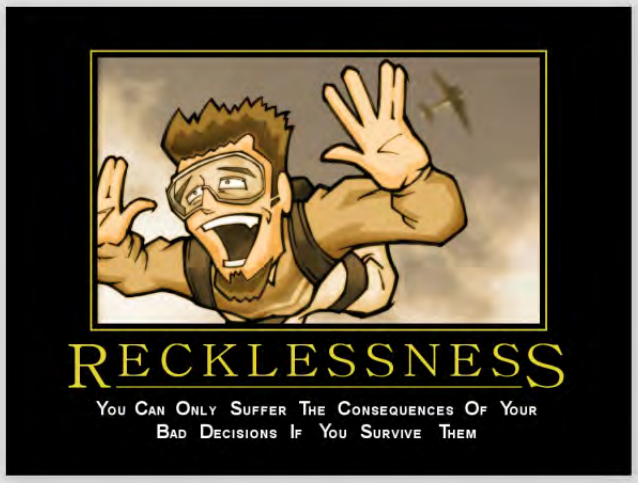


The hierarchy of mens rea.

The Court said most instances of trespass occur when people enter onto the land of another, cut down, and remove trees. Still, trespasses can result from people setting in motion actions that intrude on another's land and cause damage. Thus, the liability could still exist even if DLF workers never actually stepped onto Brewer's property.

The trial court had previously concluded that DLF was negligent by failing to cut or break the trees above its own land, and that DLF breached a duty to ensure that no damage occurred on Brewer's side of the property line. The trial court discussed two methods of trimming trees, using a track hoe to tear limbs along fences and using a bucket and chain saw, noting that "the more common but dangerous method of lifting a person" with the scoop bucket on a tractor more clearly respects the property line and causes less damage.

To establish actionable negligence, the party seeking recovery must show the existence of a duty, the breach of the duty, and injury resulting from the breach. To get at the duty, the trial court heard from expert witnesses about common practices in Darke County, Ohio, for cutting limbs. Brewer's expert naturally said that the common practice is to use a chainsaw, hand saw, or pole pruner, but never a trackhoe (which would cause more damage to a tree). The expert estimated the cost of his recommended type of pruning to be about $16,000 for the length of the fence row.



The Court of Appeals concluded that few farmers could afford such an expense for pruning, a finding echoed by a number of farmers DLF called to testify. DLF's witnesses said the custom in Darke County was to clear fences using a trackhoe or backhoe. DLF's expert stated that he had farmed in the county for 45 years, and that the common practice for clearing fencerows for the last 15 years had been to use backhoes or trackhoes to tear limbs off overhanging trees. He also named commercial services who used this method. He said that using a bucket truck and chain saw is not common because of cost, as well as the danger it presented.

Another Darke County farmer in Darke County testified that the farmers he knows stand in a loader bucket and trim trees using a chain saw, but he admitted the method was dangerous. He admitted he knew no one who used a trackhoe for trimming.

The Court of Appeals said that in light of the record, the trial court's conclusion DLF was negligent was not erroneous. "Farmers may face difficult choices if the available methods are either too expensive, or risk damage to surrounding property, or risk the farmer's safety. However, the issue in this case is simply whether the method in question caused unnecessary harm to the adjoining property. In view of the evidence, we cannot conclude that the trial court erred in the standard it applied, nor can we conclude that the court's finding of negligence was against the manifest weight of the evidence. "

Arcanum, a small town in Darke County, Ohio, is the original home of the annual Tour De Donut, in which people race their bicycles from stop to stop, where they see who can eat the most donuts the quickest. Although the 2017 race moved to Troy in neighboring Miami County (to accommodate the thousands of racers), the Tour helped Darke County establish its own standard for "recklessness."

Likewise, the Court denied DLF's that the trial judge's finding that it was reckless was against the weight of the evidence. Dick Lavy admitted that sheriff deputies told him that Brewer was unhappy with the trimming, and asked him to stop clearing the neither told tell his employee to stop clearing the line in order to give Brewer a chance to do so, nor did he contact Brewer to discuss the matter. There was no need for speed: Lavy told Deputy Nichols that he wanted to clear the fence row before spring planting, but that was two or three months away.

A person acts recklessly, the appellate court said, when with heedless indifference to the consequences, he or she disregards a substantial and unjustifiable risk that the person's conduct is likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, he or she disregards a substantial and unjustifiable risk that such circumstances are likely to exist.

The Court of Appeals noted that other defendants had been found reckless where their actions, like Dick Lavy's, continued after they learned of a dispute about the activity. The same, the Court said, was true here.

ADJOINING LANDOWNERS – ENCROACHMENT:

HURTS SO BAD

In case you missed it, this is a trackhoe removing a tree.

Now for one more lesson down on Dick Lavy's Darke County farm. As you recall, previously, we watched the fun ensue after Dick's faithful employee Sylvester trimmed the trees along a fencerow that separated one of the Lavy from land belonging to his neighbor, Jim Brewer.

We were quite impressed to watch Sylvester run a trackhoe down the Lavy side of the fencerow, smacking down branches with the machine's bucket. It was not pretty, but it got the job done effectively and cheaply.

Jim Brewer, however, wasn't very happy with the result, and sued Dick Lavy Farms. Farmer Lavy argued the Massachusetts Rule let him trim overhanging trees any way he liked, that Sylvester wasn't negligent or reckless, and that the damage – if there even was damage – didn't amount to much. The jury thought it was arboricide and socked Farmer Lavy for $148,350.

Then, we watched Court of Appeals for Darke County, Ohio, fillet Dick Lavy's argument that the Massachusetts Rule was a license to butcher. The Court affirmed a landowner's right to trim encroaching trees and roots to the property line, but held that such trimming had to be done in a reasonable manner so as not to injure the adjoining owner's trees.

The Court compared the various means of trimming a fencerow, comparing for ease of use, custom in the area, and cost. It concluded that the trial court was right to find DLF negligent in trimming part of the fencerow and reckless in continuing after a sheriff's deputy advised Dick Lavy to get legal advice before continuing (advice the farmer ignored).

Now, the Court delves into the $148,350 damage award. Clearly, the Court is troubled that Jim only paid $170,000 for the whole 70 acres, and provided no evidence that the value of the land fell a farthing because of Sylvester's trimming activities. The Court felt hard pressed to see Jim get almost $150,000 when no trees other than some saplings were destroyed.

Jim didn't help his cause by admitting (as he had to) that he only visited the land about eight times a year to hunt and picnic, and the trimming didn't interfere with those activities. He argued that he planned to build a house there in another 14 years or so, but the Court couldn't see that the damaged fencerow trees had any impact on those plans.

Usually, the measure of damages for a trespass where trees are cut is the difference in the land's value after the cutting versus before the cutting. There are times where this measure does not capture the real loss: a family loses a cherished ornamental tree, for example, or the landowner nurtures trees for their ecological value.

In this case, however, it's hard to see how Jim was hurt at all, not to mention hurt as badly as he claimed to be. Indeed, that's how the Court of Appeals seems to read it, too. Come with us now on a detailed and thoughtful journey through all of the matters a court (and aggrieved party) should consider in setting the amount of loss. Although the Court sends the damage award back for the trial judge to deal with, it's quite clear that the appellate panel is disinclined to turn the case into a winning lottery ticket for Jim Brewer.

That's what Jim Brewer claimed, too...

Brewer v. Dick Lavy Farms, LLC , 2016-Ohio-4577 (Ct.App. Darke Co., June 24, 2016):

Held : The $148,350 in damages was set aside, because Jim Brewer's property really didn't diminish in value.

The Court observed that in a previous case, it had held that where the trespasser could not reasonably foresee that trees had a special purpose or value to the landowner, and where the trespasser "cuts trees that are part of a woodland mix and not unique, the ordinary measure of the harm is the difference in the fair market value before and after the cutting." The trial court, however, had relied on a different standard:

Or, if you're Sylvester, don't use a chainsaw at all...

> In an action for compensatory damages for cutting, destroying and damaging trees and other growth, and for related damage to the land, when the owner intends to use the property for a residence or for recreation or for both, according to his personal tastes and wishes, the owner is not limited to the diminution in value (difference in value of the whole property before and after the damage) or to the stumpage or other commercial value of the timber. He may recover as damages the costs of reasonable restoration of his property to its preexisting condition or to a condition as close as reasonably feasible, without requiring grossly disproportionate expenditures and with allowance for the natural processes of regeneration within a reasonable period of time.

At trial, Jim's expert arborist testified that the cost of removing the trees Sylvester had damaged would cost $55,000, and the cost of replacing them would be $138,000, plus tax. Jim did not offer any evidence that his 70-acre property's fair market value had fallen by so much as a penny. DLF's arboriculture expert testified the life expectancy and service life functionality of the fencerow was not affected by the manner in which the trees were pruned. He valued the fencerow as a woodland edge fence and argued that real estate or fair market value would be the proper way to assess damages. Another DLF expert also testified that the fair market value of Brewer's property was the same before and after the incident.

The trial court found that removal of the damaged trees was unnecessary, and thus discounted that $55,000 cost. In addition, the court concluded that the $138,000 estimate for tree replacement was excessive, and reduced that amount by 50%. The court also deducted 14% for ash tree disease, which had already caused the death of a number of trees on both sides of the lane. The trial court thus arrived at $59,340 in compensatory damages.

The question facing the court…

Next, the trial judge decided that DLF had negligently trimmed one-fourth of the property (or about 1,000 feet), and recklessly trimmed remaining three-fourths of the fencerow. The trial court awarded $14,835 for negligence, and $44,505 for DLF's recklessness. Pursuant to O.R.C. § 901.51, the court trebled the recklessness amount to $133,515. This brought the total damages to $148,350.

The Court of Appeals noted Ohio's general rule that "recoverable restoration costs are limited to the difference between the pre-injury and post-injury fair market value of the real property," The courts have carved out an exception, however, that permits restoration costs to be recovered in excess of the decrease in fair market value when real estate is held for noncommercial use, when the owner has personal reasons for seeking restoration, and when the decrease in fair market value does not adequately compensate the owner for the harm done. This restoration cost exception has been applied, for example, where the damaged trees have been maintained for a specific, identifiable purpose (like recreation, or a sight, sound, or light barrier), when damaged trees are essential to the planned use of the property, or when the damaged trees had a value that can be calculated separate from ornamental trees have been destroyed, or where the trees form part of an ecological system of personal value to the owner.

Even where the restoration exception is applied, the Court said, "the proposed cost [cannot be] grossly disproportionate to the entire value of the injured property."

The Court said that the damage to Jim Brewer's trees was "temporary" (meaning, apparently, that the damaged limbs would grow back), and that the Ohio rule is that "damages for temporary injury to property cannot exceed the difference between market value immediately before and after the injury, is limited. In an action based on temporary injury to noncommercial real estate, a plaintiff need not prove diminution in the market value of the property in order to recover the reasonable costs of restoration, but either party may offer evidence of diminution of the market value of the property as a factor bearing on the reasonableness of the cost of restoration."

The trial court seemed certain that Dick Lavy was a deep pocket, and that may have driven its damage award.

"Viewing the trial court's award of damages from the perspective of reasonableness," the Court of Appeals said, "we must conclude that the award for restoration was objectively unreasonable." First, the application of O.R.C. § 901.51 . "almost exclusively involves situations where trees have been completely cut down, making it considerably easier to determine the full extent of the damage to the plaintiffs' property." Here, Jim Brewer admitted that other than a few small saplings, he was not claiming that any large trees had been removed from his land. Instead, he contended only "that 326 trees had been damaged in some manner and would ultimately die, even though pictures of the area taken in June 2014 depict a substantial canopy of foliage… Brewer also testified that a number of trees had died, but he did not give any specific number."

The Court found that Jim Brewer's trees were not ornamental and were not located at his residence. Instead, they were native trees that were just part of a fencerow. Jim testified he used the property for hunting only about six times a year, and for family get-togethers maybe twice a year. He also admitted the removal of branches had not had any effect on these activities or his ability to rent tillable land to farmers. Jim intended to put a house on the property after his 4-year old child graduates from high school, but he didn't claim that DLF's tree trimming affected his plans to do so.

The Court found it noteworthy that Jim Brewer paid $180,000 for all 70 acres, yet claimed the restoration cost (including removal and replanting of trees) for a very small part of that property was more than $200,000.

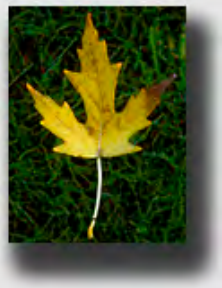
Jim did not present any proof that the fair market value of the land had fallen because of the tree trimming. The Court agreed that he was not required to present such evidence, bur said "it would have been helpful, particularly since two defense witnesses indicated that removing vegetation from the fence row did not impact the fair market value of the land." Additionally, the Court found that much of the trial judge's calculations "were based on speculation or were incorrect. For example, the court concluded that one-fourth of the fence row was trimmed negligently, but the plaintiff's own evidence showed that more like 1,800 feet had been trimmed when Jim Brewer first complained. "The trial court could have chosen to disregard [the DLF employee's] testimony," the Court said, "but there is no logical reason to disregard the plaintiffs own admission about how far the fence row had been cleared."

The trial court also gave no particular reason for its 50% discount on damages. What's more, the Court of Appeals complained, "the trees on the fence row were a woodland mix of native trees, not ornamental trees. A number of the trees were undesirable, and there was no evidence of special value. In addition, the fence row had been unmaintained for ten or twenty years. Even though these facts no longer require damages to be limited to diminution in value, they are still points that should be considered in deciding whether an award is reasonable."

The Court of Appeals was not inclined to see Jim Brewer get a winning lottery ticket…

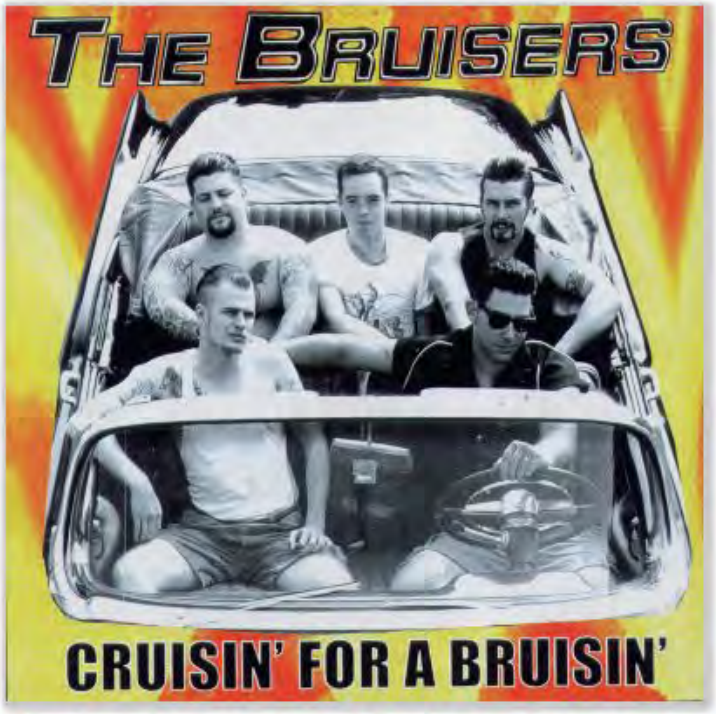
The Court of Appeals vacated the damages, and directed the trial court on remand to consider the reasonable restoration costs, taking into consideration the decrease in the fair market value of the land; the fact that the trees were a common woodland mix, not ornamental trees or trees that Jim had planted for a particular purpose; the fact that the fence row was not maintained for many years, and had undesirable and dead trees on each side of the row; the extent to which the trees have regenerated since the date of the 2013 trimming; the lack of impact on Jim's intended home site; and the fact that Jim's use of his property is "sporadic and is not impacted by any injury to the trees."

The detailed list of evidence the trial court is to consider pretty much tells the trial judge how the Court of Appeals expects this to turn out.



ADJOINING LANDOWNERS – ENCROACHMENT:

NOW LOOK WHAT YOU'VE DONE!



A Buckeye-State version of Fancher v. Fagella is coming to an Ohio courtroom soon enough, we suspect.

Rarely (as in "I don't recall when I've ever said this before") do I caution that the prevailing law in any particular state is wrong, and likely to be cruisin' for a bruisin' the next time an appellate court has to think about it. But I feel comfortable issuing that warning about this case.

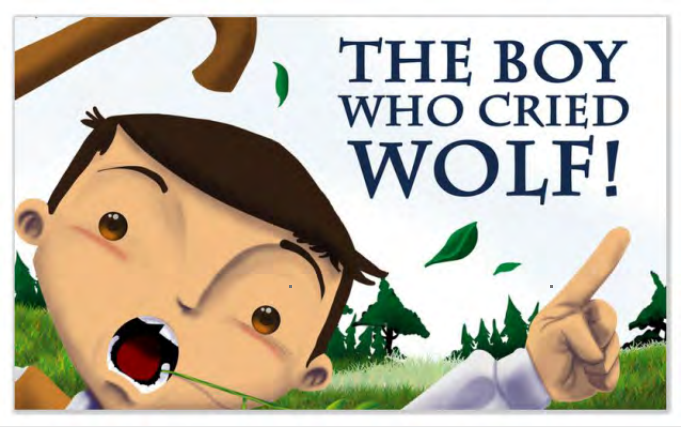
From Ohio (home of rock 'n roll, pro football, the first guy to walk on the moon, the brothers who turned a bicycle into the first airplane, and a ton of other cool things), comes a very recent case that pretty much runs smack into *Fancher* , *Herring* , the *Hawaii Rule* , and a raft of other cases reflecting the modern view that a homeowner whose tree is wreaking havoc on the neighbor's property may be ordered by a court to fix the damage at his expense.

To be fair, this case may be proof of the old legal aphorism that "hard cases make bad law." Even the most cursory reading of the facts suggests that Dave Rababy may well have been a real horse's ass, hounding his neighbor because a tree dropped leaves and twigs on his property. Speaking as a guy who owns all of my five southerly neighbors' leaves every fall – and these things are the size of dinner plates – I understand how it can be irritating to have other peoples' leaves on your lawn. But I would never sue them over it.

Dave had no such compunction, and his emesis of woe delivered to the court made him the boy who cried wolf. He howled so loudly about leaves and twigs and that his trimming crew was not allowed to trespass on Roy's property and hack away at the offending tree, and minutiae of a similar nature, that his real complaint – his driveway was being heaved and foundations dislodged by the roots – got lost in the underbrush. In *Fancher*, *Whitesell* and even *Iny*, such damage was enough to get the neighbor's tree declared a nuisance. If Dave had exercised a little plaintiff self-control, he might have gotten there, too.

We are too urban and too suburban, and our properties are too developed for the *Massachusetts Rule* to be the exclusive remedy for genuine harm done by a neighbor's tree. That is the way the law is trending in the civilized world, and it is bound to reach Ohio sooner or later.

Rababy v. Metter, 30 N.E.3d 1018 (Ct.App. Cuyahoga Co., 2015). David Rababy and Roy Metter were next-door neighbors. Dave's driveway abutted Roy's property in certain places and nearly abuts in others. A fence separated the properties, and a stand of mature trees ran along the fence on Roy's side of the boundary line.



Dave sued Roy for negligence, nuisance, trespass, and interference with a business contract. Dave asserted that trees at the edge of Roy's property extended over his own property, and dropped leaves, needles, sap, and branches onto his car and home, and that some of the trees were rotten. He said the trees cast shadows over his property and cause mold growth on his roof, as well as damaged his driveway and foundation.

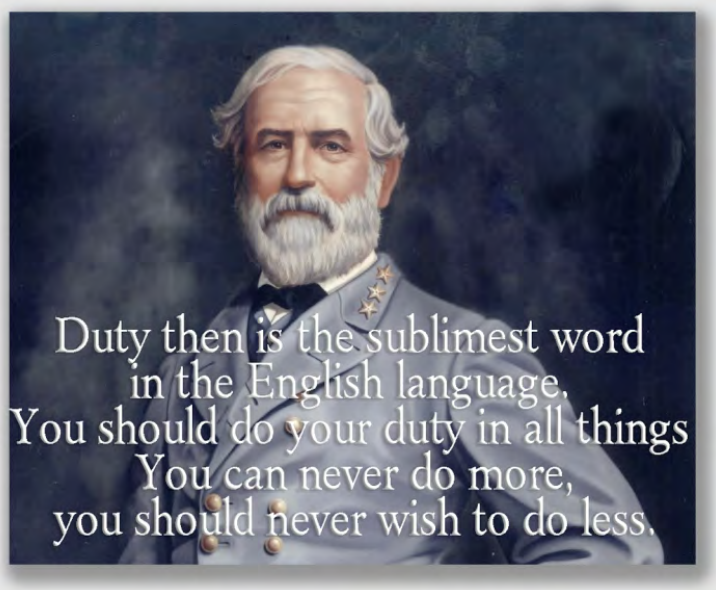
Dave complained he had a company to trim the overhanging branches, but Roy's daughter prevented the unnamed landscape service company from properly performing this work. The complaint alleged the trees constituted an ongoing nuisance and trespass and that Roy negligently maintained the trees. Dave asked for $52,500: $37,000 for future tree trimming services and $15,000 in compensatory damages.

Both parties filed motions for summary judgment. Dave argued that on "an ongoing basis, Roy's trees encroach onto my property, specifically over my home and driveway. His trees deposit leaves, debris, and sap onto my property, causing damage." Dave also repeated the claim about Roy's daughter running off the tree trimmers.

Roy argued that he owed no duty to Dave to trim otherwise healthy trees on his property. He claimed the trees were mature and preexisted either party's ownership of the property. He said that a year before, Dave hired Cartwright Tree Service to trim the row of pine trees that ran along the driveway. He said no one complained when Cartwright trimmed the overhanging branches from Dave's property free, but when Cartwright began trimming branches and trees back further than the property line, Roy's daughter objected. Roy said that he has no objection to Dave trimming the overhanging branches back to the property line.

Dave replied with new allegations that the trees in question were decaying or dead. Attached to the reply was a new affidavit that averred that the trees were decaying and dangerous and that one had fallen on his property. He included a picture of a tree that appears to have fallen across a driveway. However, the affidavit was neither signed nor notarized.

The trial court granted Roy's motion for summary judgment, and denied Dave's. Dave appealed.



Gen. Robert E. Lee knew something about duty … and even he couldn't have found that Roy owed one to Dave.

Held: Roy owed Dave no duty, so the trial court's dismissal of the case was upheld.

In order to succeed in a negligence action, the Court said, Dave must demonstrate that Roy owed him a duty, that Roy breached the duty, and that he suffered damages that proximately resulted from Roy's breach. Here, Dave offered evidence that falling pine needles, leaves, sap, and sticks have damaged his car, driveway, and roof. He also alleges, without evidentiary support, that encroaching tree roots damaged his driveway and home.

While he showed damage, Dave was unable to show that Roy owed him any duty. A landowner is generally not responsible for the losses caused by the natural condition of the land. Instead, the Court observed, states generally allow one impacted by such growth the remedy of self-help. A privilege existed at common law, such that a landowner could cut off, sever, destroy, mutilate, or otherwise eliminate branches of an adjoining landowner's tree that encroached on his land. But, the Court said, whether a separate remedy exists is an open question.

The *Massachusetts Rule* provides that in almost all circumstances, the sole remedy for damages resulting from the natural dropping of leaves and other ordinary debris from trees is the common law remedy of self-help. The rule does provide a limited exception for dead trees, just as Ohio has established a duty for urban landowners of reasonable care relative to the tree [hat overhangs a public street, including inspection to make sure that it is safe." Where constructive or actual knowledge of an unreasonably dangerous condition exists on the land of an urban landowner, such as a dead tree, the duty prong of a negligence claim may be satisfied.

The reasoning set forth in support of the *Massachusetts Rule*, the Court said, is apt to the facts of this case: "[T]o grant a landowner a cause of action every time tree branches, leaves, vines, shrubs, etc., encroach upon or fall on his property from his neighbor's property, might well spawn innumerable and vexatious lawsuits." The Court thus adopted the *Massachusetts Rule* as the law of this jurisdiction.

But Dave also argued that in Ohio a "landowner in an urban area has a duty to exercise reasonable care to prevent an unreasonable risk of harm to others from decaying, defective or unsound trees of which such landowner has actual or constructive notice." Dave contended Roy's trees were in such a defective condition and thus constituted a nuisance. Dave also argued that Roy, an urban landowner, had a duty to inspect his trees and protect others from a dangerous condition created by any unsound trees. Even if such a duty existed, the Court said, it only is breached when the owner has actual or constructive notice of a dangerous condition.

The Court held that Dave put forth no evidence that any of the trees constituted a dangerous condition of which Roy was aware or should have been aware. He presented no any evidence that the trees are dead, decaying, or unsound, and cited no case holding that "the normal yearly life-cycle of a tree and the natural shedding of leaves, twigs, and sap constituted a nuisance. Thus, he provided no compelling justification for a court to hold that Roy's trees case constituted a nuisance or a dangerous condition. The problems Dave had experienced with the trees "are the natural consequence of living in an area beautified by trees. Dave's remedy is to trim tree limbs that overhang his property back to the property line, to which Roy averred he has no objection."

Leaves – often a pain in the arse, but seldom a nuisance

The trees at issue in this case do not constitute a nuisance, and Roy is not negligent in regard to them.

Dave also asserted that the trees on Roy's property constituted a trespass. But the elements of a successful trespass claim include an unauthorized intentional act, and entry upon land in the possession of another. Here, there is no intentional act. Dave claimed that Roy's actions of not removing or trimming the trees constitute an intentional act. But, the Court said, as it explained, Dave's remedy for intrusion by vegetation is to trim it back to the property line.

In sum, Dave's claims that detritus falling from trees from the neighboring property constituted a trespass, a nuisance, and negligence were simply not actionable. The Court cited a Maryland case that "it is undesirable to categorize living trees, plants, roots, or vines as 'nuisances' to be abated. Consequently, we decline to impose liability upon an adjoining landowner for the 'natural processes and cycles' of trees, plants, roots, and vines."

ADJOINING LANDOWNERS – BOUNDARY LINES:

HOBNAIL BOOTS

We spent about 13 years living in suburban Washington, D.C., where everything that happened on Capitol Hill and at the White House was a local news story. Still, until we decamped for small-town and rural-county America, we didn't really understand how heavy-handed and ugly politics could be.

Exhibit A: A three-member township board of trustees approves a sewer improvement project. As the job progresses, the chairman of the board decides on his own that he's going to modify the plans to have some trees along the highway right-of-way removed. He is on the site supervising the work when two homeowners approach to complain that one of the trees the chairman intends to have cut down belongs to them.

Here's where big politics and little politics diverge. If that happened on a federal project, or even a state project, the bureaucrats in charge would stop everything until the engineers and surveyors who had planned the work verified that the subject tree was or was not within the right-of-way. But Uncle Joe was no pusillanimous bureaucrat: he was the "go-to" guy who had neither qualms nor the time to listen to the petitions of lowly citizens, and he's not about to let the hoi polloi get in the way of his government's work.

"Police power" is a constitutional concept, the power of the government to regulate behavior and enforce order within its territorial jurisdiction for the betterment of the health, safety, morals, and general welfare of the inhabitants. But in the real world, this is what "police power" is all about: a small-town cop ready to arrest homeowners on the say-so of a government functionary, because they are defending their property against the unlawful taking by the state. The cop needs say nothing: the handcuffs and Glock 22 on the officer's equipment belt say it all.

But we still have courts, and to court is where the homeowners repaired. It turned out the tree straddled the right-of-way boundary line, which helped Uncle Joe not at all: the Court of Appeals, citing the *Ohio Jurisprudence* legal encyclopedia (which passes for primary authority in Ohio, or so we were told in law school), joined the overwhelming majority of states that hold that a boundary tree is owned by the property owners on both sides of the boundary line. As property of the tenants-in-common, the tree may not be removed with the consent of both parties.

Pinkerton v. Franklin Twp. Bd. of Trustees, Case No. 83AP-946 (Ct.App. Franklin Co., July 17, 1984), 1984 Ohio App. LEXIS 10484, 1984 WL 13994. Joe Donovan, Chairman of the Franklin Township Board of Trustees, was a no-nonsense, get-it-done guy. Plus, he had the power of the state (or at least the township) behind him.ast the township) behind him.

When Joe's three-member Township Board of Trustees authorized a storm sewer improvement along the west side of Gladstone Avenue, Joe was the guy who would see that the job was done right. When it turned out that the sewer improvement project would be facilitated by removal of several trees, Joe was the guy who made the decision on his own that the trees would go. Two of the trees were in the highway right-of-way, but the third – a stately oak – straddled the boundary between the Gladstone Avenue right-of-way and the Pinkertons' property.

Unfortunately for everyone involved, the Pinkertons strenuously objected to removal of the boundary tree. Joe, however, was not a guy to need anyone's approval, so he did not bother to consult the other two Trustees about removing the trees. Instead, he forged ahead, ignoring the Pinkertons' objection. He even directed a local police officer to be present in case the Pinkertons tried to intervene.

They're small-town cops, but you're just a civilian. Don't forget it.

The tree was removed, just as Joe ordered. The Pinkertons' complaints were not as easily dispatched as was the oak. They sued the Township Board for trespass, demanding compensatory and punitive damages. The jury agreed, awarding them $2,000 for the tree, and trebled it to $6,000 due to Joe's willfulness.

Joe appealed.

Held: Joe, acting in his official capacity, caused the trespass and wrongful cutting, entitling the Pinkertons to $6,000.00 in damages.

The Court of Appeals made short work of Joe's claim that the evidence showed no wrongfulhat the evidence showed no wrongful cutting. Citing Ohio Jurisprudence, a legal encyclopedia, it held that "[a] tree standing on the boundary line between adjoining landowners, so that the boundary passes through the trunk or body of the tree, is the common property of both proprietors as tenants in common."

Likewise, the Court ruled that given that Joe steamrolled the Pinkertons' legitimate objections, even bringing in the police to stifle their complaints of trespass, it was not error for the trial court to tell the jury it could assess punitive damages.

ADJOINING LANDOWNERS – BOUNDARY LINES:

LIFE IS A BOWL OF BERRIES

Who knows how neighbor feuds that simmer for years and years suddenly explode? Maybe Tom Schwendeman knows.

Tom lives next to the Roaches (who are people, not insects). About 14 years ago, the Roaches surrounded their property with a chain link fence, which was clearly on their land. They even had a surveyor lay down pins before the fence went up. Since that time, the Roaches have engaged in such loathsome activities as building campfires in their back yard on as many as five, yes, FIVE occasions, and for spraying herbicide on poison ivy growing along the fence.

Oh, the humanity!

We get a sense of how things were going with the Roaches, given that grumpy neighbor Tom called the EPA to complain about the campfires (which occurred at a frequency of about one every two years, if our math skills remain sharp). The EPA, being busy creating environmental disasters of its own, apparently declined to intervene. Also, Tom liked to pick berries that grew along the fence. The herbicide on there poison ivy was the last straw for Tom. Convinced that his next blueberry smoothie would be his last, Tom tried to kick the fence down.

You of course have heard on countless police shows the Miranda warning, you know, "you have the right to remain silent…" Heed it well. Tom should have. As we like to tell clients, remaining silent is not just your right: usually, it's a pretty good idea, too.

Tom did not remain silent, but rather vented his spleen at the deputies who responded to the call. He admitted the fence belonged to the Roaches and was on their land, but… well… the campfires! And the berries! How much is a man supposed to endure?

When it came time for Tom's misdemeanor trial, his lawyer did not have a lot to work with, other than Tom's fanciful argument that the fence was already in bad shape, and his tirade did not make it materially worse. For good measure, Tom threw in the woof story that he was only trying to get the fence off his land. The last defense might have worked… if Tom had kept his mouth shut when the cops had first shown up.

State v. Schwendeman, Case No. 17CA7 (Ct.App. Athens Co., Jan. 17, 2018) 2018 Ohio App. LEXIS 242. The state charged Tom Schwendeman with criminal damaging, a misdemeanor, because he damaged a chain-link fence.

The Roaches installed the fence about 13 years ago. One day last summer, Tom – apparently furious because the Roaches had sprayed herbicide along the fence to kill poison ivy – began yelling and kicking and showing "a lot of anger towards the fence," as a witness put it. Someone called the sheriff, and Tom admitted to a deputy that he knew it was not his fence, but that the Roaches liked to have campfires in their back yard that bothered him, and that they had sprayed herbicides for poison ivy along the fence line. Tom said he picked berries along the fence.

By the time he got to trial, Tom had an explanation that was a little more congruent. He complained about his problems with the five or six fires the Roaches had built in their backyard, and argued that because the fence was 12 years old, the only damage he saw to it was "wear and tear that's happened over the period of twelve years. More than twelve years it's been there." He claimed that he witnessed tree branches falling on the fence and the Roaches' children climbing the fence, causing the fence to come apart, and that one more than one occasion, the kids made "the fence pull loose and collapse on the children when they were climbing it." He said he disconnected the cyclone fence from the posts carefully, because it was on his property and he wanted to move it. Tom claimed the Roaches knew it was on Tom's land, but refused to move unless Tom had the property surveyed and took him to court.

But on cross-examination Tom admitted he was angry when he began dismantling the fence, "I had been poisoned. My berries had been poisoned… my food had been poisoned and my next smoothie would make me very ill." Tom admitted he did not "own" the fence, but continued his claim that "it was on my property."

Fence broken? Must be those darn kids again...

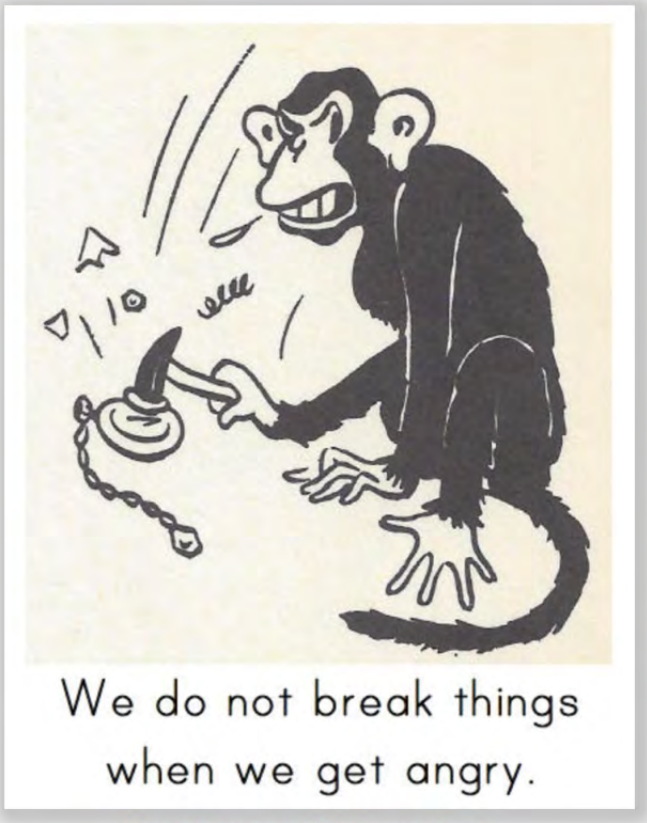
Tom's lawyer argued that children, dogs, and trees caused the damage to the Roaches' fence. However, defense counsel did not seek a jury instruction that Tom was exercising a privilege to remove an obstruction on his own land and did not object to the court's jury instructions.

The jury found Tom guilty. He was ordered to pay restitution and a fine. Tom appealed.

Held: The conviction was upheld. Tom claimed on appeal he had the right to remove obstructions from his land, but he never asked the court to instruct the jury on that defense.

When a party fails to object in the trial court, generally he or she cannot make the claim on appeal that was not raised below unless he can show "plain error" that affects substantial rights. It's a tough standard to meet.

Ohio law does indeed hold that a landowner has the rightto use self-help to remove encroachments on his property, provided the landowner acts with reasonable care. That is what is called an "affirmative defense" to the criminal damaging charges that were brought against Tom. But a defendant is not entitled to have the court instruct the jury that unless he has come forward with at least some evidence that, if believed, raises the affirmative defense. Otherwise, the court is not permitted to give a jury instruction on the affirmative defense.



Someone tell Tom that...

Tom testified the fence was on his land, but he didn't offer any evidence that that was so. He could have shown a deed, or a survey, or even a plat map. But he had to show something. What's more, not only did he offer nothing at trial, his testimony that the fence was on his land directly contradicted his statements to two sheriff's deputies. Without providing a rationale for the inconsistency with his prior admissions to the deputies, the Court said, Tom's trial testimony was not credible.

Because there was no credible evidence supporting his contention that he owned the land, the trial court as a matter of law could not properly give a jury instruction on the affirmative defense.

Tom also argued to the court of appeals that his defense attorney was a putz. The 6th Amendment to the constitution guarantees all criminal defendants effective assistance of counsel. Here, Tom fumed, his attorney was ineffective because he failed to request the jury instruction on Tom's privilege to remove an encroachment from his land. The appellate court said no dice: based there was no evidence supporting the claim, a request for an instruction would have been meritless. Tom's trial counsel cannot be deficient for failing to request an unwarranted jury instruction. Anyway, the Court of Appeals observed, Tom's lawyer was pursuing a "wear and tear" defense at trial, making a decision not to argue that Tom also had the right to move it off his property fairly sound trial strategy.

Trial counsel cannot be found deficient, the Court of Appeals said, for failing to request an unwarranted jury instruction or for exercising sound trial strategy.

CONTRACTS:

OOPSIE!

Anyone can make a mistake. Or two.

Consider this case on mutual mistake. Mutual mistake is a doctrine that started with a barren cow with a fancy name, Rose 2nd of Aberlour (popularly mislabeled as "Aberlone"), in the case of Sherwood v. Walker, the classic case on mutual mistake in contract law. Well, maybe it didn't start there, but a generation or two of law students thinks it did. Wherever it started, the doctrine remains alive and well.

In this decision, Mr. Thomas entered into an easement with Ohio Power to let the company string lines across his place to service his neighbor's new house. But it turned out the house was in another power company's service area, something no one figured out until after Ohio Power had sliced up Mr. Thomas's trees. Thomas sued Ohio Power to rescind the easement and for damages, claiming mutual mistake. The trial court disagreed, but the Court of Appeals threw out the easement.

The Court's most important point was this: maybe Thomas and his neighbor Baker didn't know where the electric service boundary lay. But after all, they weren't in the power binness. Why should they know? Ohio Power, on the other hand, was just plain sloppy in not recognizing the problem. In Court-speak, "the equities of this situation show that Ohio Power, as the company in the business of providing electric power, was in a much better position than the Thomases to discover the mistake."

In order to provide grounds to rescind (undo) a contract, the mistake must be mutual. The Battle of New Orleans was a mutual mistake – Andy Jackson thought we were at war with the British, and British Admiral Thomas Cochrane thought they were still at war with the U.S. Meanwhile, on the mythical planet of Tatooine, it appears that the mistake was not mutual – Obi-wan Kenobi was fully aware that the droids he was with were the ones the storm troopers sought, but he led the storm troopers to believe otherwise. Not a mutual mistake at all.

Thomas v. Ohio Power Co., Slip Copy, 2007 WL 2892029, 2007 -Ohio- 5350 (Ct.App. Ohio, Sept. 27, 2007)

The Thomases owned 159 acres of property in Augusta Township. Right next door was land owned by Brent Baker. The Thomas property is within the geographical area served by Ohio Power Company, but the Baker property is served by Carroll Rural Electric Power. Neither of the power companies may provide power to the area assigned to the other without the consent of both companies and the affected customer.

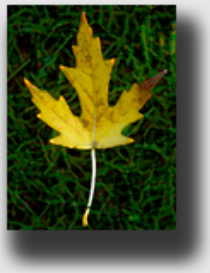
Baker asked Thomas for permission for Ohio Power to take an easement across the Thomas property to bring power to a house Baker planned to build. Thomas agreed. As a result, an easement was executed, and Ohio Power — in reliance on the easement — cut and cleared many trees on the Thomas property and along the neighboring road. But then Baker found out the house wasn't in the Ohio Power service area, and the other power company wouldn't permit Ohio Power to provide service to him, frustrating the purpose for the easement. The Thomases sued Ohio Power, seeking rescission of the easement contract and damages. The trial court concluded that the easement was valid and, therefore, not subject to rescission.

The Thomases appealed.

Held: The parties had made a mutual mistake, and the contract should be rescinded. Mutual mistake is grounds for rescission of a contract if there is a mistake made by both parties as to a material part of the contract, and where the party complaining is not negligent in failing to discover the mistake. A mistake is material to a contract when it is "a mistake … as to a basic assumption on which the contract was made [that] has a material effect on the agreed exchange of performances." Thus, the intention of the parties must have been frustrated by the mutual mistake."

Rose, not barren at all, was worth about 12 times what farmer Sherwood sold her for.

In order to claim mutual mistake as a basis for rescinding a contract, a complaint must allege (1) the existence of a contract; (2) a material mutual mistake by the parties when entering into the contract; and (3) no negligence in discovering the mistake on the complainant's behalf. Here, the Court said, the purpose of the easement was to provide electric power to the Thomases' neighbor. Both the Thomases and Ohio Power believed Ohio Power could provide electric power to that neighbor, but they were both mistaken about that fact. Ohio Power was in a better position to know that this belief was mistaken than the Thomases, and thus, the Court held, the contract should have been rescinded at the Thomases' request.



CONTRACTS:

THOSE DOGGONE COVENANTS

More and more home developments deliver to their residents not just houses, but a particular ambience, one which remains free of eyesores like sheds, clotheslines, and even colors of exterior trim and paint deemed outside the color scheme of the place. These restrictions are often contained in the deeds conveying ownership of the homes. And quite often, the restrictions begin to be violated before the ink is dry.

Many of the violations are slight, not worth the time of the neighbors or associations charged with enforcing the restrictions. But someone usually pushes things too far, and then defends himself or herself in court by complaining that Joe Doaks or Jane Doe down the street violated the same restriction, too, and no one is beefed about *that* violation.

In this case, an Ohio dog-trainer tries the same excuse when the homeowners' association tries to shut down his obedience school.

It's like complaining to a cop that everyone is speeding, making his actions stopping you somehow … well, unfair. Like President Carter told us once, "Life is unfair." And so is selective enforcement. But that doesn't mean that you can't do it.

Here, the Court told Marchus that what mattered wasn't whether other people were getting away with violating the covenants. What matter was whether there was a "substantial value" the restriction which should be protected. Where substantial value could be found, equity will enforce a restrictive covenant. No matter who else is violating it.

The guy down the street is selling on eBay for a living? Once a day, he loads his pickup truck with small boxes and goes to the post office? There's probably no "substantial value" being offended. But Mr. Marchus's baying hounds? Customers and their masters were driving in and out all day long on the private road? The other property owners were worried about wear and tear on the road, the congestion, and liability for accidents. Those concerns were legitimate.

The Court agreed to enforce the covenant, refusing to let the neighborhood go to the dogs.

Rockwood Homeowners Assn. v. Marchus, 2007 WL 1731621 (Ct.App. Lake Co., June 15, 2007). Rockwood Homeowners Association consists of the owners of ten individually owned tracts of land on Girdled Road in rural Lake County, Ohio. Each owner has a primary residence on the property. The residences are accessed by Rockwood Lane, a paved, private road running off Girdled Road.

The developers drafted specific land use restrictions which were attached to each deed, restrictions intended to preserve the rustic character of the land while permitting property owners to operate a home-based business without detracting from the rural atmosphere. Section I(A) of the Declaration of Restrictions provides that "no commercial or institutional activity shall be conducted on these lots, which is not wholly contained within the residential dwellings or which causes damage to the private gravel drive by heavy vehicles." The Bylaws for the Homeowners Association incorporate the restrictions.

Over the years, various owners operated home-based businesses from their Rockwood Estates residences, including a pest control business, a security systems business, a log home business and a tree maintenance business. In September 2001, one owner, Dick Marchus, built a 60′ x 80′building to be used as a dog training facility. After it was done, his wife ran her dog training business in the new outbuilding, conducting one class on Monday and two classes per day from Tuesday through Saturday. While some attendees would arrive with two or three dogs, she limited the commercial vehicle traffic to ten cars per class.

Almost immediately, the Association sought an injunction to keep Marchus from continuing operation of the commercial activities from the outbuilding, on the grounds that the activity violated the covenant. The Marchuses answered and counterclaimed. At trial, the Association argued Marchus's business was in violation of the restrictions. Marchus admitted the activities were not contained within the residential dwelling, but argued the restrictions had been waived or abandoned by the Association's failure to enforce the restrictions against the past violations of other property/business owners. The trial court granted the injunction, and Marchus appealed.

Held: The trial court's injunction was affirmed. The Court of Appeals noted that restrictive covenants on the use of property are generally viewed with disfavor. However, this disfavor may be overcome by evidence of a plan or scheme into which the restrictions are incorporated and notice of that plan or scheme. A plan like the Rockwood one, designed to maintain the harmony and aesthetic balance of a community, will often be upheld where the restrictions are reasonable.

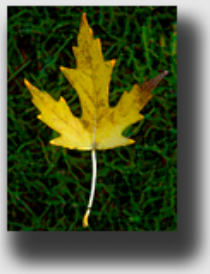
The evidence indicated the restriction was drafted with the intent of maintaining the bucolic atmosphere of the development and to prohibit increased traffic from entering and exiting the development. The Court said the restriction was uniform and applied to all property owners in the development. When the evidence was viewed as a whole, the Court said, it concluded the restrictions and the development to which they pertained were premised upon a general plan or scheme.

The evidence also showed that Marchus had notice of the restrictions. Consequently, the Court found, the restriction was valid and enforceable. As for waiver or abandonment, the Court said, the test was whether, under the circumstances, there remained a substantial value in such restriction which should to be protected. Where there was a substantial value to the dominant estate remaining to be protected, equity will enforce a restrictive covenant.

Here, the Court found, various residents expressed concerns they held since Greta Marchus opened the business. Increased traffic created congestion and destroyed the rural atmosphere of the development. Because the residents were responsible for the upkeep and maintenance of their private drive, some worried about the increased repair cost resulting from the wear and tear. Some were concerned about being exposed to liability if any of the Marchuses' customers happened to be injured on the private road. The Court found that the concerns expressed were legitimate and rationally related to appellants' violation of the covenant, and thus, there was still a substantial value in the restriction.

Even with the Marchuses' restricting classes to only ten vehicles (leading to dog carpools, no doubt), it was still too much for the neighbors …

As for acquiescence, the evidence didn't show that prior businesses operated anywhere but in the residences of the owners, something which was permitted by the restrictions.



DAMAGES – GENERALLY:

WE ONLY GET WHAT WE GIVE

Bernie may have left the political stage, but young Democratic Socialist Alexandra Ocasio-Cortez ascendant as a candidate for the House, we still are reminded daily of those corporation-hating New Radicals, whose work is still hanging around on YouTube warning us that "you only get what we give." The defendants in this case found that out a bit too late.

In many ways, a civil action is little more than a gladiatorial contest, with the court sitting to referee according to procedural rules, to apply the law when needed, and to correct inequities only in egregious circumstances. That's sort of what happened when the McCammons – garden center owners who were buying tree boughs wholesale from "Trees 4U" – cut the boughs they needed not only from the trees Reicosky had designated but also from some landscape trees they had been told not to damage (sounds kind of like Adam and Eve and the tree of knowledge, doesn't it?).

McCammon's excuse – an arboriculture version of "the dog ate my homework" – didn't really resonate with the jury.

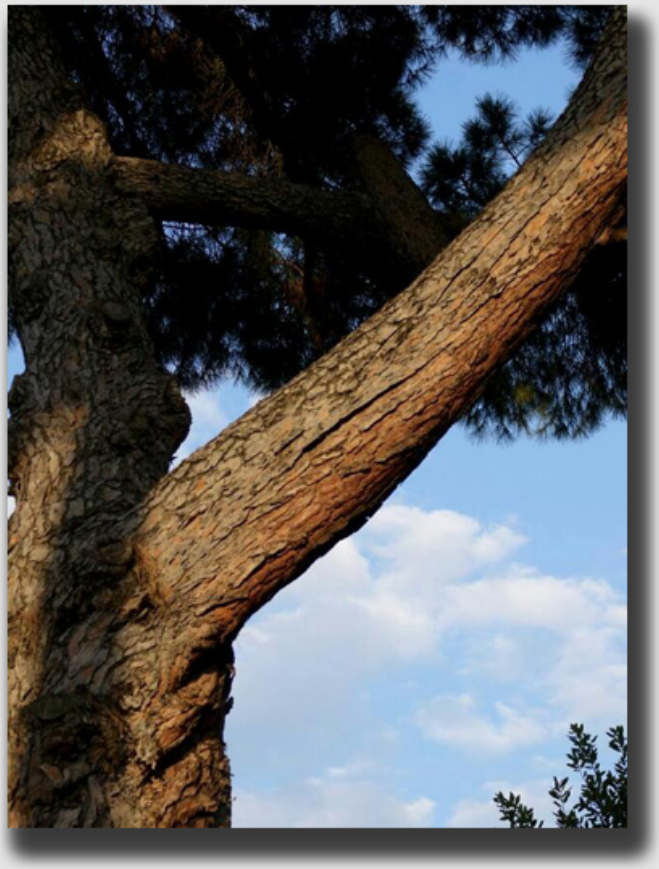
The owners of "Trees 4U" — the Reicoskys — told McCammon that those trees were definitely not for him, and sued. They claimed McCammon had destroyed $35,000 in trees, and they wanted treble damages under Ohio law. McCammon claimed that Mr. Reicosky had given him permission to cut boughs from the landscape trees. Mr. Reicosky denied it. It was up to the jury to decide whose story to believe, and it believed Mr. Reicosky.

There may not have been any compelling basis for believing the one story over the other, but when the jury makes its decision, it has pretty much settled things. It's sort of how pro football was before instant replay: what the official said happened was what had happened. (Cursed instant replay... but that's a rant for another day).

The other problem the McCammons faced came with jury instructions. A trial court gives a jury detailed instructions on what the law is, so that jurors can decide how the facts they find (such as that McCammon cut boughs from Reicosky's landscape trees after Reicosky said not to) lead to the legal outcome (McCammon thereby committed a trespass and was reckless). Both sides may suggest jury instructions to the Court. Here, McCammon didn't think things through, and agreed with an instruction that the jury figure up damages by adding the market value of the tree times the number of trees. Later on, McCammon realized that the real measure of damages should be lost profits, that is, the market value of the trees minus the cost of producing and selling them. After all, even kids running a lemonade stand know that you only get to keep the money you're paid minus what it cost you to buy the lemonade and handmade sign. McCammon complained that he should get a new trial, because the jury hadn't considered the costs of production when it calculated damages.

The Court of Appeals said McCammon was out of luck. The jury had made its decision on his liability, and whether it's what the Court agreed with or not, there was evidence enough for a rational jury to reach its finding. And as for the damages, well, Mr. McCammon, "we get what we give." The instruction might have been flawed, even unfair to the McCammons, but the McCammons were happy enough with it when it was given. A party can't make a mistake, and then cry foul that the mistake happened.

Reicosky v. McCammon, Case No. 2006 CA 00342 (Ct.App. Ohio, Feb. 19, 2008), 2008 WL 442567 (unpublished). The McCammons ran a garden center, from which they sold, among other things, tree boughs to cover gravesites. They had trouble getting enough boughs, and began buying them from the Reicoskys, who operated "Trees 4U." The Reicoskys delivered them one year, but in subsequent years, let the McCammons come to the "Trees 4U" tree farm and cut the boughs they needed. The first year the McCammons did so, the Reicoskys instructed them not to take any boughs from trees east of a particular drainage ditch, because those were landscape trees to be resold.



Bough? Wow.

The McCammons limited their cutting to the west side of the ditch one year, but the next year came back, and this time cut boughs from the landscape trees on the east side of the ditch as well. The McCammons said Mr. Reicosky had given them permission to do so on trees taller than 16 feet east of the ditch. Mr. Reicosky denied doing so, and claimed he lost 211 trees, worth over $35,000. The Reicoskys sued.

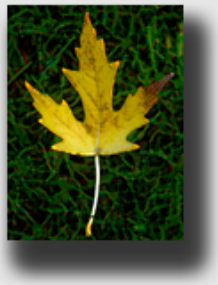
At trial, the jury heard both sides, and then found for Reicosky, holding that he had suffered $35,000 in damage. The trial court trebled this under Ohio's treble damages statute. The McCammons' motion for a directed verdict – in which they argued that no evidence supported the finding of recklessness was needed for treble damages – was denied by the trial court. Likewise, the McCammons' motion for a new trial – based on the fact that the jury considered the market value of the destroyed trees without deducting any of the costs associated with selling the trees — was turned down. The McCammons appealed.

Held: The treble damages were upheld. The Court of Appeals observed that it was limited to determining whether there was any evidence that could have convinced a rational juror the McCammons had been reckless. The evidence, because the Reicoskys were the winner, had to be construed in favor of the Reicoskys.

The Court concluded that the jury simply chose to believe Mr. Reicosky's version of what happened — that he had never given permission to cut east of the ditch and had previously made clear that the trees there were off limits — and to reject Mr. McCammon's version. The jury is the fact finder, and its determinations as to who to believe are entitled to great deference by reviewing courts. The jury having accepted that the McCammons trespassed on the east side of the ditch, the Court of Appeals was simply not entitled to decide that it may like Mr. McCammon's recitation of events better.

There's an old legal aphorism – never trust the judgment of twelve people who aren't smart enough to know how to get out of jury duty.

As for the faulty calculation of damages, the Court said McCammons' complaint was too little, too late. The McCammons had an opportunity to make sure the jury instructions accurately described how to deduct costs from the market price to determine lost profits. Instead, they submitted a jury instruction that was the same as the one the Court used, which omitted any direction as to how to calculate damages by deducting costs from market price. The Court found that "any error in the jury's determining of damages was invited by [the McCammons]. Under the invited error doctrine, 'a party will not be permitted to take advantage of an error which he himself invited or induced'."



DAMAGES – GENERALLY:

YOU'LL GET NOTHING AND LIKE IT

We've all had it happen to us. Our next-door neighbor gets drunk and rams his bulldozer into our best shade tree, gouging it up pretty badly. Then we have to sue, and while the torn-up grass he left behind and shrubs he rolled over get paid for, we get nothing for the tree. All because he wounded it but didn't kill it.

What? You say it hasn't happened to you? OK, but it did happen to Mike and Melissa in Huron County, Ohio. When neighbor Bob Tite got a little tight and rammed their tree, the trial court told them they'd get nothing for the wounded walnut, because it's not dead. Dead trees we can figure the cost of, but a wounded tree… Well, it may die sooner instead of later, but who can say? The trial court said the damage is "speculative."

Speculative? If Mike or Melissa had been rammed by the tight Mr. Tite, they would have been able to collect for their injuries without having to die first. And trees are people, too, right? Well, maybe not, but a tree probably shouldn't have to die before a property owner can get compensation for damage to it.

Tinney v. Tite, 2012-Ohio-2347 (Ct.App. Huron Co. 2012). One summer day, Mike and Melissa Tinney heard a loud noise outside of their house. When they looked out through the window, they saw their across-the-road neighbor, Bob Tite – quite inebriated at the time – sitting on his bulldozer lodged hard up against a sizeable black walnut tree in their back yard. Deep ruts across their lawn and two smaller trees splintered on the ground marked the path the bulldozer had taken.

The Tinneys sued Bob for the damage. Their certified arborist expert said damage to the walnut covered 25 to 30 percent of the circumference of the tree. He testified the extent of the damage "ruined" the tree because, although it would not kill the tree immediately, it would result in "a slow decaying process" that would eventually compromise the structural integrity of the tree and cause it to become a hazard. The arborist was unsurprised that the tree was still producing leaves one year after the incident. He said the wound was starting to develop a callus as the healing process proceeded, but the tree would weaken over time because the wound would not heal completely before decay sets in. He could not say that the tree *would* die from the wound, but he said that the structural integrity of the tree is likely to become a dangerous factor in the future.

The Tinneys also called a witness who had a degree in landscape horticulture. He said the severity of the damage would probably stress the tree out, and eventually, the old walnut would die. He testified that as the years progressed, the Tinneys could expect more decay and more branches showing signs of decline. He said the tree's declining and potentially dying was "not an immediate thing. It's going to take some time" because "it's a long process for this tree to decline."

Bob's sister testified in support of her brother, however, testifying that she saw the damaged black walnut the summer after the incident, and it looked "healthy, green, and alive" despite the wound on the trunk.

The Tinneys won a judgment $3,410.00. The award covered the lawn and the saplings, but included nothing for the wounded but still living walnut tree because the trial court found that giving them damages for the injury to the walnut would be "potentially temporary and speculative at best" since "its appearance remains the same."

The Tinneys appealed.

Held: The Tinneys were entitled to damages for the injured walnut tree.

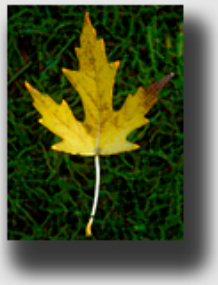
The Court observed that most decisions involving O.R.C. 901.51 – the Buckeye State's statute on wrongful cutting of trees – involve situations where trees have been completely cut down, making it considerably easier to determine the full extent of the damage. In this case, the tree is still alive, even if it is not necessarily guaranteed to stay that way for decades to come. Nevertheless, the Court said, temporary damages to vegetation are recoverable, because it is a "fundamental rule of the law of damages is that the injured party shall be fully compensated."

As a general rule, speculative damages are not recoverable. An award of damages must be shown with a reasonable degree of certainty and in some manner other than mere speculation, conjecture, or surmise. However, the Court ruled, if an appellant "establishes a right to damages, that right will not be denied because the damages cannot be calculated with mathematical certainty." Even when permanent damages are awarded for trees that were cut down, temporary damages may still be awarded if the permanent damages alone do not fully compensate the plaintiff.

Plus, the tight Mr. Tite tore up their lawn.

Both of the Tinneys' experts testified it was reasonably certain that the tree was permanently damaged, because it would not heal before decay set in. The Tinneys furnished precise calculations on the reasonable restoration value of the property. Therefore, the Court ruled, they had shown "with a reasonable degree of certainty what would be required to reasonably restore their property. The damages to the tree must have had some value, but the plaintiffs were awarded nothing, even if just a nominal amount for the temporary trespass onto their property."

The Court of Appeals sent the case back to the trial court for a calculation of damages to the wounded walnut tree.



DAMAGES – GENERALLY:

IT DOESN'T TAKE *THAT* MUCH TO BE RECKLESS

We all have some sense of what kind of conduct is reckless. At least, to channel the late Justice Potter Stewart, we're pretty good at knowing it when we see it. Riding a motorcycle into a wall at 100 mph while drunk? Yeah, probably reckless. Standing on a ledge at the top of a skyscraper for a selfie? You bet. Lying between railroad tracks while a train passes? We'll give you that one, too.

But when the law uses the term "reckless," in fact when the law adopts any standard, the term has to have a specific definition. If not, laws punishing conduct that did not meet the standard would be arbitrary (as well as falling short of their goal of causing people not to be reckless in the conduct of their affairs).

Sorry, Justice Stewart, "knowing it when [you] see it" is trenchant, but it's not a good way to regulate conduct.

In this case, a Buckeye State classic, a car repair business trespassed on a neighboring business's land to hack away at some spruce trees. The car repair manager thought the trees belonged to his company, but his belief – which flew in the face of the facts – was so heedless of the consequences that the court found him reckless.

We have seen worse cases called mere negligence, and we cannot discount that the trial court in this case was influenced by the extent of the damage to the "visual barrier" between the professional building (populated with the offices of lawyers, doctors and engineers) and the seamy oil-change-and-lube joint next door.

"Recklessness" let the trial court grant treble damages under Ohio law to the office building owner. Unsurprisingly, recklessness is what the trial court found. Maybe cynicism is creeping into our analyses as we age (we prefer the expression "as we get wiser"), but if the real estate owner had made the same unsupported surmise about the grease monkey's trees, we suspect his misfeasance would be found to fall somewhere short of "reckless." Just sayin'.

ALH Properties, P.L.L. v. Procare Automotive Service Solutions, LLC, Case No. 20991, 2002-Ohio-4246 (Ct.App. Summit Co., Aug. 21, 2002) 2002 Ohio App. LEXIS 4412. ProCare and ALH were adjoining landowners. ALH had an office building on its property, and ProCare operated an auto repair facility. Between the two properties stood a row of large Norway spruce trees, providing a visual buffer between the two businesses. The trees are on ALH's property, although some of the branches extend over ProCare's property. ProCare cut branches off of the lower ten feet of the spruce trees, destroying the visual buffer. The branches will not grow back.

ALH sued, alleging reckless injuring of the trees under *Ohio Revised Code 901.51*. The trial court entered judgment against ProCare for $34,200.

ProCare appealed.

Held: ProCare was liable to ALH.

Section 901.51 of the *Ohio Revised Code* provides that "[n]o person, without privilege to do so, shall recklessly cut down, destroy, girdle, or otherwise injure a vine, bush, shrub, sapling, tree, or crop standing or growing on the land of another… "In addition to a criminal, the statutes subjects a violator to treble damages for the injury caused.

Do you see any recklessness here?

The Court held that as used in the statute, the term "recklessly" has the same meaning in a civil claim for treble damages as it does in a criminal proceeding for violation of the statute. A person acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist.

The Court acknowledged that a privilege exists at common law for a landowner to cut off branches of an adjoining landowner's tree that encroached on his land. But here, ProCare trimmed not just branches of the trees that faced its property, but also branches facing ALH's property as well. ALH's president testified he had not given anyone permission to trim the trees, and that he had previously trimmed branches that hung over his parking area and had removed one of the trees entirely because it died.

ALH offered a videotape its president had made on the day ProCare trimmed the trees, which included his running commentary on the damage done to the Norways, and the property line marker – a large post – was clearly visible. Pictures taken both before and after ProCare trimmed the branches were admitted into evidence. ProCare stores old tires, oil cans, and a dumpster in the area near the trees, and the photos showed how the trees had created a visual buffer from ProCare's property and alleviated some traffic noise.

Martin Long, a ProCare manager, testified he thought the spruce trees were on ProCare's property and that he assumed the trees were ProCare's because "nobody ever took care of them." He said he trimmed other branches hanging over ProCare's property on two previous occasions with no negative consequences. While he admitted that on one occasion, one of the Norways, which was dying, had been removed by someone other than a ProCare worker. However, he pointed out, in the spring ProCare would mulch the trees, and no one ever told him that the trees were *not* on ProCare's property.

Long believed that only limbs that faced a direction other than toward ALH's property were cut off. He said that when Myers approached him about ProCare trimming the trees, it was the first indication he had that the trees were not on ProCare's property. Long admitted that when the spruce that was dying was removed, he did not know who removed it, but he did know that he, personally, had not directed anyone to remove it, nor did he have to pay for its removal. He stated that he thought ALH had removed it because of the risk it posed to ALH's buildings.

The trial court found that the removal of the tree branches was reckless because Long had reason to know facts that would lead a reasonable person to question whether the trees belonged to ProCare. The trial court held that that the complete removal of a large spruce tree in this row of trees at no expense or trouble to ProCare was an indication that ProCare did not own the trees nor were they responsible for maintaining them. The trial court also noted that Long's testimony that the only branches cut were those which overhung ProCare's property was disputed by the videotape and photographs which clearly showed other branches were cut that did not overhang ProCare's property.

The Court of Appeals found that the trial court's conclusion that ProCare was reckless was not against the weight of the evidence. The Court held adequate evidence showed ProCare disregarded a known risk with heedless indifference to the consequences when it trimmed branches of trees that were clearly on ALH's property.

Did someone say "reckless?"

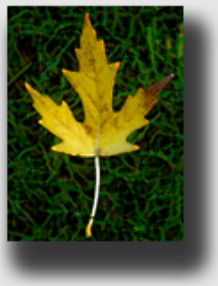
ProCare also argued the trial court's calculation of damages is against the manifest weight of the evidence.

ALH's president testified that soon after ProCare trimmed the trees, he contacted two landscapers to install arborvitae to replace the barrier. A landscaper submitted a quote for $3,850 to plant 35 arborvitae, although he said was inadvisable. He also said it was impractical to replace the spruce trees with ones of a similar size, given their 60-foot height. The landscaper provided a separate quote of $18,923 to remove the spruce trees, grind the remaining stumps, and plant a row of Colorado spruce.

A different a landscape contractor testified for ProCare, and said $3,750 to plant a row of arborvitae was appropriate, and that the shrubs would provide an adequate screening between the properties. He quoted $12,200 to remove the Norway spruce, grind the stumps, and plant Colorado spruce. He thought, however, that Colorado spruce would not provide an adequate barrier because they cannot be pruned properly. He recommended planting White Pine instead, because White Pine can be pruned and trimmed more easily than the spruce. His estimate to plant a row of White Pine was $11,400.

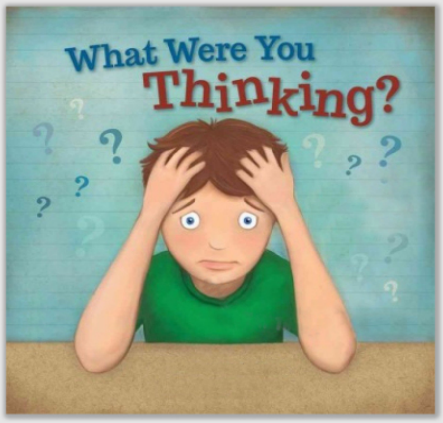
The trial court found that the best solution to replace the visual screening between the two properties was to replant trees, but that planting Colorado spruce was a disproportionate expense. It ruled that White Pine was a reasonable tree type for restoration, and awarded damages of $11,400. The amount was trebled pursuant to *O.R.C. 901.51*, for a total award of $ 34,200.

The Court of Appeals held that the trial court's decision was reasonable.



DAMAGES – TREBLE DAMAGES:

ACT IN HASTE, REPENT IN LEISURE



We can still see Mom, when we were kids, shaking her head over some blunder or another, asking us "what were you thinking?"

The answer, of course, is that we were kids, so of course we weren't thinking at all.

But you wonder how a guy who has been in the timber business for 30 years, has been shown the property boundaries, and has a clear visual cue – a line of trees – to remind him, can nonetheless overshoot by three acres, and commit an expensive timber trespass on someone else's land. So what was *he* thinking?

The issue was whether Klinck was merely negligent, or forged on heedless of the consequences (which is the very essence of recklessness). The difference is crucial, because mere negligence would cost Klinck about what he sold the shanghai'ed trees for, and thus leave his wallet smarting only a bit. Recklessness, on the other hand, will trigger ORC § 901.51, and entitle Ishan Judeh to three times the compensatory damages – in this case, the stumpage value of the trees – what we call "treble damages."

Judeh v. Mahoning Valley Timber & Land Co., Case No. 03-MA-138, 2004-Ohio-4819 (Ct.App. Mahoning Co., Aug. 31, 2004), 2004 Ohio App. LEXIS 4353, 2004 WL 2029136 (2004). Ishan Judeh owned land next to acreage owned by Gene Pyle, portions of which were wooded. Cameron Klinck, a logger who owned Mahoning Valley Timber & Land Co., contracted to remove timber from Pyles' land. Pyles described the location of the boundary dividing his and from Judeh's property.

Klinck removed trees from Pyles land as arranged, but also removed trees from about three acres of Judeh's land. Judeh sued Mahoning Valley Timber in trespass, conversion, and wrongful taking of timber from his land. The trial court awarded Judeh $6,000, representing the stumpage value of the wrongfully-cut trees, and trebled the damage to $18,000 under ORC § 901.51, finding that Klinck had been reckless in harvesting the trees from Judeh's property.

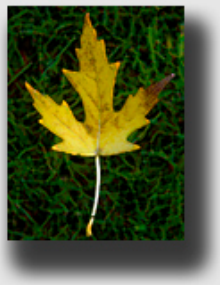
Klinck appealed.

Held: The record showed Klinck had been reckless.

The Court of Appeals reviewed the decision with a deferential standard. It "indulge[d] every

reasonable presumption in favor of the lower court's judgment and finding of facts" and "[i]n the event the evidence is susceptible to more than one interpretation, [the court] construe[d] it consistently with the lower court's judgment."

In this case, evidence showed that Klinck knew where the property boundaries law. The line was clearly visible by virtue of a tree line which extended 416 feet from south to north between the two parcels. Klinck admitted he knew where the boundary line was located, had maps and had walked the boundary line. Although he did not have the land surveyed, Klinck admitted that it was good business to survey the area of property to be logged and that he used a surveyor 98% of the time. He had been in the timber business for over thirty years and was aware of the risks in failing to survey the property. In addition, the Court said, the magnitude of the trespass – being two to three acres – suggested recklessness.



DAMAGES – TREBLE DAMAGES:

I NEED THE MONEY, MAN

The old fence marked something … just not the boundary.

Poor (and we mean that literally) Mr. Hartshorne. He and next-door neighbor Coldsnow had had some disagreements about the property boundary about 25 years ago or so, and it's fair to conclude that the Hartshornes probably don't ask the Coldsnows over for tea and crumpets all that often.

In the late 90s, Mrs. Hartshorne went to her reward. Her death left Mr. Hartshorne saddled with debts, and he sold some of his timber to pay for it. He probably should have had his property surveyed (which would have cut into the timber profits, meager though those might be). Instead, Widower Hartshorne just told the logger that he could log to the old fence, that the Hartshornes had always thought was the property boundary. It wasn't. You know how these things go.

Sadly, had the timber sale been enough to cover Mr. Hartshorne's debts, no one would ever have discovered that some of trees he sold had actually belonged to his neighbor. But the proceeds were a little light. Thus, Mr. Hartshorne divided his property in order to sell some of it off. When you divide property, you have to line up a surveyor. The survey showed Mr. Hartshorne that the old fencerow was not the boundary after all.

His neighbor, Coldsnow (perhaps aptly named for all the sympathy he showed a poor widower), found out the same, and realized that this meant that some of the trees Hartshorne's logger had cut were on his land. Coldsnow sued for trespass, and asked the court to treble the damages under the Ohio treble-damage-for-timber-trespass statute. The jury agreed with Coldsnow that the cost to restore or replace the timber was$11,500, and that Hartshorne was reckless. The damage award trebled to $34,500.

Hartshorne complained that the proper measure of damages should have been the decrease in value of Coldsnow's land, and anyway, he wasn't reckless. He had just made a mistake, and regular negligence did not support treble damages under the statute.

The Court of Appeals didn't buy it. Coldsnow's successful conflation of a few isolated border skirmishes over an eight-year period into a boundary war convinced the Court that Hartshorne — knowing of Coldsnow's prior aggressiveness in enforcing the boundary — should have gotten a survey. Frankly, we suspect that Mr. Hartshorne must not have cleaned up very well for court, because there's very little in the written decision that supports a conclusion that he acted recklessly, and thus, no other reason the Court should have oppressed him so.

We don't think a lot of this decision. The Court is saying in essence that the more unreasonable your neighbor is, the more careful you're required to be. It certainly makes it hard to define a community-wide standard of care. Because I live next to a sweet old lady who would let me sell her front door if I wanted to, I should be held to a lower standard of reasonableness? That simply does not make sense.

Knowing that your neighbor's a curmudgeon is hardly a basis for saying that your failure to take his cantankerousness into account is reckless conduct.

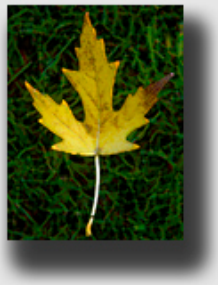
Coldsnow v. Hartshorne , 2003-Ohio-1233, 2003 WL 1194099 (Ct.App. Columbiana Co.) Russell Coldsnow sued Ed Hartshorne for cutting down some of the trees on Coldsnow's property. Hartshorne began to cut down some trees, one of which was near the fence line between his and Coldsnow's property, in 1991. At the time, Coldsnow complained to Hartshorne about cutting down that tree and Hartshorne stopped cutting down trees near the fence line. In 1995, Hartshorne had problems with people trespassing on his land to hunt. In response, Hartshorne bought some "no trespassing" signs and placed them all around his property. He also spray-painted orange circles on trees near the signs to bring them to people's attention. Some of the trees he spray painted were on Coldsnow's property. Coldsnow complained about the signs and the spray paint to the Hartshornes. In 1997, Hartshorne's wife died, and to pay the bills from her illness, Hartshorne decided to log and sell some of the trees on his property. He hired a forester, to do the logging and agreed to evenly split the profits with the forester.

Hartshorne asked the forester to selectively harvest the forest, in order to thin out the canopy to allow smaller trees to grow more quickly. He also showed the forester the property lines and asked him to only log trees more than 15-20 feet away from those lines. He did not have his property surveyed before hiring the forester, instead just showing him an old fence line which Hartshorne believed was the property line. Coldsnow became aware of the tree harvesting when Hartshorne's property was being surveyed so a portion of it could be sold as another means of paying off his wife's debt. Coldsnow hired a surveyor, who found that some of the stumps from trees which had been harvested were on Coldsnow's property. Coldsnow sued, claiming trespass and a violation of §901.51 of the Ohio Revised Code, and Hartshorne claimed adverse possession, a claim that was dismissed before the end of trial. The jury returned a verdict in favor of Coldsnow in the amount of $11,500 as the cost of restoration or replacement, and found Hartshorne had acted recklessly. Accordingly, the trial court granted judgment in the amount of $34,500. Hartshorne appealed.

Held: The jury verdict was upheld. The Court found the jury's damages award was reasonable and its conclusion that Hartshorne acted recklessly was not against the manifest weight of the evidence. Hartshorne argued that the proper measure of damages was the diminution of value of the real estate because of the logging. But in a case involving a violation of O.R.C. § 901.51, the Court said, the restoration/replacement cost of the trees is a proper measure of damages when the injured party intended to use the property for residential and/or recreational purposes, according to their personal tastes and wishes. As Coldsnow used his property in this way, the Court held, he did

Lawyers always warn their clients to dress well for court. Maybe Mr. Hartshorne ignored his attorney's advice. What else would account for this wacky decision?

not first need to show a diminution in value of the land before receiving restoration damages. The Court found that the jury's conclusion that Hartshorne acted recklessly was not against the manifest weight of the evidence, because the evidence showed that Hartshorne had a history of ignoring the boundary line between the properties.



DAMAGES – PUNITIVE DAMAGES:

IT TAKES A THIEF

It was perhaps the last of the 60s-era TV spy genre series: *It Takes a Thief* featured the adventures of cat burglar, pickpocket, and thief Alexander Mundy, suavely played by Robert Wagner, who stole to finance his life as a polished playboy and sophisticate. He ends up in prison, which is where the story begins. A U.S. spy agency proposes a deal to Mundy: steal for the government in exchange for his freedom.

Real life thieves are not so accomplished, and seldom so handsome and cosmopolitan. Which brings us to Logan County, Ohio, and Lowman Lumber Company.

We are not calling company owner Sturgil Lowman a thief. The courts of Logan County have already done that for us. Sturgil was in the timber harvesting business. Over 40 years, he seems to have developed what the criminal justice people call a modus operandi: Cut a few corners, cross a few boundary lines, and wherever possible, take some timber from the neighbor's land as well as the tract you've bought the right to harvest.

Sometimes you get caught. Then, you affect your most self-deprecating head shake and chuckle, admit you made a dumb mistake, and compensate the victim for the trees you unlawfully took. When you balance the books at the end of the year, the timber you got away with is enough to make the timber you got caught taking worthwhile. Cost-benefit.

The problem is that word spreads, especially at the courthouse, where every lawsuit record is preserved. After awhile, the "oops, I goofed" schtick gets old. That's what happened to Sturgil.

He finally crossed someone who filed a criminal complaint, and he was convicted of receiving stolen property (the trees). He paid restitution and did a little probation for the misdemeanor. But at the same time, another timber trespass case was playing out across the hall in another courtroom.

Sturgil was logging Dale's place under contract. While doing so, he busted the boundaries with the Shanklin's wooded tract, and proceeded to butcher 15 of the prettiest acres in Logan County (which is a rather pretty place to begin with). This time, the owners pursued him with a vengeance, and Sturgil's history of being private property-challenged – as well as the grossness of his violation of the Shanklin land – was enough for the jury to inflict real pain on him. Sturgil was ordered to not just pay for the damage to the Shanklins, but to pay treble damages for recklessness and punitive damages on top of that for malice.

Sturgil especially contested the trial court's award of punitive damages on top of treble damages, and frankly, it is rare for a Court to approve both. But this case, if any, proves the old maxim that "hard cases make bad law." The jury and the courts knew a bad actor when they saw one, and they used the tools at hand to

dissuade him from continuing his malefaction. The final ticket was $45,000 in compensatory damages, increased by another $90,000 under ORC § 901.51, an additional $33,500 in punitive damages, and $35,600 in the Shanklins' attorney fees. A bill of $204,100 for $30,600 in stolen timber.

How's that cost-benefit analysis looking now, Sturgil?

Shanklin v. Lowman, 2011-Ohio-255 (Ct.App. Logan Co., Jan. 24, 2011). Sturgil Lowman, a lumber company owner, harvested some timber for landowner Dale Kauffman. Dale identified the fence line that marked the boundary between his land and that of the Shanklin family, next door.

The Shanklins were retirees living in Florida, who used the wooded tract they owned solely for recreational purposes. The man who looked after the land for them, Tom Stacey, said that it was an "old growth area" with a beautiful high canopy, completely shading when leaves were present, and with tall, straight trees. He described it as having "the most lush undergrowth" he had seen anywhere in Ohio, and that the east edge of the back parcel had a dramatic, deep, narrow ravine that was about forty or fifty feet deep, with rich wildlife.

In spring 2006, Tom was cleaning up the Shanklin property due to an ice storm. As he walked the back of the property near the ravine, he discovered a road and bulldozer tracks. About twelve to fifteen acres of the property had been clear-cut, except for some stumps, and a logging road had been cut nearly a quarter mile into the property from the Kauffman property line. There two points of entry into the property, with the main logging road going through the fence line, with the fence cut off and rolled up. In addition to the removed trees, Tom found damage to trees that were not taken, including scars and "chunks" resulting from equipment being moved through the area.

It did not take long to connect it to Sturgil. Sheepishly, he admitted that Dale had shown him the property line, that he never hired a surveyor to confirm the property lines, that he never consulted any maps or real estate records to determine the property lines, but instead had an employee "mark the lines with ribbons," and that neither he nor his employees kept any documentation about how many trees or what types of trees were cut.

This was not Sturgil's first rodeo. He had been sued perhaps five time in his 40 years of operation for trespass to timber, and he was convicted of the felony of receiving stolen timber, for which he paid restitution and was sentenced to probation. Even more troubling, Tom reported that a Lowman employee had approached him a year earlier to learn who owned the Shanklin land. Tom walked the man through the property, whereupon the man offered him $10,000 if he could convince the Shanklins to let Lowman cut the timber. Tom refused, and told the man that if the Shanklins were interested, they would contact Sturgil's company directly.

James Bartlett, a consulting forester, performed a stump count for the Shanklins, identifying species and estimating the value of the wrongfully-cut trees at the time they were cut. He found 282 stumps, and – using a United States Forest Service formula – found the aggregate value of the timber to be at least $30,671. He said he could not put a value on the "loss of beauty" to the property or the loss of enjoyment of the property.

A professional registered surveyor testified that he had examined the property line, and it "seemed very straightforward to him where the property line was." He said that if Sturgil had hired a surveyor prior to the cutting, the line between the properties would have been easily determined.

A licensed realtor who had lived in Logan County his entire life testified that the property was unique because it was directly across from the highest point of Ohio, and was the most scenic ground in Logan County. He estimated that the value of the area that had been harvested, prior to the cut, would have been about $6,000 an acre, or $90,000 for the 15 acres affected. He estimated the value after cutting was about $3,300 an acre.

The jury returned a verdict awarding the Shanklins compensatory damages of $45,000, resulting in trebled damages of $135,000, and punitive damages of $33,750.

Sturgil appealed.

Held: The $168,750 damages award was upheld.

The Court found that the compensatory damages were amply justified by the testimony that the 15 acres fell in value from $90,000 to about $49,000. Additionally, the evidence showed that the timber was worth at least $30,671, but possibly more, because the Shanklins could have put the timber out for competitive bidding. Thus, the Court ruled, the record contained "competent, credible evidence supporting the jury award of compensatory damages."

Sturgil complained that the evidence did not show that the timber trespass had been reckless, which is necessary under ORC § 901.51 in order for treble damages to be assessed. The Court of Appeals made mincemeat of this argument:

> Evidence was heard at trial that an individual identifying himself as representing Lowman Lumber approached Stacy and inquired about harvesting the timber on the Shanklin property; that the man offered Stacy $10,000 if he could convince the Shanklins to let his company harvest the timber; that Stacy declined the offer and gave no indication that the Shanklins were willing to sell timber to Lowman; that Stacy eventually discovered that twelve to fifteen acres of the Shanklin property had been cut; that a logging road had been cut nearly a quarter of a mile into the Shanklin property from the Kauffman property line; that there were two points of entry into the Shanklin property with approximately twenty branches off the main logging road; that there was a fence marking the property line between the Shanklin property and the Kauffman property; that the main logging road went through the fence line and the fence had been cut off and rolled up; that a professional surveyor identified the property line between the Kauffman and Shanklin properties, and observed that cutting had taken place across the line onto the Shanklin property; that the cutting extended five or six hundred feet across the property line; that Lowman did not hire a surveyor before cutting on the property, and that Kauffman showed him the corners of the property, but did not show him the property lines; and, that Lowman admitted he had previously been convicted of receiving stolen property and criminal damaging involving tree trespass in August 2007, and that there had been several judgments in civil cases against him for cutting onto neighboring property without authorization.

The foregoing litany, the Court ruled, was "credible evidence that Lowman perversely disregarded a known risk with heedless indifference to the consequences."

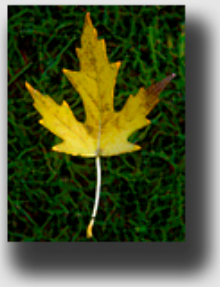
Sturgil argued that the trial court should not have awarded both punitive damages and treble damages.

The Court disagreed. “An award of punitive damages in a tort case may be made only upon a finding of actual malice on the part of the defendant,” the Court said. “‘Actual malice’ for these purposes is ‘(1) that state of mind under which a person’s conduct is characterized by causing substantial harm’… When ordering punitive damages, the trier of fact is to make a “reasoned determination* * *of an amount that fairly punishes the tortfeasor for his malicious or malevolent acts and that will deter others from similar conduct.”

The Court held that an award of punitive damages “will not be overturned unless it bears no rational relationship or is grossly disproportionate to the award of compensatory damages.”

The Court easily found that the long list of horribles that supported a finding of recklessness also rose “to the level required to demonstrate ‘a conscious disregard for the rights * * * of other persons that has a great probability of causing substantial harm’.”

There can be little doubt that the jury, and later the Court of Appeals, saw Sturgil as a serial trespasser who had long ago concluded that the cost-benefit analysis of stealing timber was such that it was worth getting caught now and then, passing it off as a “mistake,” given all the times he could get away with it.



DAMAGES – PUNITIVE DAMAGES

MILLION DOLLAR BABY

I'll tell you where the real money is in litigation. It's not the guy who walks into the lawyer's office with a tale of woe at the hands of some big, faceless, loaded corporation. It's not the guy who was busted for pot, and he bonded out on Friday but they didn't release him until Monday.

It's here: give me a nickel for every would-be client who ever asked me to take a case on contingent fee, because they were sure to get *beaucoup* bucks in the end with an outraged jury handed them millions in punitive damages for a fender-bender, or a sharp-tongued government clerk, or a badly-written newspaper story, or whatever the injury *du jour* might be. Total up my nickels, and I ought to be sitting on the veranda of my Caribbean beachfront mansion writing this right now.

Few would-be litigants really appreciate that punitive damages, also called exemplary damages, are damages awarded by a jury to punish a defendant for some terrible conduct, because, after all, it's a civil action, and you can't throw the malefactors in jail. But contrary to legend, punitive damages have to be tied to some *actual* harm.

In this case, some junior leasing agent for a billboard company got too enthusiastic in clearing the view for the billboard, and when the dust settled, some of the trees that had been felled belonged to the neighbor of the guy who had leased space for the billboard (now *there's* someone who should be locked up). The leasing agent was sloppy, careless even, perhaps – dare we say? – reckless.

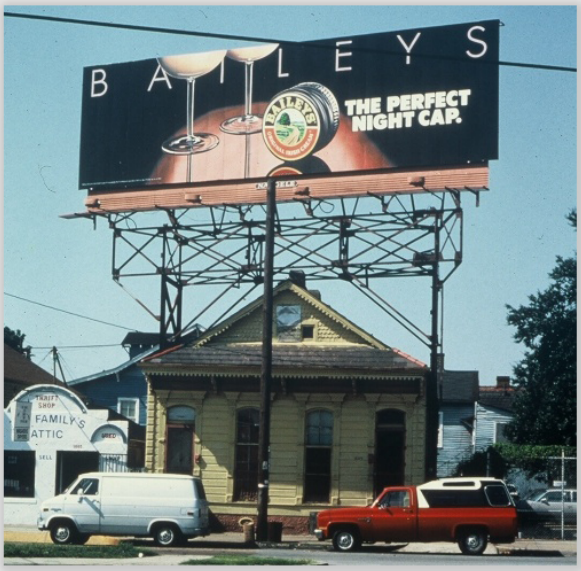
The jury found that the neighbors were harmed in an amount of about $32,000. But it added to that figure an eye-popping $2 million in punitive damages. That was too much for the trial judge, who tried to get the farmer to accept a remittitur, that is, settle for a paltry $550,000. The farmer wouldn't do it, so the court ordered a new trial. The farmer appealed.

Sue... ask for a zillion dollars in punitives... and watch the money flow!

All of $32,000 in damage, and a cool half mil on top of it? Farmer Blust was the living embodiment of the aphorism, "Pigs get fat, but hogs get slaughtered."

Blust v. Lamar Advertising Company, 157 Ohio App.3d 787 (Ct.App. Montgomery Co., 2004). A Lamar leasing agent signed up Jim Weber in September 1998, leasing a small piece of Jim's farmland near the property line

between his farm and the Blust farm for a billboard. The two farms were separated by an old wire fence that was largely concealed amid dense brush, vines, and trees. Because Lamar planned to erect its billboard near the tree line and undergrowth separating the two farms, it hired Woody's Tree Medics to remove some of the trees and vegetation from Jim's property.



And what's so bad about billboards, anyway?

A Woody's work crew entered the Blust property and cut down 34 trees, 17 of which were more than three inches in diameter. At trial, a jury found Lamar liable in tort for trespassing and removing the trees without permission, and awarded the Blusts compensatory damages of $32,000 and punitive damages of $2.2 million. The trial court denied Lamar's motion for judgment notwithstanding the verdict on the punitive damages award but indicated that it would grant a new trial on all issues, including liability, unless the Blusts accepted remittitur, that is, a reduction, of the punitive damages award to $550,000.00, with half of that amount going to a nonprofit nature conservancy. The Blusts rejected remittitur, and the trial court ordered a new trial.

The Blusts appealed, challenging the trial court's holding that the punitive damages verdict was excessive and its decision to grant a new trial on all issues.

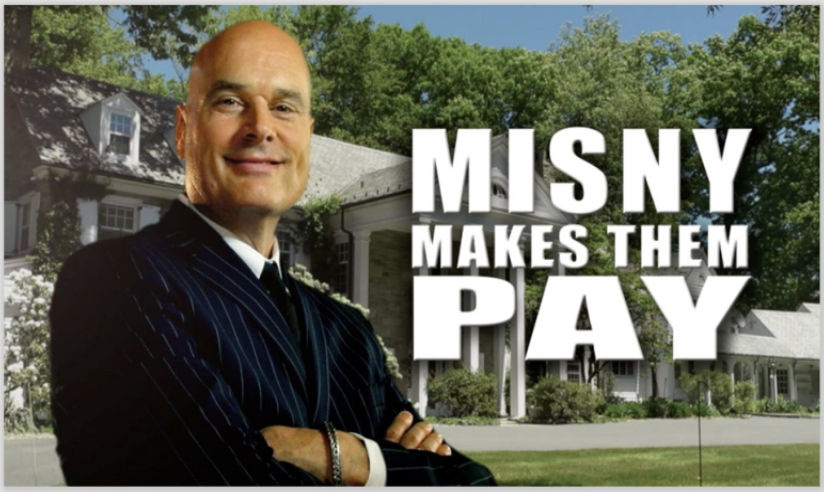
Held: The Court held that the Blusts were entitled to punitive damages, but the award was excessive. Thus, the trial court did not err in ordering a new trial, limited how much should be awarded in punitives.

In order to recover punitive damages, the Blusts had to show that Lamar acted with "actual malice." Actual malice, the Court said, is a state of mind under which a person's conduct is characterized either by ill will or by such a conscious disregard for the rights and safety of other persons that its conduct is very likely to cause substantial harm.

The Blusts argued that Lamar's act of directing their trees to be cut constituted a conscious disregard for their rights that had a great probability of causing them substantial harm. The Court agreed, finding substantial evidence in the record that Lamar's agent consciously disregarded the Blusts' property rights by ordering the cutting of trees on their property. Jim Weber told Lamar's agent about where the property line fell, and told her to follow the farm fence as a guide. After the cutting began, a friend of the Blusts appeared at the site to tell the Woody's crew that it was cutting trees on the wrong property. The Blusts' tenant farmer, Ted Eby, saw workers clearing trees from the Blusts' property,

and he spoke to Woody's crew and the agent, and told them they were cutting the Blusts' trees.

Despite all of these warnings, the agent told Woody's workers to keep the saws humming. A reasonable juror, the appeals court said, could find that Lamar consciously disregarded the Blusts' property rights.



Guys like this give people the idea that the only difference between a courtroom and a casino is that the judge won't comp you drinks.

A closer question, the Court observed, is whether Lamar's agent was aware that having the Blusts' trees cut carried with it a great probability of causing *substantial* harm. "We harbor no doubt," the Court said, "that clearing the trees had a great probability of causing some harm. Indeed, removing the trees was absolutely certain to cause harm to the extent that the Blusts lost their trees. The crucial issue on appeal is whether the agent knew that this loss of the trees had a great probability of resulting in substantial harm to the Blusts, or more specifically, whether reasonable minds could differ on this issue."

The Court said "substantial" means "major, or real importance, of great significance, not trifling or small." Here, the "harm" was obvious: it was the loss of the Blusts' trees. But in order to determine whether this harm was "substantial," it was necessary to assign some measure of value to the trees. The Blusts said that someday, they might divide a portion of the farmland into residential plots, and the absence of trees would harm the value of the plots. The Blusts' expert testified that the trees' loss would diminish the fair market value of the subdivided property by $51,600.

The Blusts also argued that they hoped to sell the wood from three wild walnut trees someday for veneer. What's more, the Blusts presented testimony that it would cost $40,566 to purchase and replant all of the trees or $24,335 to replant 11 of the larger trees. Lamar argued, on the other hand, that the stumpage or firewood value of the timber was only $105. Lamar also presented expert testimony that removal of the trees may have caused the Blusts' property value to decline by at most one percent, or $3,870.

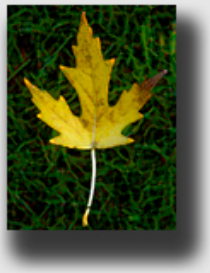
The Court held that most of the measures of damage could be characterized as "substantial." But the record contained no evidence that Lamar's agent knew the Blusts might subdivide their farm for residential purposes. The record also contained nothing to indicate that the agent knew of any plans to sell the walnut trees for veneer. Likewise, the agent did not know that the Blusts – who did not live on the parcel – would ever want to replace some or all of the trees. Thus, the agent could not have known that cutting the trees would harm the future value of the land as subdivided plots, frustrate the prospects of marketing veneer, or even just lead to $25,000 – $40,000 replacement costs.

However, fair market value is a different story. Even Lamar admitted that the cutting may have reduced the Blusts' property value $3,870. "A reasonable juror," the Court said, "could find that a loss of this size qualifies as substantial harm and not a trivial loss." A decline in property value because of losing trees is a "typical measure of the harm, and it is entirely predictable."

When a verdict is influenced by passion or prejudice, the Court held, a trial court must order a new trial. However, when a verdict is merely excessive, but not influenced by passion or prejudice, a trial court must offer the plaintiff a choice between remittitur or a new trial. If the plaintiff rejects remittitur, a new trial must be ordered.

The Court agreed that the Blusts' punitive damages award was grossly excessive under constitutional standards, and had to be set aside. Therefore, the judge properly directed the Blusts to choose remittitur or a new trial. However, the only issue tainted by error was the jury's punitive damages award. The Blusts should not have been required to place in jeopardy their compensatory damages award or the jury's determination that some punitive damages are warranted by undergoing a new trial on those issues.

The case was sent back to the trial court for a new calculation of punitive damages.



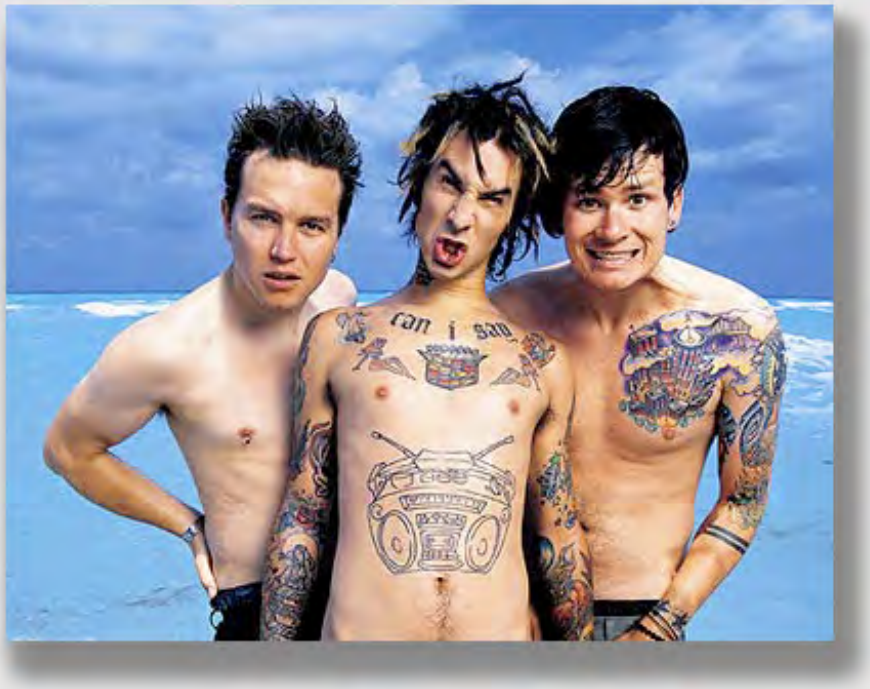
DAMAGES – RESTORATION COSTS:

RECKLESS ABANDON

On and on, reckless abandon, something's wrong, this is gonna shock them …" The velvet tones of Blink-182, so reminiscent of the Kingston Trio!

OK, not velvet tones, just teenage angst and a little toilet humor. But today's protagonist might have had the punk rockers on his iPod while he was wielding his chainsaw with… well, with reckless abandon.

One day last winter, complains loyal reader Jeff of Maple Falls, Ohio, he went to work as usual. In the middle of the day, his neighbor called him to report that some tree cutters had cut the top 60 feet off his prize 75-foot tall silver maple tree. His neighbor, the kind of nice old lady who every kid in the 'hood can't stand, had carefully noted the name of the tree trimming service in a little spiral notebook. She gave the name to Jeff, and Jeff called them.



Blink-182… What fine-looking lads. You have a daughter? Speaking of reckless, look at what she could bring home sometime.

"Ha, ha," the owner exclaimed, "what a gaffe! Boy, is our face red! We had an order to cut down a silver maple, and we went to the wrong house! Isn't that just the funniest thing?"

Jeff didn't think so. The owner sent a representative over to look at the forlorn 15-foot trunk still standing, admitted the crew had come to the wrong address, and offered $1,000 to forget the whole thing. But Jeff loved that tree, which shaded the house, nested squirrels and birds, and provided a canopy for family picnics. Jeff's arborist figured that replacement of the tree with the most comparable silver maple available would cost somewhere around $25,000.

Section 901.51 of the Ohio Revised Code lets an injured party collect treble damages from a party who "recklessly cut down, girdle, or otherwise injure a vine, bush, shrub, sapling, tree or crop growing on the land of another." Jeff wondered whether the tree trimming service reckless, and whether his $25,000 might be tripled to $75,000. If it did, he might even afford a quick shopping trip through Whole Foods … that is, if he only buys 12 items or fewer.

A person acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature. A person is

reckless with respect to circumstances when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist.

In *Collins v. Messer*, a woman hired a tree trimmer to clear some of her land. She told the trimmer to only clear to a fencerow, which she later said she believed was the property line. It was not, and the other property owner was unhappy. Mrs. Messer tried to settle with him, but things broke down and he sued.

The trial court found Mrs. Messer's testimony about her mistaken belief that the fence marked the boundaries credible, as well as her statement that she told the trimmers not to go beyond the fence. Based upon those findings, the trial court determined that Messer's actions were not reckless and she was not liable in treble damages under the statute. In assessing damages for the trespass, the court held that the measure of damage is the cost of reasonable restoration of property to the pre-existing condition or to a condition as close as reasonably feasible without requiring grossly disproportionate expenditures and with allowance for the natural processes of regeneration within a reasonable period of time.

The tree service owner was red-faced … but somehow, that didn't make Jeff feel much better.

What does this mean for Jeff? Whether the tree trimmer was reckless depends on what led him to the wrong house, and what steps he might have taken to verify the address. Cutting down a healthy 75-foot tall hardwood shade tree is a pretty final act, and industry standard is for the tree trimming employee who performed the estimate and pre-work inspection to be on-site when the work is begun. The irrevocability of cutting down a large tree on a residential lot in the city is such that the trimming company had to have understood the known risk that if the work to have understood the known risk that if the work was performed at the wrong house, the consequences would not be pretty.

One might think that the tree trimming company would want to settle this one for the cost of restoration, rather than roll the dice on whether it will have to pay treble that amount. It is pretty clearly liable for the blunder. When its best hope is to convince a jury that the blunder was just negligence, there isn't much up-side in litigation. As Ronald Reagan once said, "If you're explaining, you're losing."

Collins v. Messer , Case No. CA 2003-06-149 (Ct.App. Butler Co., June 14 2004) unpublished, 2004 WL 1301393 - Collins sued his neighbor, Messer, for having trees and vegetation removed from Collins' residential property.

The rear of Collins' home abuts the rear of Messer's property in a residential subdivision. Mrs. Messer hired Wilson Garden Center to clear vegetation to an old farm fence, which she thought was a property line. She was not present when the Garden Center employees cleared the vegetation. Mrs. Messer had never met Mr. Collins, and she didn't speak to him before the Garden Center performed the work. The vegetation, with the exception of a few trees, was cleared up to and beyond the farm fence at a time when neither party was at home. It turned out that Messer's property line did not extend to the old farm fence and that most of the vegetation cleared was on Collins' property. Mr. Collins testified that he was "devastated" when he learned of the destruction of the vegetation.

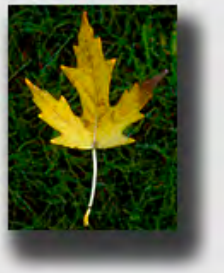
Collins and Messer split the $1,647.91 cost of hiring a landscaper to plant some pine trees in the area between the properties, but the relationship between the parties deteriorated during the year that followed. Finally, Collins sued Messer in trespass, seeking treble damages under O.R.C. §901.51.

Treble damages … when "uh-oh" just isn't good enough.

Held: The Court found that the evidence was sufficient to support finding that Mrs. Messer's actions were not reckless, and thus Mr. Collins was not entitled to treble damages. She testified that she was mistaken that the fence constituted the boundary, and she never told the Garden Center workers to go beyond it. Mr. Collins had no evidence to rebut Messer's claim of mistake, and the trial court may have been swayed by Mrs. Messer's willingness to share the cost of the mistake before things deteriorated into a lawsuit.

Also, because the parties already had agreed on splitting the costs of planting replacement trees, Mr. Collins wasn't entitled to additional trespass damages for loss of vegetation. In assessing damages for the trespass, the trial court held that the measure of damage is the cost of reasonable restoration of property to the pre-existing condition or to a condition as close as reasonably feasible without requiring grossly disproportionate expenditures and with allowance for the natural processes of regeneration within a reasonable period of time.

The appeals court agreed with the trial court that Mrs. Messer compensated Mr. Collins for his damages by paying $823.00 for the pines planted on Mr. Collins' land.



DAMAGES – RESTORATION COSTS:

LET'S GET THIS STRAIGHT – JOYCE KILMER WAS *NOT* A GIRL

This case reminded us of the tension between those of us who love trees for all of the intangibles they deliver – shade in the summer, shelter from the rain, a windbreak, a place on which to mount our birdhouses and hammocks and tires on a rope for the kids…

Joyce Kilmer at Columbia 1908 - Definitely not a girl.

What all of these have in common is that none of them is accounted for when a tree is cut down, stripped of branches and run through the sawmill. The stumpage value – the worth of the tree's harvestable wood to the mill on the ground in the woods – doesn't account for all of what we like about our ornamental trees.

That reminded us of Joyce Kilmer, who was among the first to calculate the noncommercial value of ornamental trees (after a fashion), writing, "I think that I shall never see a poem as lovely as a tree…"

And that in turn reminded us to be proactive in telling everyone that Joyce Kilmer was ***not*** a girl. Not that there's anything wrong with girls, or girl poets (we're big Emily Dickinson fans ourselves), but we regularly come across knuckleheads who say "Joyce Kilmer wrote those words because she…"

Nope, nope, nope. Joyce was a boy, and later a young man, His poetry and writing career was cut short when he fell, killed in action, in France 100 years ago this month.

In timber trespass case below, we venture to say it's a cinch that Gordon Lamb – who is also a boy – didn't read much Joyce Kilmer. He was probably more a William Blake fan, because he sure hit his logging assignment like a "tiger, tiger burning bright…" He cut all of the trees he was supposed to, and then, for good measure, cut or destroyed about 400 extra.

The trial court held that the homeowners whose trees fell victim to the tigrine Mr. Lamb were limited to stumpage value. It was a sweet outcome for the defendant: 400 trees ended up costing Gordon about $7,000, well less than $20.00 per tree destroyed. But then the Cincinnati-based Court of Appeals stepped in, applying what is by now universally recognized as the proper measure of damages: noncommercial trees are generally worth more than an equal number of commercial trees.

Sgt. Joyce Kilmer died leading a party scouting for German machinegun emplacements during the Second Battle of the Marme, July 1918

Denoyer v. Lamb, 490 N.E.2d 615 (Ohio App. 1, December 5, 1984). Murphy Development Company marketed subdivided lots from a wooded parcel it owned. It sold five parcels, of which four had homes built on them. The parcels were cleared except for a mature woodland behind them (which Murphy still owned), which growth extended onto the rear of the five lots.

Murphy Development hired Gordon Lamb to harvest mature timber from the woods the development company still owned. Gordon Lamb set off like a tiger, cutting not only trees from the Murphy acreage, but sawing into the woodlands on the five private lots. When the sawdust settled, Gordon's crew had cut 68 trees that did not belong to the Murphy company, and destroyed 331 more.

The afflicted property owners whose trees were decimated, including the Denoyer family, sued.

The trial court limited the Denoyers' compensatory damages to the stumpage value of the cut and destroyed trees. It also restricted their recovery to either punitive damages or treble damages, but not both. The jury awarded the Denoyers $7,412.00 in compensatory damages, but found no grounds to award punitive damages.

The Denoyers appealed.

Not necessarily an "ornamental tree"

Held: The trial court judgment was reversed, and the Denoyers were permitted to claim restoration damages

The Court of Appeals laid the framework for assessing when replacement damages should be awarded. "In an action for compensatory damages for cutting, destroying and damaging trees and other growth, and for related damage to the land," the Court wrote, "when the owner intends to use the property for a residence or for recreation or both, according to his personal tastes and wishes, the owner is not limited to diminution in value (difference in value of the whole property before and after the damage) or to the stumpage or other commercial value of the timber."

Instead, the Court ruled, an owner may recover as damages the costs of reasonable restoration of the property to its preexisting condition or (because regaining the preexisting condition of often not possible) to a condition as close as reasonably feasible. "Reasonably feasible" means that the courts should not order grossly disproportionate expenditures, and allow for natural regeneration within a reasonable period of time.

Where cut trees have been used for a specific purpose – such as a sound barrier and screen from highway traffic, or shade, or even mere ornamentation – restoration cost is the proper measure of damages. Additionally, the cost of restoration should be used as the measure of damages where "the owner's personal use is neither specific nor measurable by commercial standards, and when the trees form a part of an ecological system of personal value to the owner."

Ornamental tree

The Court reasoned that in the present case, stumpage value could be determined in several ways, but all of those methods would yield a much smaller amount than the cost of replacement. To limit the Denoyers' and their fellow lot owners' recovery to stumpage value would be to enforce a timber harvest the plaintiffs never contracted for, or even wanted. It would fail to account for their intended use or real loss.

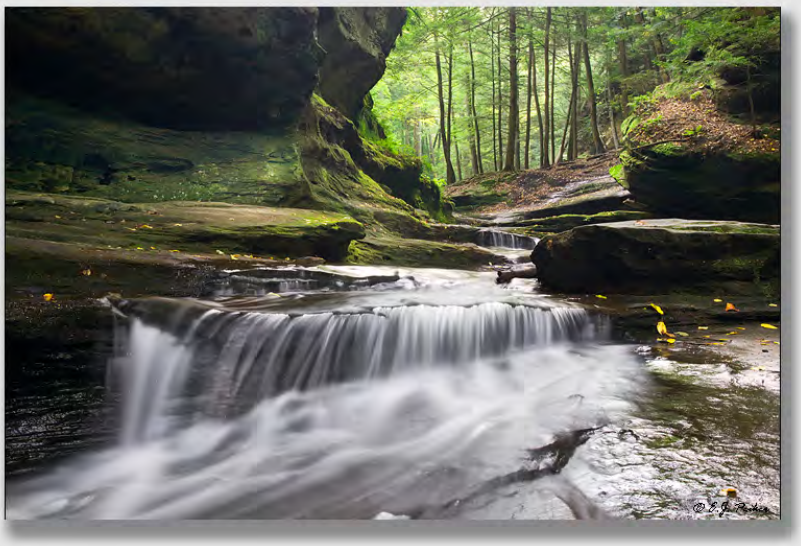
The Court of Appeals thus held that the trial court erred in excluding evidence of reasonable restoration costs, including cleanup, repair and regrading.

DAMAGES – TIMBER:

WHEN YOU CAN'T SEE THE FOREST FOR THE GOODS

We're always looking for ideas, and we're rather shameless about appropriating them. So when an Ohio lawyer friend of ours, himself from a timber-harvesting family, mentioned an case to us that delineated when trees were attached to the real estate and when they were "goods," we chased the decision down.

Speaking of "appropriating," that was exactly the context in which the case was decided. It seems that Dudley DeBolt had a pretty nice place in Hocking County, beautiful Appalachian foothill country. In fact, Dudley's place was so nice the government wanted it for a park. Governments being what they are, the appropriate agency – an entity called the Board of Park Commissioners of the Columbus and Franklin County Metropolitan Park District – sued Dudley to take 40 acres of his wooded land for its purposes.



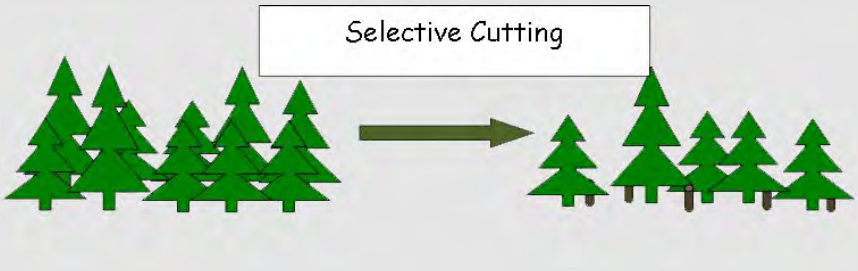
You can see why Hocking Hills is a good place for a park.

Under the laws governing eminent domain, not to mention the 5th Amendment, when the government takes private property for public purposes, it must pay just compensation. But it seems that the Park Board didn't want to pay Dudley for the timber contract he had already signed with a local timber merchant, one for the select cutting of about 150,000 board feet of hardwood. The land itself was worth$58,000, Dudley claimed, but there was also the timber contract that he now would be unable to fulfill, for an additional$14,000.

Nope, the Park Board argued, the trees are attached to the land and had no value separate from the land. That had been Ohio law prior to the adoption of the Uniform Commercial Code. The trial court agreed with the Park Board.

The Court of Appeals did not. Rather, it held that the UCC had changed everything, and as a result, Dudley was given a chance to prove to the jury the existence and value of the timber contract. The Ohio Supreme Court agreed, and the case went back to the trial court.

Board of Park Comm'rs v DeBolt, Not Reported in N.E.2d, 1984 WL 4248 (Ct.App. Ohio, 1984). Board of Park Commissioners of the Columbus and Franklin County Metropolitan Park District sued landowner Dudley DeBolt, Jr., appropriate 40 acres of his land. Mr. DeBolt believed the fair market value for the land to be $73,970, including $32,000 for the land at $800 an acre, $26,000 for the home and $14,000 for his profit from the removal of certain timber on the property. The trial court agreed with the Park Board that Mr. DeBolt was not allowed to calculate the value of his standing timber separately from the land, and it refused to allow Mr. DeBolt to put in any further evidence of the value of his timber. The jury returned a verdict of $58,000 as compensation for the land and improvements taken. Mr. DeBolt appealed.



Held: Mr. DeBolt was allowed to value the timber separately. Although the Board argued that Ohio law prohibited setting market value for trees upon land to be appropriated separate and apart from the value of the land, the Court pointed out that the decision which included that holding was the decision which included that holding was made well prior to the adoption by Ohio of the Uniform Commercial Code. The UCC provides that a "contract for the sale apart from the land of growing crops or other things attached to realty and capable of severance without material harm thereto … or of timber to be cut is a contract for the sale of goods within sections 1302.01 to 1302.98 of the Revised Code, whether the subject matter is to be severed by the buyer or by the seller even though it forms part of the realty at the time of contracting, and the parties can by identification effect a present sale before severance." Thus, the Court ruled, the UCC had abrogated prior Ohio law by making a contract for the sale of timber into a contract for the sale of goods.

Here the evidence showed that in the summer of 1981, a timber merchant and DeBolt had a contract for cutting timber and had agreed on a price. Therefore, the Court said, DeBolt ought to have had the right to prove the existence and value of the timber contract. It was a contract for the sale of goods, and Debolt thus had a vested contractual right which was frustrated by the Park Board's appropriation. The Court said that "the enactment of the UCC has in our opinion changed the character of standing timber from realty to personalty when there is a contract under R.C. 1302.03." Once the contract was made, the trees were "goods" under the UCC and no longer a part of the land.


Bill of Rights

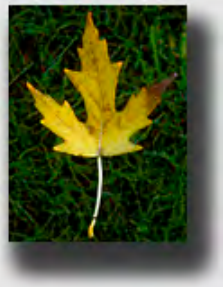
Congress of the United States,

People who have to pay attention to the bottom line make careful decisions whether appealing an adverse decision is worth the time and legal costs. Not so governments, which hire lawyers by the gross and pay them with taxpayer dollars. Unhappy at having to part with an additional $14,000, the Board of Park Commissioners appealed to the Ohio Supreme Court. Even in 1984, a for-profit entity would have easily seen that legal fees and wasted time would easily exceed that.

Board of Park Comm'rs v DeBolt, 15 Ohio St.3d 376 (1984) The Ohio Supreme Court agreed with the Court of Appeals that the record supported a finding that a contract may have existed for the sale of the timber. The Supreme Court found some evidence that

Dudley DeBolt was to receive $14,000 for the sale of some 150,000 board feet of lumber, and that such lumber was to be obtained in a select cutting, which was permitted under the terms of his mother's will. The timber cutter said 150,000 board feet of lumber could be obtained in a select cutting, and stated that he had first surveyed the property some eighteen months prior to the trial.

The Supreme Court ruled that a contract for the sale of timber is a contract for the sale of goods, not realty. *ORC* § 1302.03(B). Such a contract is protected against a governmental taking without just compensation, as it was part of the property taken by the Board of Park Commissioners. Because such a contract is an asset separate and apart from the land, it is subject to separate valuation. The case was sent back to the trial court to give Dudley a chance to prove his case.



GOVERNMENTAL LIABILITY:

BUILDING A CASE

A family's Christmas – and for that matter, its future – was ruined on a rural Ohio one dark December night.

Mike and Traci Reed were driving their two kids home from a Christmas celebration, Traci and her 5-year old son in her car following her husband and their daughter in his, because they had picked up her car at her office, where she had left it earlier. When Mike and daughter Samantha got home, Traci – who had been following them – was no longer behind them. Mike backtracked to find her car crushed by a tree. An EMS worker at the scene told him that his wife was dead and son in critical condition.

The wheels of justice ground slowly after the accident. Four years after the accident, the Ohio Court of Claims – which decides questions of the State's liability – finally decided the question of the Ohio Department of Transportation's liability. The case is of interest not just because of the dry reduction of human tragedy into a dispassionate allocation of responsibility (although it is interesting for that, too). The findings of fact and conclusions of law handed down by the magistrate (who is kind of an assistant judge) illustrate a well-structured case presented by the plaintiff and a poor rebuttal by ODOT.

One wonders why the State of Ohio didn't just settle the case if it was going to make such a poor showing. Its own employees made the plaintiff's case, and its expert pretty much just "phoned it in." But from the plaintiff's perspective, the case is a veritable "how to" try a claim of liability against a state agency in a "danger tree" case.

Trees falling on vehicles never work out well for the vehicle.

Reed v. Ohio Dept. of Transportation, 2012-Ohio-1244 (Ct.Cl., Mar. 23, 2012). Traci Reed and her young son, Conner, were driving northward through the hilly eastern Ohio countryside, when a tree fell on their car. Traci was killed and her son was badly injured.

The tree that fell on Traci had shown as "substantial 'lean'" in the year prior to the accident, and other trees on the same embankment had fallen during that time. Traci's husband had observed this, but he had never complained to the Ohio Department of Transportation himself. Rather, he assumed that ODOT knew about the condition because road crews maintained the area throughout the years.

The Court noted that ODOT had a general duty to maintain its highways in a reasonably safe condition for the traveling public, but it is not an insurer of the safety of its highways. ODOT may be held liable for damage caused by defects, or dangerous conditions, on state highways where it has notice of the condition, either actual or constructive. Actual notice exists where, from competent evidence, the trier of fact can conclude the pertinent information was personally communicated to, or received by, the party. Constructive notice is that notice which the law regards as sufficient to give notice and is regarded as a substitute for actual notice. Under Ohio law, in order for there to be constructive notice of a nuisance or defect in the highway, that nuisance or defect must have existed for such length of time as to impute knowledge or notice.

The plaintiff (who was the husband of the deceased wife and mother) presented several ODOT employees responsible for vegetation management and hazard abatement along the road in question. He established that some of the employees knew of the tree and believed it to be dangerous, and others – while not recalling the tree – agreed when studying the accident photos that it was dangerous. Plaintiff called a surveyor to establish that the tree had fallen within the state's right-of-way on the highway, and put people on the stand who had lived close to the accident site, and who testified that they had seen the tree and thought it was a hazard.

Additionally, the plaintiff produced an urban forestry consultant who was certified by the International Society of Arboriculture as an arborist. The forester prepared for his testimony by reviewing court documents, photographs, visiting the accident site, and examining cut-up tree remnants. He testified that that the tree was a 50-year old red oak, and that it contained "reaction wood," which forms to counter a lean of the tree. He observed that the pith, the biological center of the tree, was off-center, and that the tree's roots in the embankment showed mild to moderate decay. He concluded that the tree was "hazardous" (as defined by the International Society of Arboriculture Hazard Rating System). His conclusion was based on the tree's potential to fail and the potential to hit a target, because of its significant lean, its location in a sloped embankment with exposed roots, and the visually obvious deadwood in the crown of the tree. He testified that once a tree is "off vertical" with unstable soil, each progressive year increases the risk of failure. The tree was located on a steep slope, which compromised its stability.

The expert concluded that ODOT failed in its duty to remove a hazardous tree that had several significant defects, readily observable from the roadway. He said it was "not a question of if, but a question of when" the tree would fall on to the highway.

ODOT presented the testimony of one of its employees who said he had removed the tree from the road after it fell, and he had been familiar with it prior to that time. He said he had never seen any condition that concerned him, and if he had, he would have reported it. ODOT also presented its own expert, who prepared his testimony in the same manner as did the plaintiff's expert. He said that the tree has a "classic natural lean," due to the fact that the tree was on the edge of the woods and it grew toward the sunlight. According to ODOT's expert, the center of the tree was asymmetric but there was no indication that the tree was dead or distressed. The State's expert opined that the tree falling was "natural, it was not predictable." However, on cross-examination, he conceded that the tree's center of gravity was "probably not over the roots" and that a tree does not have to be dead, decayed, or diseased in order to be a hazard.

The finder of fact – in this case, a magistrate who heard the evidence for the court – found the Reed's expert to be more persuasive. The evidence about the tree's shifted center of gravity carried the day; the court concluded that the red oak tree that fell on Traci Reed's vehicle was a hazard to the motoring public. As for notice, although ODOT said it had received no complaints from either its staff or the public regarding the tree, two of its employees acknowledged that they were aware that the canopy of the tree extended over the roadway. The court found that ODOT had actual knowledge of the hazardous condition, which had existed for more than a year prior to the accident and which was within the State's right-of-way.

ODOT argued that the property owner where the tree was located was liable for the tree, but ODOT presented no evidence showing that the landowner had actual or constructive notice. As well, it argued that the tree fell due to an act of God. The court rejected that argument. The evidence showed that there was no weather than night that was sufficiently "unusual and overwhelming as to do damage by its own power" to make the falling tree an Act of God. Even if there had been an adverse weather condition on the night of the accident, the Court said, "it has also been the rule of law that, '[i]f proper care and diligence [on a defendant's part] would have avoided the act, it is not excusable as the act of God.'" ODOT's failure to exercise proper diligence resulted in the tree falling, the Court said, not an act of God.

ODOT was held liable for the falling tree, and Traci Reed's death.

And after considering the damages showing? The Court awarded the family $4 million.

GOVERNMENTAL LIABILITY:

A TRAGEDY WITHOUT COMPENSATION

We are into the final weeks of summer now (not the astronomical kind, but the vacation-from-school and lazy-days kinds. We took some time this weekend for a visit to Nickel Plate Beach in Huron, Ohio. Nickel Plate (named for a great railroad of the same name) is a substantial extent of sand on the south shore of Lake Erie. Usually, it's sunny and peaceful there. But sometimes, when the wind is out of the northwest, the deceptively tranquil beach develops a serious undertow.

The story is repeated often enough that lifeguards hear it in training as a cautionary tale. Someone is drowning, and a rescuer tries to help, only to die as well. On a stormy summer day in 2002, a woman was trapped in the undertow at Nickel Plate Beach. She was rescued, but not before four young men perished when they entered the troubled water to save her.

Nickel Plate Beach on a hot but windy summer day.

Afterwards, families of the men sued the City of Huron, arguing that despite Ohio's recreational user statute, the City was not immune from liability for the men's deaths. The trial court disagreed, and dismissed the suit. An appellate court agreed. The City ran the beach, but there was no evidence that it controlled or tried to control the waters of Lake Erie, which belonged to the State of Ohio. The men drowned in Lake Erie, the Court held, not on the grounds of the city park. Thus, even if Lake Erie constituted a nuisance, it wasn't the City's nuisance,but rather the State's.

Smith v. Huron, Slip Copy, 2007 WL 4216133, 2007 - Ohio-6370 (Ohio App. 6 Dist., Nov. 30, 2007). Four people died at Nickel Plate Beach on July 10, 2002, when another person screamed for help from the water. The four entered the water to save her, but although she survived, the four would-be rescuers drowned in the windswept waters of Lake Erie.

Their survivors sued the City of Huron, seeking recovery for the drowning deaths from the city and entities that controlled the beach. They claimed that the city failed to maintain the swimming area it owned in a safe manner and failed to warn the general public of hazardous defects on the premises. The complaint also alleged the city maintained or abetted the creation of a nuisance at the beach and in the water; that the deceased men had reasonably relied upon representations that

the beach and waters were safe, and that the city voluntarily assumed a duty of controlling and maintaining the waters adjacent to the beach.

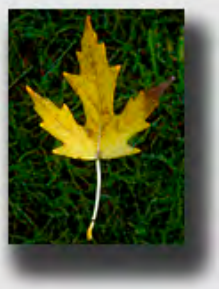
The City of Huron filed for summary judgment arguing that it was entitled to immunity as a political subdivision pursuant to O.R.C. Chapter 2744, that it was not liable because it had satisfied the requirements of Ohio's recreational user statute, that the men engaged in recreational pursuits prior to their deaths, and that the decedents assumed the risk by voluntarily exposing themselves to the waters of Lake Erie even though they were warned of the dangerous conditions. The trial court granted the City summary judgment. The survivors appealed.

Held: The City of Huron was immune from liability. The survivors claimed that O.R.C. §2744, Ohio's *Political Subdivision Tort Liability Act*, did not confer immunity on Huron. And indeed, under O.R.C. 2744.02(B), in some situations, a political subdivision can be held liable for damages in a civil suit arising from injury, death, or loss to persons or property allegedly caused by any act or omission of the political subdivision or its employees in connection with a governmental or proprietary function.

The survivors claimed the City was liable under the exception that a political subdivision can be held liable for damages in a civil suit arising from injury, death, or loss to persons or property caused by its failure to keep the public grounds within their political subdivision open, in repair, and free from nuisance. They argued that Nickel Plate Beach and the waters of Lake Erie adjacent to the shoreline are public grounds within the city of Huron.

The Court of Appeals ruled that the city didn't maintain any actual control over Lake Erie itself by placing buoys in the lake or at times posting "no swimming" signs on the beach. The city didn't actively keep swimmers from going beyond the buoys or boaters from going inside the marked area; nor did the city take overt actions to prevent swimmers from going in the water when the beach was "closed" due to rough conditions. More important, the Court said, title to Lake Erie clearly belongs to the state of Ohio, which holds it in trust for the benefit of the people of Ohio.

The victims in this case drowned in Lake Erie, not on grounds within Nickel Plate Beach or Huron. The City didn't maintain any actual control of Lake Erie. Based on that, the Court found that the trial court correctly granted summary judgment in favor of the City of Huron.



GOVERNMENT LIABILITY:

YOUR RESPONSE STINKS

This case is the septic equivalent to the old doctor's advice of "take two aspirin and call me in the morning."

Mrs. Hubbell was a resident of Xenia, a small city in southeastern Ohio (Motto: One of America's only cities to start with 'x'"). One unfortunate day, Mrs. Hubbell discovered that 'x' didn't just stand for "Xenia." It stood for 'x'crement, too.

When Mrs. Hubbell's basement, bathroom and kitchen all started filling up with some pretty nasty effluent from the sewer line, she called the emergency help line the City of Xenia maintained for homeowners with such smelly problems. But it was the weekend, and the sewer department worker on duty wasn't too keen on going out in the rain to check out her problem. He figured that it was just the rain backing things up, and if it were really bad, Mrs. Hubbell would call again.

Well, it was really bad, and Mrs. Hubbell did call again an hour later, to catalog all of the types of malodorous waste bubbling into rooms all over her house. That time, the worker did come. When he and his assistants pulled a manhole cover off the sewer main around the corner, a fountain of filth erupted and the liquid waste in the Hubbell home started draining away. It turned out that tree roots had jammed up the sewer main, and the City's maintenance program hadn't gotten around to clearing them away.

Mrs. Hubbell was unhappy at the Sewer Department's lackadaisical response to her problem, so she sued. The City claimed it was immune under Ohio's governmental immunity statute, because its inspection program was an exercise in discretion. True, the Court agreed, but there was nothing requiring any special expertise in the lazy worker's refusal to respond when Mrs. Hubbell reported a problem. The problem, the Court said, is that almost everything required some discretion, and to accept the City's argument meant that everything a governmental entity did would be immune.

Here, the City had a kind of a contract with its residents. The City offered an emergency number, and the implied deal was that if a local taxpayer called, the City would respond. The worker's decision to let the stink build — and to be sure, it was a real problem worthy of his attention on a Sunday afternoon — could easily be negligence. The Court said Mrs. Hubbell was entitled to her chance to prove that to a jury.

Hubbell v. Xenia, 175 Ohio App.3d 99, 885 N.E.2d 290 (Ct.App. Ohio 2008). Water and sewage began flowing into Mrs. Hubbell's

home through drains in a shower, a toilet, and a bathroom sink. Believing that the stinking problem was likely caused by a malfunction in the sewer system maintained by the City of Xenia. She called the City's emergency services, and the call automatically transferred to the Xenia Police Department. The police paged an on-call sewer and waste maintenance worker, but he refused to do anything, suspecting that the problem was likely the result of heavy rainfall that day.

The sewage and dirty water continued to flow into Mrs. Hubbell's home, and she desperately placed a second call for help several hours later. This time, the on-call worker decided to respond and investigate the problem, and a service crew was brought in.

Hubbell's home is located at the intersection of Monroe and Home Avenues. The house is connected to the sewer main on Home Avenue, which in turn connects to the main on Monroe Avenue. The service crew examined the Home Avenue main line and found it was flowing freely, but when they removed the Monroe Avenue manhole cover, the back-up into Hubbell's house promptly subsided. The crew removed tree roots that had invaded the main. Sewer Department officials conceded that the roots may have contributed to the blockage.

Hubbell sued, alleging that Xenia was negligent in maintaining and operating its sewer line because it failed to inspect the Monroe Street main, allowing the line to become obstructed and clogged by tree roots and collected refuse, causing the back-up into her home. She also said the sewer condition constituted a nuisance for which Xenia was liable. Xenia claimed it was immune from liability under the *Political Subdivision and Tort Liability Act.*

The trial court refused to throw the case out, and Xenia appealed.

Held: The City was not entitled to have the case dismissed without trial. Generally, the Court said, where a municipal corporation assumes the management and control of a sewer, it is required to exercise reasonable diligence and care to keep the system in repair and free from conditions which will cause damage to private property. The municipality's failure to do so may make it liable for damages caused by its negligence.

However, a municipal corporation's liability is nevertheless subject to the defense of governmental immunity provided by §2744.01 of the Ohio Revised Code, if any of the five exceptions or one of the defenses to immunity set out in the statute apply.

Here, the Court ruled, Xenia's ongoing inspection and cleaning of its sewer lines was entitled to governmental immunity because the execution of the program involved judgment and discretion as to how extensive and in what manner the program would be executed. However, routine decisions requiring little judgment or discretion and which, instead, portray inadvertence, inattention, or neglect, are not covered by the statute's grant of immunity.

The City maintenance worker's decision not to respond to Mrs. Hubbell's call regarding sewer back-up incident, due to his belief that her problem resulted from excess rainfall, wasn't an act of judgment or discretion for which city was entitled to governmental immunity. Instead, the City's contractual agreement with its residents to provide emergency services to those to whom it provided sewer services gave rise to duty to perform such emergency services with ordinary care.

The City maintenance worker's decision not to respond to Mrs. Hubbell's call regarding sewer back-up incident, due to his belief that her problem resulted from excess rainfall, wasn't an act of judgment or discretion for which city was entitled to governmental immunity. Instead, the City's contractual agreement with its residents to provide emergency services to those to whom it provided sewer services gave rise to duty to perform such emergency services with ordinary care.

When one undertakes a duty to perform an act, and another reasonably relies on that undertaking, the act must generally be performed with ordinary care. A genuine issue of material fact existed, the Court said, as to whether the City was negligent in its performance of its duty to provide emergency services to Mrs. Hubbell, and that matter could only be settled at trial.

GOVERNMENTAL LIABILITY:

DANGER TREES AND PIXIE DUST

A while ago, Jim Busek, a Norwalk, Ohio *Reflector* columnist who may have been running short on things to write about, was up in arms over that city's plans to cut down 62 boulevard trees that were interfering with the sidewalks.

Instead of removing the trees, Jim proposed that the offending roots be chopped out, and the trees then be encouraged not to grow any roots to replace them. While Jim was busy whispering to trees, we were wondering whether he might be liable if the dead ash tree he complained was standing on his tree lawn fell onto a passing motorist. Now, mind you, we don't know whether Jim even has any trees on his tree lawn, but you know how it is when you hold yourself to the public as a famous columnist. You become a lightning rod. Sorry, Jim… you're fair game.

In our discussion of *Wertz v. Cooper*, we delivered the bad news that Jim, as owner of the strip of grass between the public sidewalk and street, may well be liable. As an urban property owner, he has a duty to inspect and remove trees that may reasonably pose a danger to third parties passing on public streets. So Jim's hanging out there a country mile (or maybe a city mile, because he is an urban landowner, and *Wertz* tells us they're different).

But is he hanging out there alone? Although Jim owns the tree lawn, it lies within in the 60-foot wide right-of-way of the street. The Ohio Supreme Court has pointedly said that the "roadway, the space immediately above the roadway, the shoulder, the berm, and the right-of-way are all under the control of the political subdivision … [which] has a duty to keep the areas within its control free from nuisance, *i.e.,* conditions that directly jeopardize the safety of traffic on the highway. Where the [subdivision] fails in its duty, it may be liable for injuries proximately caused by the nuisance." *Manufacturer's Nat'l Bank of Detroit v. Erie County Road Comm* (1992), 63 Ohio St.3d 318, 322-23.

So the City has Jim's back (or is on the hook, depending on your viewpoint) in case the pixie dust dosen't work on the tree roots. Of course, the City has to have actual or constructive notice of the defect, just like the landowner in yesterday's case. However, the City has already noted that 62 trees should be removed, and – if the homeowners balk enough to convince the City otherwise – the City's previous decision that the trees should go would cut against any denial by the powers-that-be that they were blissfully unaware.

All of which brings us to this case. This lawsuit relates to an unfortunate man who was killed when a dead tree fell onto his car one stormy November night. The tree was on private property out in the country, but it had been dead for so long that the landowner may have had liability. We can't tell, because this case — in the Ohio Court of Claims — was solely against the Department of Transportation. The Court held that ODOT would be liable, notwithstanding the fact that the tree was on private land, if it had breached its duty to inspect the tree.

ODOT had a drive-by inspection program reminiscent of one we considered recently in the case of *Commonwealth of Kentucky v. Maiden*. The victim's heirs argued that if ODOT had gone around behind the tree (away from the road), they would have seen the decay. Well, yes, the Court said, but that's beside the point. ODOT has over 40,000 miles of road to inspect, and to inspect every tree in the manner suggested by the plaintiff would be economically infeasible.

Still, the principle we take away from this decision is that just because the tree is on private land, the City of Norwalk would not get off the hook. That doesn't mean that Jim's going to feel that much better in the defendant's dock if the mayor has to stand next to him.

If Jim happens to ride a bike, he might be at risk from the decayed tree, too …

Our sad conclusion: Jim may not be the only one liable here. He knows the City has identified the trees as a hazard, and that alone places him on actual notice. If his 98-cent remedy of cutting some roots and hoping for the best doesn't work, both his homeowners' insurance and the City's pocketbook could get a workout.

What a pain in the ash that would turn out to be!

Blausey v. Ohio Dept. of Transportation, Not Reported in N.E.2d, 2005 WL 894878 (Ohio Ct.Cl.), 2005 -Ohio-1807. Dale Blausey was killed during a windstorm when the car he was driving was struck by a falling Norway spruce tree on a U.S. highway in Erie County, Ohio. The tree had been growing on a roadside right-of-way obtained by defendant on land that was owned by Joe Henry but occupied by a tenant. The primary proximate cause of the fall was the severe deterioration of the roots on the east side of the tree and the high wind that blew the tree onto the highway. The tree had been struck by lightning in 1973, and the damage from that strike led to interior rotting and an infestation of carpenter ants, the combination of which destroyed much of the root system. The deterioration had existed for as long as ten years, gradually weakening the tree to the extent that it became a hazard.

Before it fell, the east side of tree that faced the highway showed little, if any, evidence of decay. Dead limbs were not clearly visible from the highway. Limbs had been removed from the lower part of the tree, which was not uncommon as landowners sought to mow, decorate, or otherwise use the land. Additionally, the lower part of the tree was obscured by bushes and vegetation. The upper growth of both the healthy and the diseased spruce trees was green and quite similar, although on close inspection, the growth on the healthy spruce appeared to be slightly more dense. Cone growth was normal on both trees. Although the 1973 lightning

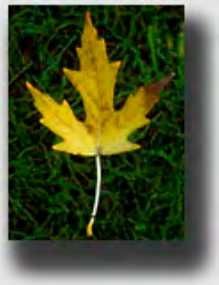
strike had caused the tree to lose its "Christmas tree" shape at the top, the loss was not very noticeable. However, an inspection of the west side of the tree would have revealed evidence of deterioration and of a potential hazard. The State had not inspected the tree except from the highway, and that inspection did not reveal any defect.

Blausey's executor sued the State for negligence in not identifying and removing the danger tree prior to the accident, and accused it of maintaining a nuisance.

Held: The State was not negligent. In order to prevail upon a claims of negligence, a plaintiff must prove by a preponderance of the evidence that defendant a duty, that it breached the duty, and that the breach proximately caused the injury. The State has a duty to maintain its highways in a reasonably safe condition for the motoring public, but it doesn't have to become an insurer of the safety of state highways.

To constitute a nuisance, the thing or act complained of must either cause injury to the property of another, obstruct the reasonable use or enjoyment of such property, or cause physical discomfort to such person. In a suit for nuisance, the action for damages is predicated upon carelessly or negligently allowing such condition to exist. But in order for liability to attach to a defendant for damages caused by hazards upon the roadway, a plaintiff must show the defendant had actual or constructive notice of the existence of such hazard. The distinction between actual and constructive notice is in the manner in which notice is obtained or assumed to have been obtained rather than in the amount of information obtained. Wherever from competent evidence the trier of fact is entitled to hold as a conclusion of fact and not as a presumption of law that information was personally communicated to or received by a party, the notice is actual. Constructive notice is that which the law regards as sufficient to give notice and is regarded as a substitute for actual notice. To establish that defendant had constructive notice of a nuisance or defect in the highway, the hazard "must have existed for such length of time as to impute knowledge or notice.

The court found that there was insufficient discernible evidence available to defendant's inspectors to warrant further investigation of the damaged tree or to determine that it was hazardous prior to the accident. While a close inspection of tree would have revealed that tree was a hazard, the deteriorated condition of tree was not apparent through Department's routine visual inspections from roadway, and with over 40,000 miles of road to inspect, the Department was not — as a matter of social and economic policy — expected to individually inspect the trees.



GOVERNMENTAL LIABILITY:

WHAT DID THE GOVERNMENT KNOW, AND WHEN DID IT KNOW IT?

One of the enduring lines from the endless (or so it seemed at the time) Watergate investigation was Howard Baker's famous question, "What did the president know and when did he know it?" On the answer to that question turned the culpability of the President for the high crimes and misdemeanors of his minions. It still does, despite the fact that we now know that the Watergate investigation timetable was a rocket ship compared to Whitewater-Lewinsky, Valerie Plame, Benghazi-Fast and Furious-IRS, and Trump-Russia.

It's a great question. Many plaintiffs have discovered that possessing or lacking the answer to it often is the difference between winning and losing a tort action.

We have talked about strict liability , but strict liability is not generally the way we do things. Were it otherwise, commerce and society would screech to a halt, because anything act, regardless of how responsibly it was performed, could lead to liability and financial ruin.

Consider this case. A tree branch cracked and settled so far down the tree that it dangled dangerously low over a road. Linda hit it, damaging her car. No one would disagree that the branch should not have been there. Nevertheless, the harm it caused did not mean Linda could pick the State of Ohio's pocket for repairs itself unless the State had a duty to the motoring public which it failed to discharge.

Shouldn't the Ohio Department of Transportation have known about the danger? Should it not have corrected the defect before Linda happened along? Shouldn't those highway workers do *something* to justify their paychecks? That all depends on the State's knowledge of the defect. Or, as the late Sen. Howard Baker might have put it, "What did ODOT know, and when did it know it?"

Coleman v. Ohio DOT, 2009-Ohio-6887 (Ct. Claims, Aug, 25, 2009), 2009 Ohio Misc. LEXIS 3. One February day, Linda Coleman was driving along a state highway a half mile outside of the village of Westville, Ohio, when her 2004 Honda Accord hit a very low tree branch overhanging the road. The impact broke the windshield and damaged the right side of her car.

Linda sued ODOT, theorizing that the damage to her car was proximately caused by ODOT's negligence in failing to maintain the roadway free of hazardous conditions. She sought a paltry $745.01, the cost of fixing her Honda.

Sen. Howard Baker asks the now-immortal question

ODOT denied liability, contending that none of its employees or agents had any knowledge of the hazardous overhanging tree limb prior to Linda's collision with it. ODOT denied receiving any reports about the limb prior to the accident from anyone. ODOT did receive a report after Linda struck the tree, and responded by dispatching two ODOT workers to remove the tree limb the same day Linda hit it. ODOT argued that the facts suggested that "it is likely the tree limb existed for only a short time before the incident."

ODOT related that its manager for that county inspected all state roadways n the county at least twice a month. Apparently, no overhanging tree condition was discovered at Milepost 2.50 on State Route 560 the last time that section of roadway was inspected.

Held: ODOT had no liability to Linda.

To be sure, ODOT has the duty to maintain its highways in a reasonably safe condition for the motoring public. However, the state agency is not an insurer of the safety of its highways. In order to prove a breach of ODOT's duty to maintain the highways, Linda would have had to prove that ODOT had actual or constructive notice of the precise condition or defect alleged to have caused the accident. ODOT would only be liable for a roadway condition of which it has notice but failed to take reasonable steps to correct.

In order to recover on a claim of this type, the Court said, Linda had to show either that ODOT had actual or constructive notice of the low-hanging tree limb and failed to respond in a reasonable time or responded in a negligent manner, or that ODOT in a general sense maintains its highways negligently. For constructive notice to be proven, Linda would have had to show that sufficient time has passed after the dangerous nature of the tree limb came into being, so that under the circumstances, ODOT should have learned of its existence.

The court hearing the case may not infer that ODOT knew, unless Linda presented evidence of when the defective limb first appeared to be too low over the roadway. Here, Linda had no proof that ODOT had any notice, either actual or constructive, of the damage-causing tree limb.

Generally, to prove negligence, a plaintiff must prove that a defendant owed her a duty, that it breached that duty, and that the breach proximately caused her injuries. She must also show she suffered a loss, and that this loss was proximately caused by the defendant's negligence.

Linda had no evidence that her injury was proximately caused by ODOT's negligence, because she could not show when the dangerous condition came into being. Therefore, she was unable to show that the damage-causing object was connected to any conduct under ODOT's control, or to any ODOT negligence.

GOVERNMENTAL LIABILITY:

LET'S LEAVE GOD OUT OF THIS

There's plenty of talk about old-time religion around these days. The Supreme Court just decided a case pitting a baker's religious freedom against anti-discrimation laws. Last winter, the Virgin Mary and a sheep get into a tussle over Baby Jesus at a nativity scene. If there's a lesson for us here, it's that we shouldn't try to enlist the Almighty too easily as justification for falling trees.

But the folks at the Ohio Department of Natural Resources are all too willing to overlook the separation of church and state when it's especially convenient to do so. When one of ODNR's decrepit cottonwoods fell on Mr. Vondrell's seawall (or perhaps "lakewall," because there're only freshwater lakes in Ohio), the State said, "oops, an act of God." The winds were blowing pretty fiercely that day, but the DNR figured that was enough to claim that the tree fell in a storm. Just a capricious Almighty, don't you know? Which of course meant the DNR wasn't liable.

It may have been breezy, Mr. Vondrell countered, but the cottonwood that crushed his concrete wall fell because it was good and dead, and had been for a long time. Perhaps so, DNR responded, but we didn't know it was dead.

The Court of Claims sided with Mr. Vondrell. An act of God has to be *all* God, the Court said. If the cause of the falling tree is aided at all by the agency of man, even the fact that the deadfall resulted primarily from an act of God won't relieve a defendant from liability.

Still, for a defendant to be negligent, he, she or it had to be on actual or constructive notice of the hazard posed by the tree. Here, the fact that tree had been dead for over five years and DNR employees had been seen in the area of the tree was enough for the Court to conclude that DNR reasonably should have known about the defective tree.

So when there's an act of God, it better be all God… and no man (or woman).

Vondrell v. Ohio Dept. Natural Resources, 2007 Ohio 7232, (Ohio Ct. Claims, Dec. 4, 2007), 2007 Ohio Misc. LEXIS 503 Mr. Vondrell had a seawall on his lakefront property. A cottonwood tree next door in a state park fell during a windstorm and damaged the concrete. The agency managing the park, the Ohio Department of Natural Resources, argued that the damage was due solely to an "act of God," the high winds that caused the tree to fall. Mr. Vondrell argued the damage-causing tree was dead, that DNR personnel had years of prior knowledge the tree was dead, and that DNR knew or should have known the dead tree presented a falling hazard. Photographic evidence showed the tree was clearly dead.

Mr. Vondrell argued the tree that fell was very tall and was dead when he had bought his adjacent property in 1999, five years before the collapse. Additionally, he said, DNR personnel were seen in the area around the dead cottonwood trees many times between 1999 and 2005. He contended his property damage was proximately caused by negligence on the part of DNR in maintaining a known hazard on park premises and not merely by high winds falling a healthy tree.

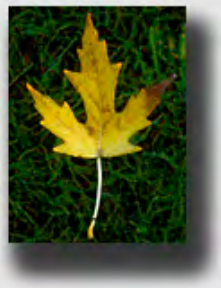
Mr. Vondrell sued in the Ohio Court of Claims, which has jurisdiction over claims against the State.

Held: DNR was negligent, and had to pay. The agency adduced all sorts of evidence as to high wind speeds on the day in question, but high winds alone do not an act of God make.

It's true, the Court said, that no liability can attach to an act of God. However, an act of God must proceed from the violence of nature or the force of the elements alone: the agency of man must have nothing to do with it.

The Court held that Mr. Vondrell proved that DNR had constructive notice of the condition of the tree. The tree stood dead for over five years, and DNR employees were seen around it often. Under Ohio law, the Court said, it wasn't enough that DNR argued it didn't know about the condition of the tree. It was on constructive notice of the condition of the tree.

In a situation such as this one, where two causes contributed to an injury, one cause which is a defendant's negligence and the other cause an act of God, a defendant may be held liable if a plaintiff's damage would not have happened but for defendant's negligence. If proper care and diligence on the part of DNR had avoided the act, it is not excusable as an act of God. Essentially, if DNR's negligent act concurs with an act of God to cause damage, defendant cannot escape liability.



PRIVATE PARTY NEGLIGENCE:

IT WAS A DARK AND STORMY NIGHT

Snoopy made the opening line of Paul Clifford one of the most famous in the history of pedestrian writing.

Or so begins Edward George Bulwer-Lytton's 1830 novel, *Paul Clifford*, the opening line now famous thanks to Snoopy in the comic strip *Peanuts* and the fiction contest that bears the author's name. It's a bit ironic: we are enjoying as a lot of summertime light and sun light today. But let's look back on a really dark and stormy night, when the aptly-named farmer Hay drove his truck through the rain-swept and lightning-illuminated Ohio countryside, past a golf course owned by a local lodge of the Benevolent and Protective Order of Elks.

On this particular dark and stormy summer night, an oak tree by the side of the road, weakened and decayed after a lightning strike several years before, fell on Farmer Hay, bringing to a sudden end his time on this mortal coil. Subsequently, his estate sued the Elks, claiming the Lodge had been negligent in failing to do anything about the hazardous tree, despite the fact that its decrepit state was well known to the duffers.

Relying on rather thin precedent, the trial court threw out the Hay descendents' claim, holding that a rural landowner had no duty to protect travelers on the highway from the natural condition of trees on his or her property. The matter reached the Ohio Supreme Court in 1951.

The Supreme Court began with the observation that the law permitted every landowner to make such use as the person's property as he or she wishes, provided it is used in such a manner as not to invade the rights of others. It then added flesh to that general rule, holding that while a rural landowner has no duty to inspect trees adjacent to a highway, when he or she has knowledge – actual or constructive – of a patently defective condition of a tree which may injure a traveler, the landowner must exercise reasonable care to prevent harm to people lawfully using the highway.

While there was little precedent in other states for the duty to act defined by the *Hay* court, the decision hardly came as a surprise. The American Law Institute's *Restatement of the Law of Torts* had previously held that while "[n]either a possessor of land, nor a lessor, vendor or other transferor thereof, is subject to liability for

bodily harm caused to others outside the land by a natural condition of the land other than trees growing near a highway." But it contained an important *caveat*. The *Restatement* – which is written with a goal of identifying trends in the law – noted that its drafters expressed "no opinion as to whether a possessor of land who permits trees not planted by himself or his predecessors to remain on a part of the land near a public highway is or is not under a duty to exercise reasonable care to prevent their condition becoming such as to involve a grave risk of causing serious bodily harm to those who use the highway and the burden of making them safe is not excessive as compared to the risk involved in their dangerous condition."

The ALI presciently foresaw evolution of the duty defined in *Hay* and cases in other jurisdictions that followed it. The *Hay* rule has since become a standard of care imposed by virtually all states.

Hay v. Norwalk Lodge No. 730, B.P.O.E, 92 Ohio App. 14, 109 N.E.2d 481 (Court of Appeals, 6th Dist., 1951). Farmer Hay was driving his truck on New State Road when a large limb or limbs fell from a tree located on land owned by the local chapter of the Benevolent and Protective Order of Elks. The limb struck the top of the cab, injuring Mr. Hay so that he lost control of the truck, crashed into a tree, and died as a result of his injuries.

These things happen … but the landowner may be liable, depending on what he knew and when he knew it.

The late Mr. Hay's estate sued, alleging that the tree had been struck by lightning several years before, and was extensively damaged and weakened as a result. The complaint said the damage to the tree was visible and apparent for several years, and that after the tree was struck by lightning, apparent natural processes of decay set in and further weakened the tree and its branches, which extended over and above the traveled portion of the road. Finally, the complaint averred that the Elks knew that portions of the said tree extended over the road, that it had been struck by lightning, and the tree was thus weakened. The complaint concluded that the Elks had neglected to remove or to brace the damaged portions or to do anything to make the tree secure, and failed and neglected to give notice to motorists of the danger.

The trial court held that the Elks had no duty to Mr. Hay to alert him as to the danger tree, or to remove or trim it. It threw out the complaint. The matter ended up before the Ohio Supreme Court:

Held: The Supreme Court reversed, and sent the case back for trial. It held that every person may make such use as he or she will of real property, provided he or she uses it in such manner as not to invade the rights of others. But in the case of rural landowners, this means that although there is no duty imposed upon the owner of property abutting a rural highway to inspect trees or to ascertain defects which may result in injury to

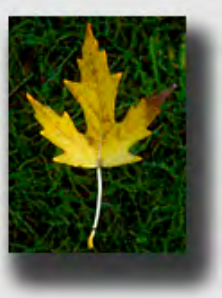
motorists, an owner having actual or constructive knowledge of a patently defective condition of a tree which may result in injury to motorists must exercise reasonable care to prevent harm to people lawfully using the highway.

The Court noted that the only Ohio holding even close to its conclusion in this case was one in which the owner of property upon which a tree was situated was held to have the duty to exercise ordinary care for the safety of pedestrians using the sidewalk. However, the American Law Institute in had noted in *Restatement of the Law of Torts* that its members were split, and thus had no opinion on "whether a possessor of land who permits trees not planted by himself or his predecessors to remain on a part of the land near a public highway is or is not under a duty to exercise reasonable care to prevent their condition becoming such as to involve a grave risk of causing serious bodily harm to those who use the highway and the burden of making them safe is not excessive as compared to the risk involved in their dangerous condition."

The Ohio Supreme Court observed that the law imposes upon every member of society the duty to refrain from conduct of a character likely to injure a person with whom he comes in contact and to use his own property in such a manner as not to injure that of another. The justices reviewed cases from other states, which led the Court to the "conclusion that in the absence of knowledge of a defective condition of a branch of a tree which in the course of natural events is likely to fall and injure a person in the highway, no liability attaches to the owner of the tree. On the other hand, where the owner has knowledge of the dangerous condition of the tree or its branches, it is his duty to exercise reasonable care to prevent the fall of the tree or its branches into the highway." The Court agreed with a Minnesota case that held that it was unreasonable to require the owner of rural land to inspect his property with regard to naturally arising defects, because of the burden thereby imposed upon the owner of large and unsettled tracts of land. But the Court rejected the Minnesota case's conclusion that the owner was not liable even if he had actual knowledge.

The Ohio Supreme Court instead followed dictum from a Federal court decision that "an owner of property abutting a highway has the obligation to use reasonable care to keep his premises in such condition as not to endanger travelers in their lawful use of the highway. If he fails to do so and thereby renders the way unsafe for travel, he should be liable therefor. It is, therefore, concluded that, although there is no duty imposed upon the owner of property abutting a rural highway to inspect growing trees adjacent thereto to ascertain defects which may result in injury to a traveler on the highway, an owner having knowledge of a patently defective condition of a tree which may result in injury to a traveler on a highway must exercise reasonable care to prevent harm from the falling of such tree or its branches on a person lawfully using the highway. If the danger is apparent, which a person can see with his own eyes, and he fails to do so with the result that injury results to a traveler on the way, the owner is responsible because in the management of his property he has not acted as a reasonably prudent landowner would act."

Because the complaint filed by the Hay Estate alleged that the Elks had actual knowledge of the decayed tree, the complaint made out a claim that, if true, would entitle the Estate to recover. The case was reinstated and sent back to the trial court.



PRIVATE PARTY NEGLICENCE:

THE EAGLE HAS LANDED

When the elder Mr. Eagle volunteered to help trim a tree at his church, his son tagged along. It seems that Ralphie was anxious to help Daddy.

Ah, the brashness of youth. The lad (he was 50 years old, but he still lived with mom and dad, so he was unquestionably a kid, albeit a big one), shouldered the three septuagenarians out of the way and climbed the ladder himself. Well, one thing led to another, and the group of tree-trimming amateurs lost control of a limb. The limb fell, the 70-year old man holding the ladder jumped out of the way to avoid being hit, and the falling limb knocked the ladder out of the way. Ralphie fell off the ladder and he landed — hard.

Unlike the kid above, our Ralphie was not quick like a bunny when the limb fell.

Having his eye on the collection plate, the litigious Eaglet sued the Church, the other retirees and, of course, his own father (with whom he resided) for negligence. He claimed that the volunteers were acting as agents of the church, making the church liable.

The trial court would have none of this, and threw the case out. The Court of Appeals agreed, finding that as volunteers, the tree trimming crew members owed each other reasonable care at most. And it wasn't reasonable to believe the man holding the ladder would stand and take a hit when the limb fell. There wasn't evidence that any of the trimmers were negligent, so the Church couldn't be liable.

As for premises liability, the Court said, the evidence showed Eagle had volunteered to help three old men do something dangerous: he should have seen it coming. In reading the decision, one gets the impression that neither the trial court nor the appellate panel thought much of the young Eagle, who had horned in on the volunteer effort, ignored his father's request that he not participate, and then – after he got hurt – sued everyone involved.

Eagle v. Owens, Case No. C-060446 (Ct.App. Hamilton Co., 2007). A small church needed some tree trimming performed. During a Sunday service, the pastor had asked for volunteers to perform the tree-trimming task. The church typically relied on volunteers for landscaping work, including potentially dangerous work such as trimming trees. Merida and Owens volunteered for the task. Both had performed similar tasks for the church on several occasions in the past without incident.

Before leaving the church that day, the two volunteers stood by the tree to examine what had to be done. When Eagle's father walked by, they recruited him to help them. Eagle's father was a deacon of the church, an unpaid, rotating position that required him to make decisions for the church's benefit with the four other deacons. Ultimately, the three men, all over the age of 70, agreed to meet the next morning to perform the task.

When the elder Eagle arrived the next day, he brought his 50-year old son with him. The son thought the other volunteers were too old, so he took over trimming from a ladder perch. Before the younger Eagle began sawing, his father insisted on changing the position of the rope around the limb. Merida remembered telling Eagle's father that he did not like the change, but he claimed that he deferred to him because he was a deacon. The limb did not fall cleanly, and its branches knocked over the ladder the younger Eagle was standing on. One of the men who had been holding the ladder ran to avoid being struck by the limb. Eagle fell and was injured.

He sued everyone who was there, as well as the church, alleging that they had "carelessly and negligently caused a tree limb to fall and strike" him. He also alleged that his father, Owens, and Merida were acting as agents or employees of the church when the accident occurred, and that the church was responsible for the acts of its agents. The individual defendants moved for summary judgment on the basis that Eagle had assumed the risk of any injury by participating in such an inherently dangerous activity. The church moved for summary judgment on the respondeat superior claim, arguing that it could not be liable where the individual defendants were not negligent and were not agents of the church, and where Eagle had assumed the risk.

The trial court granted summary judgment for the defendants without giving any reasons or issuing a decision. The younger Eagle appealed.

Held: The young Eagle's wings were clipped. The Court agreed with the trial court's dismissal, holding that as nonprofessional volunteers, the defendants at most owed Eagle a duty of reasonable care under the circumstances. Eagle did not present any testimony, expert or otherwise, to demonstrate how his father's, Merida's, or Owens' conduct fell below a standard of reasonable care. No one foresaw that the branches on the limb would strike Eagle after breaking off from the trunk, and no one expected Owens to hold the ladder if it swayed while Eagle was on it, because it was obvious that he was physically unable to do so. And if he had stayed to steady the ladder, he likely would have been struck and injured by a large limb.

The Court held that the duty of reasonable care did not require such a foolish act of bravery, despite Eagle's assertion that he would have steadied the ladder and suffered the blow of the limb if the roles had been reversed. To establish a claim against the church under the doctrine of respondeat superior, the record must demonstrate that a principal-agent relationship existed, and that the tortious conduct was committed by the agent while in the scope of his agency.

Here, the Court said, it did not need to determine whether reasonable minds could have concluded that any of the three men were agents of the church and whether Eagle was injured by acts taken within the scope of that agency, because the individual defendants did not act tortiously towards Eagle in carrying out the task. Where there is no actionable conduct by an agent, there can be no vicarious liability for

principal. Finally, on the claim of premises liability, the Court held that in determining the duty the church owed to Eagle, it had to focus on Eagle's status as a participant in the tree-trimming task, because his injury resulted from his participation in this task and not from his status as a person present on the church's property in general.

It was undisputed that Eagle was warned of the danger; that the church had always used volunteers, including Merida and Owens, to perform similar tree-trimming tasks in the past; and that these volunteers had performed in the past without incident. Eagle did not present any testimony from a tree-trimming professional to attack the church's decision to use these same volunteers to remove this limb. The Court concluded that reasonable minds could come to but one conclusion, and that conclusion was that the church did not breach a duty of care owed to Eagle.

PRIVATE PARTY NEGLIGENCE:

NO GOOD DEED…

Regular readers of treeandneighborlawblog.com know that many benefits usually flow to Harry and Harriet Homeowner from hiring an independent contractor to remove a tree. Primary among those advantages is that if (or maybe "when") things go south on you – such as the tree falls on somebody's house or a tree service employee takes a header from 100 feet up – you, the homeowner, aren't liable.

Harry and Harriet Homeowner - famous trademarks of Washington, D.C., area D-I-Y store icon Hechinger's, 30-some years ago

Alas, this isn't *always* true. If Harry and Harriet have superior knowledge of the particular latent danger which causes an injury to the contractor, they may be liable. Likewise, if Harry can't keep his nose out of things, and starts participating in the tree removal, he may be liable for injuries resulting from injecting himself into the contractor's work. Generally (and reasonably), however, the law protects people who hire the experts and then leave them alone to do their jobs.

So what was Tony Cox's problem? First, he was a tightwad, not wanting to drop a grand on removing a hazardous tree. So instead hiring the experts, he decided to cut it down himself. After all, he had a saw and gravity to assist him. What could go wrong?

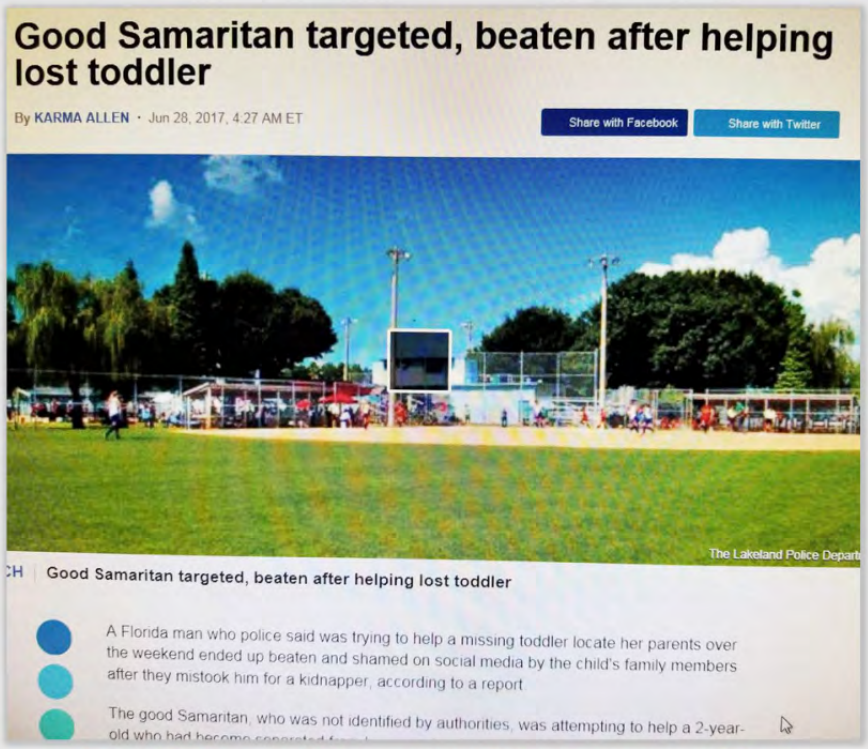
Then, there was Tony's acrophobia. To solve this problem, he recruited his neighbor Dick Strayer. Dick wasn't afraid of heights. He climbed radio towers for a living (usually using a safety rig that attached to the towers). Plus, o the side, he cut down trees. Who better than Dick?

Hey, Dick, Oscar Wilde (or maybe Clare Booth Luce, who knows for sure?) said no good deed goes unpunished. What do you suppose he meant by that?

Dick and Tony began cutting. Dick was in the tree, because Tony, as we mentioned, was afraid of heights. Dick was sawing away on a limb when something happened. No one really saw the accident, but everyone saw Dick, as well as the decayed limb he had been sawing, on the ground.

Of course, a lawsuit ensued. Otherwise, we would not be writing about this tragedy-in-a-teapot. Dick claimed Tony was liable for his injuries because Tony did not tell him the limb was rotten, and Tony was actively participating in the tree-removal job. Lucky for Tony, the court was convinced that Dick's tree experience and his position astraddle the rotten branch made the hazard open and obvious to Dick. What's more, the court held, Tony did not owe Dick any duty under the participation exception to a property owner's general lack of duty to an independent contractor, because while Tony was on the crew, he did not "actively participate" by directing the activity that resulted in Dick's injury.

Strayer v. Cox, 38 N.E.3d 1162 (Ct.App. Miami Co., 2015). Richard Strayer was injured while attempting to cut down a tree located on the property owned by his neighbor, Anthony Cox. Dick Strayer had some qualifications for the job: he been involved in various types of residential and commercial construction, and had been employed climbing cell phone towers. Prior to the accident, he had climbed trees 20 to 25 times to cut them down.



Oscar Wilde was right - no good deed goes unpunished.

At some point, Tony decided that he wanted to remove a 25' tall tree in his front yard. Tony presumed it was dead, and he balked at the $1,000 estimate from tree services to remove the tree. So he told Dick he wanted to take the tree down, and asked Dick to help because he was afraid of heights.

Dick first inspected the tree, and thought it looked "okay," although he later admitted no one short of a tree expert could have told that any of the branches were rotting, and Tony would have had no way to determine if there was rotting or damage to any of the limbs.

At one point, Dick's feet were on the base of the tree (where a branch met the trunk), and he was standing in the middle of a series of big limbs about 12 feet up. Dick began cutting a branch with his chainsaw. The next thing he knew, he had fallen to the ground, riding the rotted-out branch all the way down. As a result of the fall, Dick hurt his left ankle, which required surgery.

Dick sued, but the trial court granted summary judgment for Tony and his insurance carrier. Dick appealed.

Held: Dick's lawsuit was thrown out. The appellate court ruled that the trial court did not err in rendering summary judgment in Tony's favor. The court held that the undisputed facts showed Tony had no duty to

protect Dick from an open and obvious hazard on Tony's property. Furthermore, Tony did not owe Dick any duty under an exception to a property owner's general lack of duty to an employee of an independent contractor. Tony did not "actively participate" as required for application of this exception by directing the activity that resulted in Dick's injury, by giving or denying permission for the critical acts that led to Dick's injury, or by exercising sole exclusive control over a critical variable in the working environment.

The Court said, "It is fundamental that in order to establish a cause of action for negligence the plaintiff must show the existence of a duty, a breach of that duty, and an injury proximately resulting therefrom. The status of the person who enters upon the land of another (*i.e.,* trespasser, licensee, or invitee) defines the scope of the legal duty that the landowner owes the entrant." Here, Dick was an invitee, someone who rightfully came onto Tony's property by invitation, express or implied, for a purpose beneficial to Tony, to wit, the removal of the tree.

An owner owes business invitees a duty of ordinary care in maintaining the premises in a reasonably safe condition so that invitees are not unnecessarily and unreasonably exposed to danger. However, the Court observed, the owner does not act as an insurer of an invitee's safety and owes no duty to protect invitees from open and obvious dangers on the property. Open and obvious hazards are those hazards that are neither hidden nor concealed from view and are discoverable by ordinary inspection. The question is always whether an invitee exercising ordinary care under the circumstances would have seen and been able to guard himself against the condition.

"Liability only attaches when an owner has 'superior knowledge of the particular danger which caused the injury'," the Court wrote, "as an 'invitee may not reasonably be expected to protect himself from a risk he cannot fully appreciate'. The open and obvious doctrine is determinative of the threshold issue, the landowner's duty. In the absence of duty, there is no negligence to compare."

Dick was barred from recovery because the deteriorating tree was an open and obvious hazard that he freely ascended. He was in a better position to assess the safety of standing on the branch. Naturally, the Court held, Tony had no duty to warn Dick about dangers of which Tony was unaware, such as that the limb Dick was cutting was deteriorating from the inside, decay that was not observable from the outside. In addition, the court observed that Dick had significant experience with cutting trees and that the risk of encountering deteriorating branches was open and obvious.

Dick also argued that Tony should have contacted a certified arborist prior to removal to conduct a risk assessment of the tree. He claimed Tony's failure to have a risk assessment conducted violated American National Standards Institute (ANSI) sections Z133 and A300, part 1 and 9, which require that any tree being

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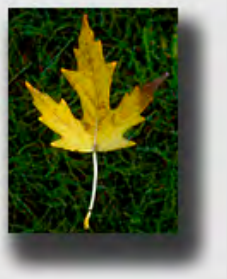
Dick also argued that Tony should have contacted a certified arborist prior to removal to conduct a risk assessment of the tree. He claimed Tony’s failure to have a risk assessment conducted violated American National Standards Institute (ANSI) sections Z133 and A300, part 1 and 9, which require that any tree being worked on “undergo a tree risk assessment for tree worker safety.” But the court ruled that homeowners like Tony are not subject to the requirements of ANSI, even if the standards were not voluntary to begin with (which they are).

Even if the ANSI standards were somehow to apply to a Harry-Homeowner-tree-removal job, the court ruled, “Ohio courts have held that summary judgment may be granted in cases where building code violations are open and obvious ‘because the open-and-obvious nature of the defect obviates the premises owner’s duty to warn.” The hazard of climbing on the tree limb in a tree with dead branches was open and obvious.

Finally, Tony’s participation on the job did not make him liable to Dick. One who engages the services of an independent contractor, and who actually participates in the job operation performed by such contractor and thereby fails to eliminate a hazard which he, in the exercise of ordinary care, could have eliminated, can be held responsible for the injury or death of an employee of the independent contractor. Here, testimony of the parties indicated that if anyone directed the activities that day, it would have been Dick, who was the individual experienced in cutting down trees and using chain saws. The record was devoid of any indication that Tony directed Dick to do anything on the day of the accident, or even that Tony had any prior experience with chain saws or with cutting down trees.

Dick “directed the activity which resulted in the injury or gave or denied permission for the critical acts that led to the… injury.” The cause of Dick’s injury, in his own words, was that the limb on which he stood fell, taking him down with it, because the limb “was rotted.” Tony had no role in the injury, and thus no liability.



PRIVATE PARTY NEGLIGENCE:

BRANCHING OUT

An unhappy homeowner from urban Cincinnati, Ohio – we'll call her Sylvia Glade – wrote to us about her neighbor's oak tree. It seems that the tree had a branch overhanging Sylvia's home. The branch constantly dropped sticks, and the tree itself has been shedding branches regularly. As far back as the late 1990s, Sylvia thought the tree was dangerous and began asking her neighbor, whom we'll call Elouise, to do something about it. A tree expert Sylvia hired to look at her trees five years ago agreed, saying the big oak should go.

The elderly Elouise was unmoved. She gave Sylvia permission to cut down the tree (as long as Sylvia paid to do so), but then denied her the right to enter the property to do so. With the property line hard up against Sylvia's house, without Elouise's cooperation Sylvia couldn't even get a ladder under the branch to cut it away.

Crunch After the tree falls, the insurance company adds insult to injury.

But there's good news: Sylvia doesn't have to worry about that branch any more. Sadly, there's bad news, too: the branch is no longer a hazard because it fell on a windy day, crushing two floors of Sylvia's house. Her neighbor's insurance carrier said, "Oops, looks like an act of God! Not our responsibility." Sylvia thinks God should be left out of things, because the branch — which broke right at the trunk — looked very decayed.

Elouise's insurance company says Elouise had no idea the tree wasn't healthy. "She didn't know, so we don't owe," the company's mantra seems to be. Sylvia complains she told the neighbor on many occasions, and the neighbor admits she saw decayed branches that had fallen from the tree. Once, Elouise even hired Sylvia's son to haul away some large branches that the old oak shed in a windstorm. Sylvia asked us what duty of care Elouise owed her under Ohio law.

We start with the evolution of the Massachusetts Rule. Originally, the Rule held that a homeowner usually had no remedy against overhanging branches or intruding roots from a healthy tree, other than his or her right to trim the branches or roots back to the boundary line. That Rule has been limited recently, notably in the Virginia Supreme Court case of *Fancher v. Faglia* (2007) and the North Dakota Supreme Court holding in *Herring v. Lisbon Partners Credit Fund, Ltd.* (2012), although Massachusetts doubled down on the Rule just last month in *Shiel v. Rowell* , Both Virginia and North Dakota said that while a property owner might be limited to self-help where an encroaching tree was only doing what trees do, that is, dropping leaves, nuts, berries, seedpods and twigs, where a tree becomes a nuisance, the owner of the tree is liable for removing it.

The relevant Ohio case is *Nationwide Insurance Co. v. Jordan.* Mrs. Jordan's big maple tree fell, damaging the neighbors' place. They sued Mrs. Jordan, claiming the tree trespassed.

No dice, the Court said. The trespass claim would only work if the tree were an absolute nuisance, and that isn't the case. Mrs. Jordan would be liable, the Court held, if she actually knew the tree was dangerous or if she reasonably *should have known* the tree was dangerous. The Court decided Mrs. Jordan has neither kind of knowledge. The neighbor, although vociferous in her condemnation of the tree to anyone else in earshot, admitted that she never complained to Mrs. Jordan about it.

In Sylvia's case, the insurance company is wrong. It's not enough that the neighbor says she didn't know the branch was dangerous. The other half of the question is this "*should have known*" business. Was Elouise on constructive notice that the tree was dangerous, that is, should she reasonably have known the decay was making the tree unsafe? If Sylvia is right, the evidence will show the neighbor was told many times the tree was a hazard. Elouise had witnessed the tree drop a number of large branches of the previous years. She had to hire Sylvia's strong son to clean up the mess. And Sylvia told her about the danger, even agreeing to pay for the removal the tree herself.

Several Ohio cases (such as *Wertz v. Cooper*) suggest that neighbor Elouise – being an urban dweller – has a greater duty to inspect her trees than would a country squire. The evidence suggests Elouise had every reason to be concerned about the tree, and thus had a duty to inspect it to be sure it wasn't about to collapse Sylvia's house.

Elouise's insurance company may want to rethink its position… and start looking for its checkbook.

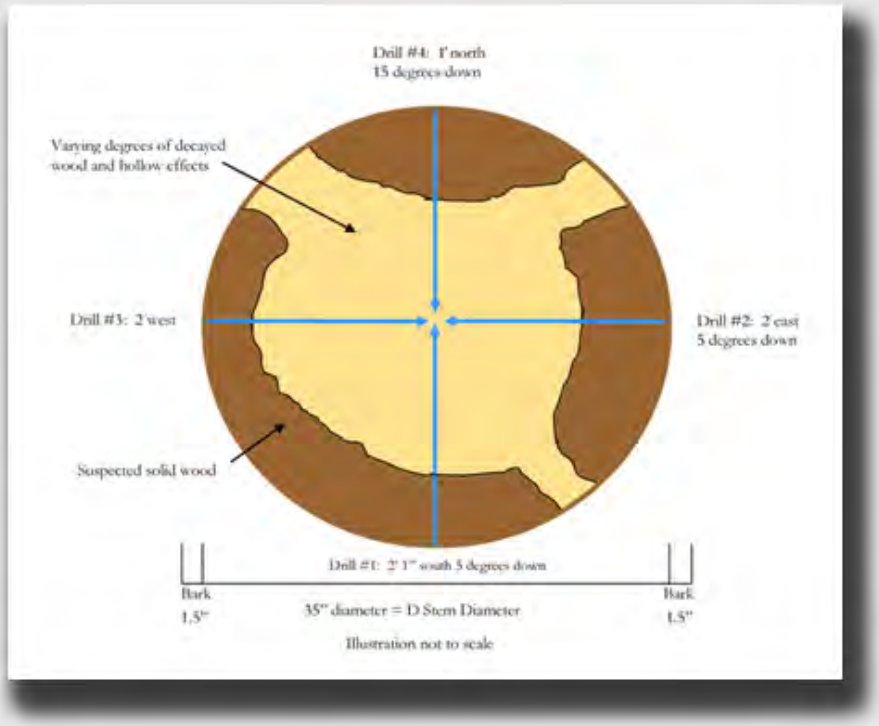
Nationwide Insurance Company, et al. v. Jordan, 639 N.E.2d 536 (1994).This action arose between adjoining landowners as a result of the falling of a mammoth maple tree. The insurance company, which had paid the damages to its insured's place, sued for trespass and negligence. The defendant tree owner testified that she had no notice the tree was susceptible to falling. Her tenant likewise testified that she had no notice of the tree's danger. The defendant's tree service manager testified that he worked on the property's trees every two years, and that the tree in question was not unsafe less than two years before it fell. The only person to testify to notice that the tree was rotten and likely to fall was the plaintiff's insured.

The trespass claim arose because the plaintiff maintained that the falling tree trespassed on the insured's property. The trial court made short work of this, holding that the only way liability could be imposed on Mrs. Jordan without proof of fault would be if the tree were an absolute nuisance. Healthy trees growing on property, even urban property, are not absolute nuisances, the trial judge said. Thus, the insurance company had to prove that Mrs. Jordan either knew or had constructive knowledge that the tree was likely to fall. The insurance company couldn't prove that, so the trial court found for Mrs. Jordan. The insurance company appealed.

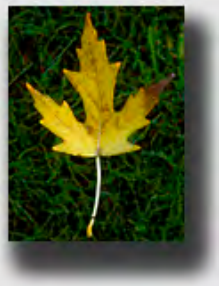
Held: Mrs. Jordan was not liable. The Court said that there was no evidence that Mrs. Jordan actually knew or had any reason to know that the maple tree was in danger of falling. The neighbor complained that the tree's propensity to fall was obvious to her, but she admitted he never told Mrs. Jordan. The Court observed that "[h]ad the plaintiff conveyed this knowledge to her neighboring landowner, the danger might well have been obviated, or, alternatively, the plaintiff's hands would be clean and the defendant would have been on notice and resultantly liable for the fall."

The Court further held that a tree on an owner's property was not an "absolute nuisance," and thus the adjoining landowner could not proceed merely upon strict liability against owner. Instead, the neighbor was required to prove negligence. To recover on a theory of negligence arising out of falling tree, a plaintiff's evidence must establish that defendant had actual or constructive notice of patent danger that tree would fall. Here, Mrs. Jordan had neither actual notice nor constructive notice of tree's dangerous condition. Both Mrs. Jordan and her tenant testified that they had no notice of tree's danger, Mrs. Jordan's regular tree trimming contractor worked on property's trees every two years and found that tree in question was not unsafe not more than 24 months before it fell.

The Court ruled in favor of Mrs. Jordan.

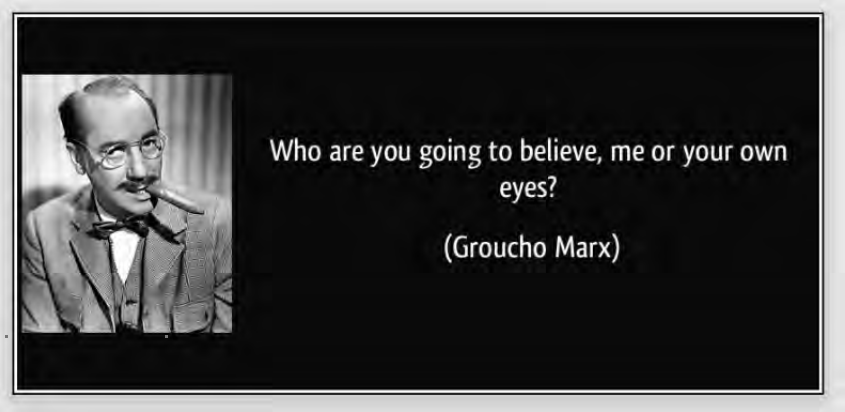


A diagram of one modern method of measuring a tree's decay. Elouise had any number of options – some cheap, some costly, some old school, some high-tech – for verifying the health of her big old oak.



PRIVATE PARTY NEGLIGENCE:

WHO ARE YOU GOING TO BELIEVE?



We make countless assumptions every day, based on our experience and education and sometimes prior hard luck. Where we live, whenever you see a cross the road in front of you, you slow way down, because experience has taught you that there's probably a second, and even a third, tailing along. When we grab some fast food, we assume that the acne-challenged teens cooking it in the back are practicing good hygiene, because we know that the County Health Inspector is on the case, and we know that the restaurant knows that, too. And when the Cleveland Browns draft a new dream quarterback, we know the coming season is going to be a disaster, because… well, we just know.

The law indulges us our reasonable assumptions, because those assumptions are the grease that make society work. If we see a person collapsed by the side of the road and call an ambulance, the law will protect us from a claim by the injured party that we should pay for the emergency squad because they never asked us to call. If we see a toddler wandering in the Walmart parking lot, our reasonable assumption that the child is lost protects us from liability for taking her hand and leading her to the store manager.

Even in this era of unusual domestic arrangements, the law permits us our reasonable assumptions. When Phil and Marlee Snowdon decided they wanted to clear some trees and brush along their property line adjoining the neighbors, Hal and Carol Dickinson, they did what good neighbors do: they asked for the Dickinsons' consent. Phil and Hal walked the boundary line, Phil described what he and Marlee wanted to do, and Hal consented.

What Phil and Marlee did not know was that Carol had owned the property since before she married Hal, which was about 15 years before. She paid all the bills on the place and made all the decisions. Hal was just a kept husband.

Believing they had permission, Phil and Marlee hired Charter Oaks Tree & Landscaping Co., Inc., to perform the work. Charter Oaks was a few days into the tree and shrub removal when Carol returned from an out-of-town trip and blew a gasket. It did not matter that Hal had given permission, Carol fumed, because she had not.

Carol sued the Snowdons and Charter Oaks for trespass and wrongful cutting of trees. The Snowdons admitted she had not given them permission, but argued that her husband, acting as her agent, had done so. Carol said that didn't matter, because he lacked the authority to do so, and no sense that he was acting as her duly-authorized agent could be inferred from her conduct, because she had never said a thing that would make Phil and Marlee think he could speak for her.

Poor Hal, the kept man. He could not have felt very good about how his wife legally emasculated him. And neither, apparently, did the court. Not because he's a guy, but rather because you ought to be able to rely on the promises of one marriage partner to bind both.

Sure, marriage alone isn't enough to presume an agency relationship exists, but assuming that hubby and wifey speak for each other is some of that societal grease we mentioned. Clearly, the court – while mouthing the legal platitude about no presumption of agency arising from the marriage – was going to find a way to make Hal his wife's agent. The alternative would be to throw sand in the neighborhood gears, requiring the folks next door, the banker, the grocer and auto mechanic all to question one marital partner expressing the demands and desires of the couple. How could anything ever get done?

This court wasn't going to be a party to that. Hal was found to have apparent authority to let Phil and Marlee cut the boundary trees.

No worries... and no authority, either, it seems.

Dickinson v. Charter Oaks Tree & Landscaping Co., Inc., Case No. 02AP-981 (Court of Appeals, Franklin County, Ohio, April 24, 2003) 2003-Ohio-2055, 2003 Ohio App. LEXIS 1940. In October 1997, Marlee Snowdon and her husband Richard moved next door to Carol Dickinson and her husband, Hal. Carol Dickinson had lived in her house for 30 years. After Hal and Carol married some 15 years before, he began living there, too. Notwithstanding that, Carol owned and managed the property. Significantly, she admitted the Snowdons had no idea who owned the property.

That's what she said...

One spring, the Snowdons decided to clean out substantial vegetation overgrowth along the side of their property abutting the Dickinson property. After Marlee and Richard decided to do the work, Richard told her he had received permission from Hal Dickinson after the two men walked the joint property line together and Richard Snowdon pointed out to Hal Dickinson what the Snowdons wanted to do. Marlee Snowdon hired Charter Oaks to do the work.

Marlee Snowdon told Charter Oaks that the Dickinsons had given their consent to removing vegetation along the border between the properties. Charter Oaks' normal practice was to rely on the representations of the contracting party about the consent of adjoining landowners. Charter Oaks began removing the vegetation between the Dickinson and Snowdon property.

Hal watched Charter Oaks run chippers and perform its work the first day. But on the second day, Carol returned from an out-of-town trip, and became upset about the work.

Carol sued the Snowdons and Charter Oaks for trespass and wrongful cutting.

Held: Hal acted with apparent authority, and the Snowdons and Charter Oak were within their rights to rely on his consent. The evidence showed that not only did Hal work frequently in the Dickinson yard, both alone and with Carol, but he trimmed and removed vegetation from the Dickinson property, including the area along the joint property line with the Snowdons. Hal dealt with contractors, including a tree service Carol hired that performed work on the Dickinson property. No evidence suggested the Snowdons were told Hal had limited or no authority to make decisions regarding landscaping matters on the Dickinson property. That evidence let a reasonable person infer that Carol knowingly permitted Hal to act as though he had authority over landscaping matters on the Dickinson property.

What's more, the evidence showed that Richard Snowdon believed in good faith that Hal had apparent authority to give permission to the Snowdons and Charter Oaks to enter onto the Dickinson property to remove vegetation in the area of the joint property line.

A defendant is not liable for trespass or destruction of vegetation if he is privileged, by receiving the consent of the owner or her agent, to enter onto the property of another to remove vegetation. "Because competent evidence was presented at trial to support a reasonable conclusion that Hal Dickinson was Carol Dickinson's agent and had apparent authority to give consent to defendants to enter onto the Dickinson property and to remove vegetation," the Court said, Carol's claims against the Snowdons and Charter Oak failed.

RECREATIONAL USER:

DIVING INTO THE SHALLOW END

The advent of the swim season always gets us thinking about – what else? – liability. Nationally, there are about 800 spinal cord injuries a year from swimmers — mostly young people — diving into shallow water. The idea that you ought to check the depth of the water before diving in is a pellucid as Bahamian waters. Yet diving accident victims and their families often litigate the issue anyway. This case is an interesting application of the "open and obvious" doctrine.

The Koops, who were lakeside property owners, weren't recreational users, because their property was open only to invited guests, not the public. So they had no immunity under Ohio's recreational user statute. As invitees, their guests were owed ordinary care by the Koops – which included a warning of any dangers that weren't open and obvious. When one guest ran across the dock and dove into 18-inch water — thus rendering himself a quadriplegic — he sued the Koops for negligence. The Court ruled that the danger was open and obvious.

Not to be deterred, Galinari argued he had been distracted by "attendant circumstances." Not a bad argument: "attendant circumstances" can defeat the "open and obvious" doctrine. But such circumstances must divert the attention of the injured party, significantly enhance the danger of the defect, contribute to the injury, and be beyond the control of injured party. Attendant circumstances in the past have included such circumstances as time of day, lack of familiarity with the route taken, lighting conditions, and accumulation of ice. But here, the best the plaintiff could muster was that the water was inviting, other people were swimming in the lake, and there were no posted warnings. Not enough, the Court ruled, to excuse the young man from the simple precaution of checking water depth first.

Galinari v. Koop, Slip Copy, 2007 WL 2482673 (Ct.App. Clermont Co., Ohio, Sept. 4, 2007). In a tragic July 4 accident, 21-year old Nick Galinari dove off a dock into a shallow lake owned by Koop, severely injuring his spinal cord and rendering him a quadriplegic. Galinari was invited by his girlfriend, Kristin Bounds, to attend a family party hosted by Koops on their property.

The property included a small, man-made lake on which guests are permitted to swim, canoe, fish, and generally use for recreational purposes. On the shore of the lake, there was a ramp connected to a floating dock, all of which extends about 28 feet into the water. The water near the shoreline is quite shallow, fluctuating between approximately ankle-deep and knee-deep. Galinari and his girlfriend pitched a tent and then mingled with guests at the party for about 45 minutes. Galinari, Kristin, and Kristin's sister then decided to go swimming. Kristin went into the lake while Galinari changed clothes.He then headed down the stairs to the ramp and floating dock to enter the water. He saw Kristin in the water near the end of the dock,

but could not recall later if she was standing or swimming. Without stopping to check the depth of the water at the end of the dock, Galinari jogged to the end of the dock and attempted a "shallow dive" to the right of Kristin. The water where he dove was about 18 inches deep. He struck the bottom of the lake, severely injuring his spinal cord. There was no sign on the property, nor did anyone give any verbal warnings, about diving off of the dock due to the depth of the water.

Galinari sued the property owners for negligence for failure to warn him about a dangerous condition on their property. The owners moved for summary judgment, arguing that they were under no duty to warn Galinari of something as open and obvious as the shallow lake. The trial court granted the Koops summary judgment, agreeing that the shallow water was an open and obvious condition and that they therefore had no duty to warn Galinari about a danger which he could have discovered through ordinary inspection. Galinari appealed.

Held: Galinari lost. he contended that despite the known dangers involved in diving, the question of the Koops' negligence in failing to warn him of the shallow water required jury evaluation. He argued that he was a social guest on Koops' property and that they breached a duty of care in failing to warn him of the dangers of diving off of the dock into their lake.

The Court disagreed, holding that in order to establish a cause of action for negligence, Galinari had to first show the existence of a duty. A social host owes his invited guest the duty to exercise ordinary care not to cause injury to his guest by any act of the host or by any activities carried on by the host while the guest is on the premises. This includes warning the guest of any condition of the premises known to the host and which a person of ordinary prudence and foresight in the position of the host should reasonably consider dangerous, if the host has reason to believe that the guest does not know and will not discover the dangerous condition.

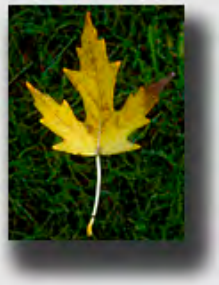
However, a property owner owes no duty to warn invitees of dangers which are open and obvious. The rationale for this "open and obvious" doctrine is that the nature of the hazard serves as its own warning, and invitees then have a corresponding duty to take reasonable precautions to avoid dangers that are patent or obvious. In determining whether a condition is open and obvious, the determinative question is whether a condition is discoverable or discernible by one who is acting with ordinary care under the circumstances. This determination is an objective one: a dangerous condition does not actually have to be observed by the claimant to be an open-and-obvious condition under the law.

Here, the Court held, it is clear that the depth of water at the end of the Koops' dock was a discoverable condition. Kristin was standing in the water near the end of the dock when Galinari dove in. The water on that day was at or below her knees. The lake bottom was clearly visible from the floating dock where Galinari dove. Galinari presented no evidence justifying any reason to believe that the water may have been deeper where he dove. He hadn't been told he could dive from the dock and that he hadn't seen anyone dive from that dock before him. Kristin was the only person he recalled seeing in the water as he jogged forward along the ramp and dove off of the dock. Based on this evidence, the Court said, the water was a discoverable condition by someone exercising reasonable care under the circumstances. Sadly, the Court said, if Galinari had merely looked at the water at the end of the dock, or stepped into the water to determine its depth, he would have easily determined that the lake was too shallow for diving. However, he took no precautionary measures prior to diving into the lake.

But Galinari argued that despite the open and obvious danger created by the shallow water, the doctrine of attendant circumstances precluded summary judgment. Attendant circumstances are an exception to the open and obvious doctrine and refer to distractions that contribute to an injury by diverting the attention of the injured party and reduce the degree of care an ordinary person would exercise at the time. An attendant circumstance must divert the attention of the injured party, significantly enhance the danger of the defect, contribute to the injury, and be beyond the control of injured party. The phrase refers to all facts relating to the event, including such circumstances as time of day, lack of familiarity with the route taken, lighting conditions, and accumulation of ice.

Galinari argued the "inviting nature of the water," "other water activity" and the "lack of warnings" were circumstances contributing to his belief that the water was safe for diving.

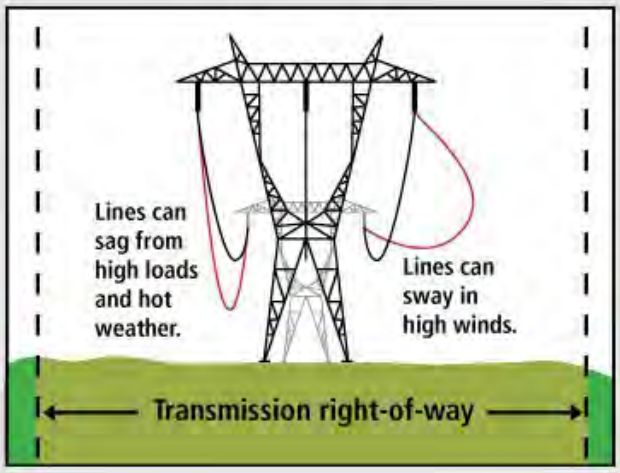
The Court noted that while the nature of the cool water may have been inviting on a hot Fourth of July, it could not consider that to be an attendant circumstance distracting appellant from the ordinary use of care. Certainly, the Court said, inviting water did not prevent appellant from being able to discover its depth. Nor did the existence of other docks and slides, the length of the dock from which he dove, and the presence of people and canoes in the water create a visual appearance that diving from the end of the dock was safe. It was clear from this testimony that the "attendant circumstances" which Galinari asserted were not distracting him from exercising due care because he did not even notice them. These circumstances in no way prevented him from exercising the ordinary amount of care or led him to believe that the water was safe for diving.



UTILITIES – EASEMENT:

POUNDING ON THE TABLE

The old trial strategy aphorism recommends that "if your case is weak on the law, pound on the facts; if it's weak on the facts, pound on the law; and if it's weak on the law AND facts, pound on the table."



It doesn't work all that well, as our hapless landowners in this case, the Wimmers, found out.

"Wimmer" rhymes with "winners," which is ironic given the outcome in this case. It seems the Wimmers owned land for which they had given the electric utility an easement for its power lines. That's pretty common – anywhere power or communications lines cross over land, or pipes run under the ground, there's probably an easement involved. The easement in the Wimmers case let Ohio Edison trim and remove trees as needed to keep vegetation clear of the lines.

The Wimmers didn't want to see much of their foliage cut away, but because trimming and removing trees costs money, the utility didn't want to do more than was absolutely necessary. Thus, there was a happy confluence of interest that continued for years.

Then came August 14, 2003. Some high-voltage transmission lines owned by the same Ohio Edison – hot from weather and the high electrical demand of the day – sagged into untrimmed trees just south of Cleveland. Three lines shorted out simultaneously. Normally, such a condition would have tripped an alarm at a monitoring center, letting technicians redistribute the load. But a bug in the software permitted what engineers call a "race condition," and the alarms didn't sound. The result was a cascading power failure that became the great North American Blackout of 2003, affecting 55 million people on the eastern seaboard and midwestern United States, as well as the province of Ontario.

After that day, everything changed. The public fumed, the media chastised, politicians fulminated. Changes had to be made. Ohio Edison was understandably humiliated by being the utility whose poor vegetation management started it all. Suddenly, occasional and desultory tree trimming became much more scorched earth. For the Wimmers, that meant that the power company's crews showed up at their place one day to clear-cut the entire easement.

The family took exception to the plan, and sued to stop it. While their case was wending its way through the courts – not very satisfactorily to them, because Ohio Edison was winning every step of the way – the Ohio Supreme Court handed down its decision in Corrigan v. Illuminating Co. Corrigan held that vegetation management issues fell within the exclusive jurisdiction of the Public Utilities Commission of Ohio. Common pleas courts had no authority to decide whether tree trimming and removal within easements was prudent or unduly robust.

The Wimmers recognized a break when they saw one, and promptly took a mulligan. Sadly, they fared no better before PUCO than they had in the state court system. That might be because Ohio Edison rolled out the IEEE standards for vegetation management to an expert witness who had inspected the easement, could identify the individual trees involved, and had facts and figure at her fingertips on the risk each tree posed to the power lines.

There wasn't any question that the easement permitted Ohio Ed to cut down trees. The only issue was whether it was reasonably necessary. The Wimmers didn't have any facts to counter the power company's showing. They didn't have any compelling legal arguments. All their lawyer could do was pound on the table, and argue that it was speculative that the trees would grow to be a hazard to the power lines.

Well, sure … the expert was only speculating that the trees would grow, and that they would reach the average height for that kind of tree, and for that matter, that there would ever be a high wind or ice storm that would cause them to ensnare the electric lines. Likewise, it's speculation that the sun will rise in the morning, based on nothing more than a sheer guess based on the fact that it's done so for the past 1.6 trillion days since the earth was formed. You see where this is going?

Neither PUCO nor the Ohio Supreme Court – which reviewed the agency's denial of the family's complaint – was impressed with the Wimmers' defense. "Who are you going to believe – me, or your own eyes?" their lawyer seemed to argue. Both answered that question. Actual evidence carried the day.

Wimmer v. PUCO, 131 Ohio St.3d 283, 964 N.E.2d 411 (Sup.Ct. Ohio, 2012). Ohio Edison owned a transmission-line easement running over the Wimmers' property. For years, Ohio Edison – in accordance with the company's general policy – trimmed and once in a great while removed trees growing in the easement. But its policy changed after the 2003 Northeastern United States blackout. When the company tried remove all of trees in the easement, the Wimmers sued to stop it. They went to court, where Ohio Edison won. But before the decision was final, the Ohio Supreme Court ruled in *Corrigan v. Illuminating Co.* that PUCO, not a court, was required to decide whether removal was reasonable.

The Wimmers then took their complaint to PUCO. After an evidentiary hearing, the commission ruled that Ohio Edison could remove the trees.

The Wimmers appealed.

Held: Ohio Edison was permitted to remove the trees. The Supreme Court held that there was "no question that the company has a valid easement," that "the tree is within the easement," and that the easement "grants the company the right to remove any tree within the easement that could pose a threat to the transmission lines."

The Wimmers nevertheless argued that PUCO's decision that the circumstances permitted Ohio Edison to remove the trees was not reasonable. They argued that Ohio Edison failed to present evidence that their trees "may interfere with or endanger the utility's transmission lines." The Wimmers maintained that the utility's evidence was "long on Ohio Edison's fear and speculation and short on hard facts."

The area of North America affected by the 2003 Blackout is marked in red.

The Court disagreed. It found that evidence presented to the commission showed that "the vegetation in question has the genetic disposition to grow to heights tall enough to potentially interfere with" the power lines, and that Ohio Edison determined that this vegetation may interfere or threaten to interfere with the transmission line and should be removed." The utility had presented an expert witness who had described the trees growing in the right-of-way – which she had personally examined – and explained that their average mature heights were well above the height of the power lines. She had testified that "even with continuous trimming and pruning, at least one tree had already grown to within four feet of the line, in violation of the National Electric Safety Code, which is published by the Institute of Electrical and Electronics Engineers and sets the industry-accepted safety standards. "

The Wimmers didn't present any contrary evidence or challenge the Ohio Edison witness's credentials, but rather just complained that her testimony was speculative. In order to overturn PUCO's determination, the Wimmers had to show that the decision was "so clearly unsupported by the record as to show misapprehension, mistake, or willful disregard of duty." They did not come close to doing that.

The Ohio Supreme Court did, however, "note with approval the commission's admonition that Ohio Edison 'attempt to minimize the impact to property owners, to the extent possible and without sacrificing safety and reliability, when performing [utility-vegetation-management] activities'."

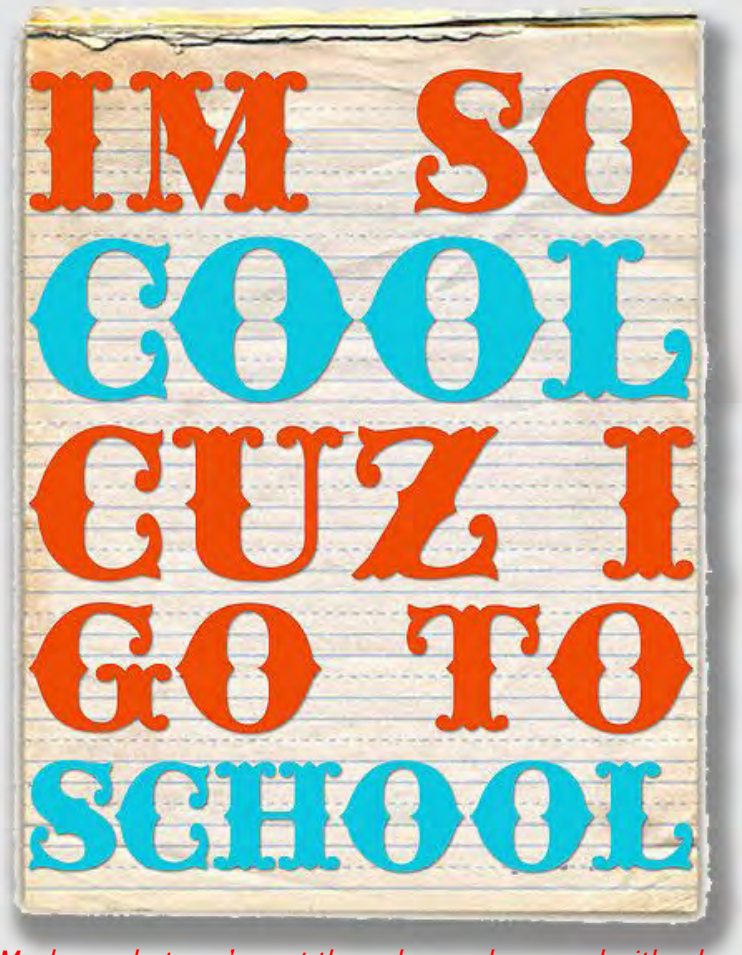
UTILITIES – EASEMENTS:

TRUST US … WE KNOW WHAT WE'RE DOING

Anyone who hasn't been living in a cave the past few years knows that sunny California has been just a little too sunny . The state and local governments have begged, pleaded and cajoled homeowners to save water. Some rather severe measures were implemented.

Then, the story broke that the California rich – like the rich everywhere – aren't exactly like you and me. At least, not like me. Sure there's a severe shortage. And sure people should cut back. But not rich people. "We pay significant property taxes based on where we live," one uber-wealthy property owner complained to the Washington Post. "And, no, we're not all equal when it comes to water."

Ah, yes, we know what entitlement must feel like. It's sort of like how the Andrewses, high-powered and sophisticated lawyers both, must have felt when they bought their house. You see, Mr. and Mrs. Andrews weren't your typical blundering homebuyers. He was a tax attorney – the high priests of the legal profession – and she was an appellate specialist. So when they settled on a beautiful homestead in the Ohio countryside next to a hillside covered with pine trees, they figured that they understood all those 'thences', distances and bearings to PK nailsets, and 'principal places of beginning', you know, the stuff other lesser lawyers put in deeds. So how could they have missed the easement that the prior owner had granted to the gas company for two pretty big gas transmission lines buried on the place?



Maybe so, but you're not the only people around with a law degree. Some folks at the gas company have them, too.

We're sure they must have read it. But these legal beagles apparently never dreamed the easement meant what it said.

About four years after they moved in, the gas company came along and said the pine trees on the hill were encroaching on the easement and had to go. Being frugal as well as sharp, the Andrewses sued in local court, acting as their own attorneys. They argued the gas company was stuck with the trees because it had let them grow there in the first place, and anyway, it hardly needed to clear-cut a swath 80 feet wide (25 feet on either side of the two pipelines and 30 feet in the middle).

Ol' Abe Lincoln was right: the Andrews had a pair of fools for clients.

As it turned out, Columbia Gas had a few lawyers, too, and these guys knew easements like Mr. Andrews knew tax. Maybe even better. The gas company removed the case to federal court where after a trial, the Andrewses had their heads handed to them. The Court of Appeals affirmed the defeat.

The court held that Columbia Gas hadn't acquiesced to the trees, because they weren't any there when the pipeline was built (but were planted by a later homeowner). The fact that the gas company hadn't cut a swath of trees from the easement in 55 years didn't matter, nor did it matter that the gas company was cutting such a wide right-of-way on neighboring easements. The court gave credence to the Columbia Gas and state utilities commission witnesses, who carried the day by carefully explaining all of the safety, economic and reasons for the gas company to want the trees removed.

The Court ruled that absent evidence to the contrary, a judge should presume that the parties contemplated that normal development would result in some changes in the use of the easement, even if it is unlikely that the parties anticipated specific developmental changes. New technology permitting aerial inspection, new federal regulations on pipeline safety and security, and new techniques of internal pipeline inspection, were all such "developmental changes," arguing for the gas company to take a heightened interest in keeping its easement clear.

Andrews v. Columbia Gas Transmission Corporation, 544 F.3d 618 (6th Cir., 2008). In 1947, Ruby W. Davies owned the piece of land in Licking County, Ohio, where the Andrews family now lives. She granted The Ohio Fuel Gas Company an easement to build and maintain a pipeline and to "lay, maintain, operate, repair, replace and remove other lines of pipe at any points on said premises upon the payment of like consideration" and the right of "ingress and egress to and from the same" over and across the property. Ohio Fuel agreed to "pay any damages which may arise to crops and fences from the laying, maintaining, operating and final removal of said pipe line." The agreement did not specify the width of the easement.

Pursuant to the agreement, Ohio Fuel installed two large high-pressure underground natural gas transmission pipelines through the property. The first, Line K-170, is 16 inches wide and was installed in 1947. The second, Line K-205, is 24 inches wide and was installed in 1957. The two pipelines run parallel to each other about 30 feet apart. Columbia Gas succeeded to Ohio Fuel's interest in the right of way and still operates and maintains the pipelines. The property changed hands several times over the past 50 years. In the late 1960s, the owner planted pine trees on the hillside behind the house for aesthetics and erosion control. The owner was unaware that he had planted the trees within 25 feet of Line K-170.

In March 2000, the Andrews bought the property with notice of the 1947 right of way agreement. By then, the pine trees had matured. The Andrews' decision to purchase the property was motivated in large part by the rural setting and the hillside landscaping.

Columbia Gas made no efforts to clear a right of way around the pipelines until 2004, when a work crew told the Andrews that the location of the pipeline required them to remove the stand of pine trees. Columbia Gas claimed the right to remove the trees and to maintain a right of way totaling approximately 80 feet, 25 feet on each side of the two pipelines and the 30 feet between the two pipelines. The Andrews sued Columbia Gas, seeking an injunction and asking for damages if the trees were cut. After trial, the court entered judgment in favor of Columbia Gas, relying on the testimony of Timothy Seibert, a long-time Columbia Gas employee responsible for overseeing the inspection and maintenance of the pipelines running through Andrews' property, and Paul Hollinger, an investigator for the Public Utilities Commission of Ohio, the state agency responsible for overseeing natural gas transmission lines. Based on their testimony, the Court concluded that a 50-foot right of way for each pipeline was "necessary and convenient and consistent with the language of the 1947 Davies easement." The court declined to apply the doctrines of laches, estoppel, or waiver, noting that those doctrines do not apply to expressly granted easements under Ohio law. Finally, the Andrews were not entitled to compensation for removal of the trees because the right of way agreement only provided recovery for damage to crops and fences. The Andrews appealed.

Held: Columbia Gas was entitled to the 80' wide right-of-way, and the Andrews were not entitled to damages for the lost trees. Under Ohio law, an easement is an interest in the land of another, created by prescription or express or implied grant, that entitles the owner of the easement to a limited use of the land in which the interest exists. The owner of the land subject to an easement has the right to use the land in any manner not inconsistent with the easement, but has no right to interfere with or obstruct the reasonable and proper use of the easement. The owner of an easement has the right to remove objects within it that unreasonably interfere with or obstruct its reasonable and proper use.

Where the terms of an expressly granted easement are ambiguous, the Court held, a judge must determine its scope from the language of the grant, the circumstances surrounding the transaction, and what is reasonably necessary and convenient to serve the purposes for which the easement was granted. Absent contrary evidence, a judge should presume that the parties contemplated that normal development would result in some changes in the use of the easement, even if it is unlikely that the parties anticipated specific developmental changes. Acquiescence for a long time in a certain construction of a grant of an easement, estops the assertion of a different construction.

The Andrews argued that Columbia Gas never cleared any area within its claimed right of way, and never objected when the prior owner planted the pine trees in the late 1960s. But lack of action prior to this time did not stop the gas company from asserting its rights now. If Columbia Gas had consistently cleared only 10 feet on each side of its pipelines, the Court said, the Andrews' argument would have more force. But the fact that the company did nothing is not fatal to its claim. Besides, the Court said, Columbia Gas did not acquiesce to the trees. No trees were growing there in 1947, making it reasonable for the trial court to conclude that Columbia Gas's conduct after the trees were planted did not evidence the original intent of the parties.

The Andrews also argued that Columbia Gas acquiesced by allowing trees near its pipelines on other properties. But the original intent of the parties is the primary inquiry, and only the conduct of the parties regarding the particular property at issue is relevant. The fact that the gas company may or may not have enforced its easement to its fullest width elsewhere has absolutely no bearing at all on whether it may enforce its easement to its fullest width on the Andrews property.

Captain Picard may well have landed at the plaintiff's table in this case...

Relying on testimony by expert witnesses, the lower court ultimately concluded that a 50-foot easement was reasonably necessary and convenient for the inspection, operation, and maintenance of each of the pipelines. The factual findings upon which he based that conclusion were not clearly erroneous. Although each easement case is factually unique, almost every court to construe an easement with similar language as the one at issue here has concluded that a 25-foot right of way on both sides of the pipeline was reasonably necessary and convenient. And it is beside the point to argue that federal regulations do not require natural gas companies to clear rights of way around their pipelines. Assuming that to be true, the regulations do not prohibit gas companies from clearing rights of way. Although federal law may be helpful in construing certain ambiguous easements, the rights granted in an easement ultimately flow from a private agreement. The difficulties Columbia Gas might face in conducting pipeline inspections was a primary ground for the lower court's conclusion that a 50-foot right of way was reasonably necessary and convenient for each of the pipelines on the Andrews property.

Columbia Gas offered evidence that the trees hindered the company's ability to conduct both aerial and close interval pipeline inspections. The presence of trees within the right of way interfered with aerial inspections. Additionally, trees within 25 feet of the center of a pipeline could hinder the company's ability to conduct close interval surveys and to excavate the pipeline in the event of an anomalous inspection or an emergency such as a leak or rupture.

The Andrews argued that Columbia Gas had safely maintained its pipelines for decades without removing the trees and that if an emergency ever arises, it can remove the trees quickly enough at that time. The trial court recognized this as well, but also reasoned that there were some circumstances in which the additional time to remove the trees could impose a substantial hardship on customers who would be without natural gas service during the excavation and the delay to remove the trees could unnecessarily jeopardize public safety. There was ample support in the record for the conclusion that a cleared right of way was reasonably necessary to ensure a safe, timely, and efficient excavation. The trial court also considered evidence that a 50-foot right of way is standard in the gas pipeline industry.

Finally, the Andrews challenged the trial court's determination that they are not entitled to damages for removal of the trees. Because the trees were inconsistent with the easement rights of Columbia Gas, the company was authorized to remove them.

UTILITIES - EASEMENTS:

EASEMENT CREEP

It's a common enough problem when a deal gets cut by people who later leave the company, retire, pass on, whatever. Over the years newer, younger Turks come along, who redefine the deal to suit the newer aims and needs of the company.

So it was with some gas line easements in the Mohican forest area of eastern Ohio. We've discussed previously why a careful description of the bounds of an easement is such a good idea. Here's another example. When the easements for these three gas pipelines were written, they didn't contain any description of the width of the right-of-way being provided to the easement holder. Over the first 40 years or so, the gas company kept the right-of-way cleared to 10 or 15 feet. But in 2003, the company suddenly decided it required 20 to 25 feet, feet, and it began cutting accordingly.

A pipeline runs through it … but how wide is the easement?

Even that wasn't enough, and so in 2006, the gas company sued a church camp and some other recreational landowners for a declaratory ruling that the easement was really 50 feet wide.

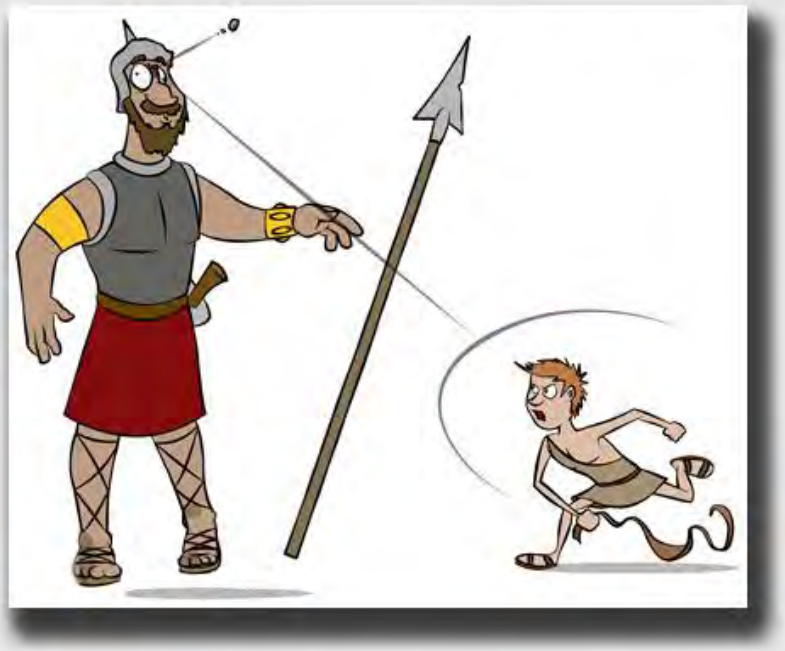
The Federal district court denied summary judgment to the gas company. The gas company's argument, reduced to its essence, was that it must obey new, stiffer federal laws and regulations in the wake of 9/11, and those require a 50-foot wide easement. The court wasn't buying it.

Finding no language to help it in the easements themselves, the court looked at other factors. It seemed pretty clear that nothing in the way the gas company had operated for 40 years or so supported a finding that the parties understood all along that they were dealing with a 50-foot wide easement. The gas company's arguments that its operations required 50 feet failed — the court said the best it could justify based on the evidence was 29 feet wide. And the court was troubled that the gas company had met with the church in 1965, when the church was buying the campground, and told church representatives that it was looking at a 10-15 foot right-of-way. Thirty-eight years later, it told the church it needed a 20-25 foot wide easement.

Sometimes, you have to dance with the girl who brung ya …

None of this meant that after a full trial, the court might not feel differently. But for moment, it was David 1, Goliath 0. And – reading the handwriting on the wall – Columbia Gas Transmission Corp. ended the litigation several months later.

Columbia Gas Transmission Corp. v. First Congregational Church, Slip Copy, 2007 WL 4350769 (N.D. Ohio, Dec. 11, 2007). Columbia Gas owned three gas pipelines that traverse the Church's camping retreat property. Two of the easements had been granted by the Muskingum Conservancy District, the Church's predecessor-in-interest, providing the right to ingress and egress, the right to lay, maintain, operate, repair, replace and remove the pipe, provided the pipe would be buried so as not to interfere with the cultivation of the land. A second easement had been granted for the sole purpose of drilling for oil and gas and to use the premises for pipelines, water lines, pumps, tanks, structures and stations necessary or convenient in connection with drilling, provided that the pipelines be buried and the easement holder pay for all damages to growing crops and trees.

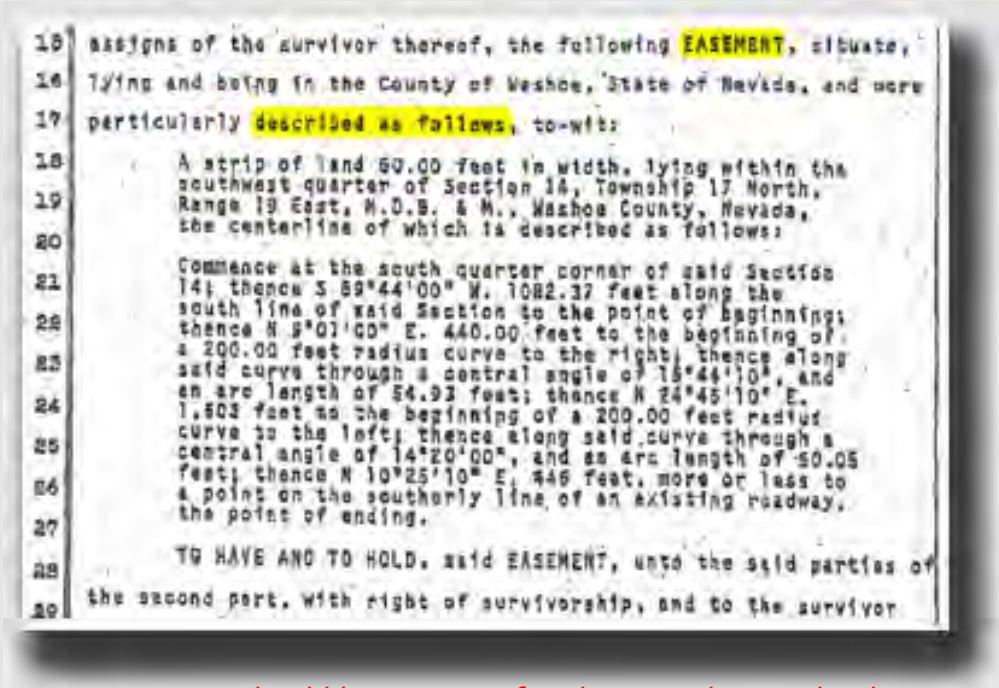


Sometimes the little guy really does win...

When the Church bought the campground in 1965, gas company representatives showed the clergymen the clearings for the pipelines, which were between 10 and 15 feet wide. In 2003, the gas company expanded its cleared right-of-way to 20 to 25 feet. Three years later, the gas company told a church member it owned a 50-foot right of way, and asserted that the Department of Homeland Security required this for gas pipelines. The gas company cleared all the trees within 50 feet of one of the pipelines without informing the church of its intention. The gas company dumped brush piles in excess of 55 feet from the centerline of the pipeline, needlessly changing the topography of the area. Shortly thereafter, the gas company sued the church for injunctive relief that its easement entitled it to clear a 50-foot right-of-way on a second pipeline. The church wasn't alone: several other landowners were sued as well, and the court consolidated all of the cases. The Church filed a counterclaim seeking declaratory judgments and injunctive relief that Columbia Gas was not entitled to a 50-foot right-of-way in its easements for its pipelines, and sought damages from the previous tree clearing along the one pipeline. Columbia Gas moved for summary judgment.

Held: The gas company's motion was denied. Under Ohio law, the granting of an easement includes a grant of all things necessary for the use and enjoyment of the easement. Where the complete terms of the easement are not expressed in the instrument granting it, the extent and limitation of the easement are ascertained from the language of the grant, from the circumstances surrounding the transaction, and by what is reasonably necessary and convenient to serve the purpose for which the easement was granted. The holder of an easement may not increase the burden upon the servient estate by engaging in a new or additional use of the easement. However, without specific language to the contrary, an easement holder is entitled to vary the mode of enjoyment and use of the easement by availing himself of modern inventions if by doing so he can more freely exercise the purpose for which the grant was made.

Here, the easement agreements were ambiguous at best, and provided no basis for determining what the parties had intended. As to what is reasonable, it is true that the gas company has a duty to maintain its storage pipelines in accordance with federal law. It has a policy of not allowing any growth more than five feet tall within the right-of-way. However, its evidence of use of the easement and of hazard to pipelines from tree roots supports a clearing of only about 29 feet at most. Furthermore, Ohio courts have also looked to use and acquiescence and have refused to extend easements to fifty feet where the gas company has allowed mature trees growing within fifty feet of the pipeline.



assigns of the survivor thereof, the following EASEMENT, situate, lying and being in the County of Washoe, State of Nevada, and more particularly described as follows, to-wit:

A strip of land 60.00 feet in width, lying within the southwest quarter of Section 14, Township 17 North, Range 19 East, M.D.B. & M., Washoe County, Nevada, the centerline of which is described as follows:

Commence at the south quarter corner of said Section 14; thence S 89°44'00" W. 1082.37 feet along the south line of said Section to the point of beginning; thence N 9°01'00" E. 440.00 feet to the beginning of a 200.00 feet radius curve to the right; thence along said curve through a central angle of 15°44'10", and an arc length of 54.93 feet; thence N 24°45'10" E. 1,503 feet to the beginning of a 200.00 feet radius curve to the left; thence along said curve through a central angle of 14°20'00", and an arc length of 50.05 feet; thence N 10°25'10" E. 446 feet, more or less to a point on the southerly line of an existing roadway, the point of ending.

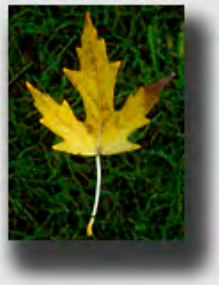
TO HAVE AND TO HOLD, said EASEMENT, unto the said parties of the second part, with right of survivorship, and to the survivor

Easements should be very specific – because the people who wrote them won't always be around.

Even if the regulations suggested a fifty-foot wide clearing were necessary, the Court said, the parties never contemplated such a right-of-way at the time of the granting of the easement. The gas company argued that 50 feet is necessary for it to conduct aerial patrol. The Court said it presumed that the parties contemplated normal develop-mental changes in the use of the easement, but nothing in the evidence ever suggested that anyone contemplated a 50-foot right-of-way.

The parties' experts' discussion of the relevant safety issues is only one question among many that the Court was willing to consider in determining the dimensions and scope of the easement. The Court also considered the language of the grants and the circumstances surrounding the transactions. Neither of those entitled the gas company to an injunction.

The Church argued that the gas company should be estopped from arguing a larger easement than 25 feet is reasonably necessary and convenient, because it not only used a small right-of-way in the past, but its representative affirmatively showed the Church's representative the clearings of the trees so that the Church would know what to expect — showing him clearings of 10 to 15 feet in width. Further, in 2003, the gas company told a member of the Church it needed 25 feet, not 50. The Court said these conversations and interactions, coupled with the gas company's failure to remove mature trees until now, might demonstrate enough evidence of use and acquiescence to estop the gas company from arguing for 50 feet.



UTILITIES – EASEMENTS:

WHO YOU GONNA CALL?

It's not easy to defeat a utility company holding an easement for transmission lines, especially after the power outage of 14 years ago. The great Blackout of August 2003, after all, started primarily when power lines sagged into trees in the Cleveland, Ohio, area.

Yeah, it's tough to beat the power company and its chainsaw-wielding minions … but the Corrigans did it for awhile. They had granted an easement to a Cleveland electric utility for a transmission line. In the wake of the blackout, the utility told the Corrigans (and thousands of others) that it would vigorously pursue cleaning up vegetation in the easements. This mean, among other things, no trees within 25 feet of the lines.

So who you gonna call?

The Corrigans had a big silver maple that was about 22.5 feet from the lines. They loved that tree, so they hired an arborist at considerable expense to trim it away from the lines and to inject the tree with a hormone to slow growth. Tough luck, the utility said, it's coming down anyway.

So who do you call when the power company shows up with chainsaws and a gleam in its institutional eye? The Corrigans raced to the local common pleas court, and asked for an injunction. The trial judge agreed, and the Court of Appeals concurred. Both of those courts sided with the Corrigans that the utility could only cut trees that were "a possible threat to the transmission lines."

It seemed important to the Court of Appeals that the community had not experienced any service interruptions since the Corrigans had pruned the tree, although that reasoning's pretty thin. The tree has to only fall once, cascading one failed transmission lines into a continental disaster. But the Court seems to have been favorably impressed by the amount of money the Corrigans had spent getting the tree professionally trimmed.

The utility saw an issue here that was bigger than just the Corrigans and their lone silver maple tree. It framed the question as being just who was in charge here, the 88-odd common pleas courts spread throughout Ohio or the public utilities commission. The Ohio Supreme Court agreed that this was indeed the issue, and ruled that the inclusiveness of the state statute and regulations delegating power to the Public Utilities Commission of Ohio gave PUCO the sole authority to decide questions of vegetation management.

We have to admit that the appellate decision had left us with the uneasy feeling that the Court of Appeals'

attempt to do some rump justice here may have made it much more difficult for a utility to exercise its easement rights. To be sure, a utility being sued in a case like this would have to be prepared with an expensive and eye-popping case that graphically depicts the dangers that a tree in the transmission path — even a well cared-for tree — can pose.

The Ohio Supreme Court's holding provides electric utilities a much friendlier forum in which they must litigate issues of vegetation management, although that may not be a bad thing. Utilities have to walk a fine line, incurring ire if property owners think trees were pruned too aggressively, and facing universal fury (not to mention catastrophe) when service is interrupted by vegetation coming into contact with transmission and distribution lines.

Corrigan v. Illuminating Co., 122 Ohio St.3d 265 (Sup.Ct. Ohio 2009). The Corrigans granted a quitclaim deed to The Illuminating Company, the local electric utility, for a transmission line to run through their yard. The easement gave the Illuminating Company the right to "enter upon the right-of-way occupied by said transmission lines … with full authority to cut and remove any trees, shrubs, or other obstructions upon the above described property which may interfere or threaten to interfere with the construction, operation and maintenance of said transmission lines." The Corrigans had a large silver maple tree located about 22.5 feet from the centerline of the transmission lines. At considerable expense, they had their own arborist trim the tree and inject slow-growth hormone to keep the tree from posing a risk to the transmission line. Nevertheless, the Illuminating Company decided to remove the tree, and the Corrigans sued for an injunction.

The trial court granted an injunction barring the Illuminating Company from removing the tree, and the Court of Appeals agreed. The electric utility, seeing the issue as one that transcended the issue of one tree, but rather affected the company's ability to manage vegetation in its rights-of-way throughout the state.

Held: The Corrigans argued that the issue was purely a contract matter, but the Supreme Court disagreed. Noting that "[t]here is no question that the company has a valid easement and that the tree is within the easement" and the easement's language was unambiguous that the utility had the right to remove trees that might interfere with its transmission lines, the Court said the issue was the correctness of "the company's decision to remove the tree instead of pruning it." That was "really an attack on the company's vegetation-management plan [and] that type of complaint is a service-related issue[] which is within PUCO's exclusive jurisdiction."

The statute creating PUCO to administer and enforce these provisions provides that the commission hears complaints filed against public utilities alleging that "any regulation, measurement, or practice affecting or relating to any service furnished by the public utility, or in connection with such service, is, or will be, in any respect unreasonable, unjust, insufficient, unjustly discriminatory, or unjustly preferential." This jurisdiction is "so complete, comprehensive and adequate as to warrant the conclusion that it is likewise exclusive."

The Court used a two-part test to reach its determination. First, it asked whether the commission's administrative expertise was required to resolve the issue in dispute, and, second, whether the act complained of constituted a practice normally authorized by the utility.

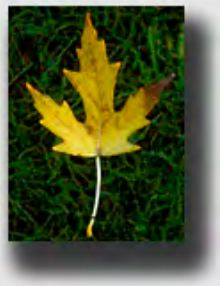
The Ohio Administrative Code chapter on electric service and safety standards requires that utility companies establish a right-of-way vegetation-control program to maintain safe and reliable service. The Code requires that each electric utility inspect its electric-transmission facilities (circuits and equipment) at least once every year, in accordance with written programs, and takes a number of factors into consideration such as arcing, sagging, and line voltage as well as regulatory requirements from OSHA, FAA, and the Army Corps of Engineers. In addition, electric utilities are required to comply with the American National Standard Institute's National Electrical Safety Code.

The utilities are required to submit their programs to the Commission, which will resolve any disputes as to the efficacy of the plan.

The Court concluded that the Ohio Administrative made it clear that PUCO's administrative expertise is required to resolve the issue of whether removal of a tree is reasonable.

The second part of the test determined whether the act complained of constitutes a practice normally authorized by the utility. Again, the Court said, the Administrative Code made it clear that vegetation management is necessary to maintain safe and reliable electrical service. Thus, the Supreme Court ruled, the second part of the test was satisfied, and the Corrigan's complaint fell within the exclusive jurisdiction of PUCO.

That meant that the Illuminating Company's decision that the silver maple interfered or threatened to interfere with its transmission line was a service-related question, and one that the Corrigans could only dispute in front of PUCO. The Court of Appeals judgment was thrown out.



UTILITIES – EASEMENTS:

CLIVEN BUNDY HAS A GUN… OHIO HAS THE COURT OF CLAIMS

Recently, we had a kerfluffle in our home county over pipeline company employees giving notice to people that they would be coming onto private land to survey for a new underground pipeline. The nature lovers on the left united with the libertarians and assorted wingnuts on the right to argue that the state could not let these pipeline renegades trespass on our sacred private homesteads in order to plan an environmentally cataclysmic pipeline. Think "pipeline construction equals K-T extinction event," and you get the idea.

You may remember that famed anti-government rancher Cliven Bundy had a similar problem – government functionaries trespassing on his land just because he was letting his cattle trespass on government land. His approach was much more direct, employing caliber 5.56 and ending up with two criminal trials in two different federal courtrooms (and two "not guilty" verdicts, we hasten to add). Clive's approach was every bit as effective as that of our home county protesters… which is to say "not very."

Our *ad hoc* coalition of pipeline opponents lost, of course. They, like many landowners, were unhappily surprised to learn that state laws – written by state legislators, after all – permit state employees, agents, and even employees and agents of public utilities to come onto private land at any time to conduct surveys for public works projects.

That's what happens when you get in the way of progress. You get both disappointment and a pipeline through your side yard. But sometimes, some landowners can bite back.

Ron and Maggie bit back, maybe not hard, perhaps just nipped back a little, when the Ohio Dept. of Transportation sent some local yokels onto their land to remove three trees believed to be in a highway right-of-way. But no one checked the r-o-w to be certain, and half of the three trees – yes, your math is right, 1.5 of the 3 trees – were not ODOT's to cut. What's more, the county boys seemed to have run bulldozer races through Ron's and Maggie's protected wetlands, laying waste to a fragile ecosystem, harming the habitat of the woolly salamander (or something like that), and pissing off the landowners.

Ron and Maggie demanded justice in the Ohio Court of Claims. By the time the Court was done whittling down their claims, they got their measure of justice – but it was a small measure, indeed.

Kerns v. Ohio Dept. of Transportation, 2017-Ohio-7154 (Ct. of Claims, July 25, 2017): Ronald Kerns and Margaret Ruth Leslie owned 18 acres of mostly wooded property, including federally protected wetland with vernal pools that provide a habitat for salamanders. When the State of Ohio had to replace a bridge on a road

in front of the property, the State notified the owners that its representatives would be coming onto the land to survey, that they would use due care in doing so, but if there was any damage to the land, the State would pay for it. Like most states, Ohio had laws that authorized state employees to come onto private property for such purposes.

The day after Christmas 2014, crews from the Portage County Engineer's Office came onto the property and laid waste, cutting down trees inside and outside of the state right-of-way, running heavy equipment across the property, dumping wood chips in the vernal pools (resulting in ecological damage to the wetlands on the property); and leaving large drag marks where larger trees were removed. Ron and Maggie asserted that trees and vegetation on their property were damaged or removed without either their permission or the permits required by the EPA.

Anyone see the irony here?

The engineer testified he asked Portage County to remove a hickory tree that was larger than 18″ wide, a swamp white oak that was over 50" wide, and a dead tree trunk. He thought the three trees that he had marked to be removed were all within the right-of-way. When he learned that more than those three trees had been removed, he sent an assistant to check on the damage. The assistant found that heavy equipment had been on the property, that the wetland was disturbed, that wood chips had been cast into the vernal pools, that many more trees had been cut down, and that vegetation had been disturbed.

Jason Knowles, a certified arborist, used the Trunk Formula Method to calculate a core value for each type of tree. According to Knowles, Ohio has its own guide for what the value of a tree should be. Knowles examined the tree stumps to determine the species and size of the trees that were removed. Knowles determined that a total of 18 trees were removed, in an area that was 60 feet long by 60 feet wide. Although Knowles observed damage to the vernal pools from the wood chips, and damage to the soil due to the heavy machinery tracks, he did not determine a value for either soil compaction or vegetation that was removed. Knowles testified that the value of the trees that were removed totaled $18,200.

ODOT's expert, Charles Flagg – a real estate appraiser – testified the damage to the plaintiffs' property had no impact on its market value, in that the property was densely wooded, and the loss of trees was not substantial and had no effect on the market value of the property.


ODOT promised that its crews would be careful not to needlessly disturb the land...

Held: The Court first concluded that the Portage County Engineer did not trespass on the property. A trespass occurs when a person, without authority or privilege to do so, physically invades or unlawfully enters the private premises of another. Because state law granted ODOT the privilege to cut, trim, or remove any grass, shrubs, trees, or weeds growing or being within the limits of a state highway, and enter private land to conduct a survey for plans and specifications for proposed projects, the agency and its representatives had a privilege to enter plaintiffs' property and, therefore, did not commit a trespass.

Although ODOT could not be liable for cutting down vegetation within the right-of-way, the Court ruled, plaintiffs could prevail if they were to prove that ODOT removed trees outside of the right-of-way. Here, ODOT directed Portage County to remove three trees in what it assumed was the right-of-way. But the bitternut hickory was not within the right-of-way, and the swamp white oak straddled the right-of-way boundary. ODOT thus trespassed when its agents removed those trees. Accordingly, the magistrate recommends judgment in favor of plaintiffs on their claim of trespass with regard to the swamp white oak and the large bitternut hickory tree.

While Ron and Marge could not prove that ODOT was liable for treble damages under *O.R.C.* § 901.51 – because they could not prove ODOT was reckless – ODOT nevertheless was responsible for the removal of one and a half trees on plaintiffs' property outside of the right-of-way (one of the trees straddled the right-of-way boundary line, although it is not clear how ODOT could have removed only its half). Still, the Court said, the removal of those trees "was not so extreme as to amount to a substantial deprivation of all of the rights of ownership of plaintiffs' property" and thus did not rise to an unconstitutional "taking" of property in violation of the 5th and 14th Amendments.

What's more, because ODOT only told the County to remove three trees, it ws not responsible for the additional trees, including two green ash trees, two, 12" wide bitternut hickory trees, and twelve saplings, that the County Engineer destroyed.

Right-of-way? Who needs a right-of-way?

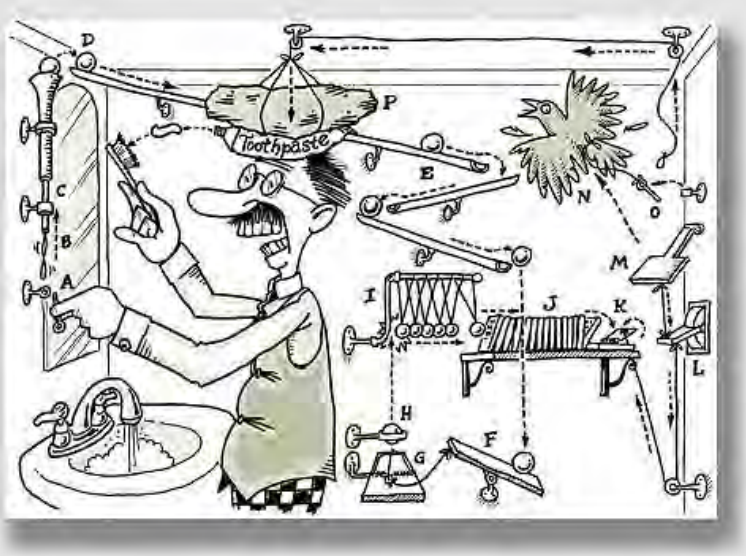
When a party trespasses and cuts trees that are part of a woodland mix and not unique, the ordinary measure of the harm is the difference in the fair market value before and after the cutting. However, the Court said, "there is an exception… in which restoration costs may be recovered in excess of diminution in fair market value when real estate is held for non-commercial use, when there are reasons personal to the owner for seeking restoration, and when the diminution in fair market value does not adequately compensate the owner for the harm done." The Court held that "destruction of trees that form part of an ecological system of personal value to the owner justifies restoration cost as a measure of damages. In addition, in an action based on temporary injury to noncommercial real estate, a plaintiff need not prove diminution in the market value of the property in order to recover the reasonable costs of restoration, but either party may offer evidence of diminution of the market value of the property as a factor bearing on the reasonableness of the cost of restoration." Diminution in value is a factor to be considered in determining whether restoration costs are reasonable, but it is not itself an element of damages that must be considered. Finally, in cases involving trespass that results in the removal of trees or other vegetation, "a landowner is entitled to recover reasonable restoration costs, plus the reasonable value of the lost use of the property between the time of the injury and the restoration."

Plaintiffs' expert arborist testified that the swamp white oak had an appraised value of $8,498.00, and that the large hickory tree had an appraised value of $4,345.00. The Court found that he Trunk Formula Method is an acceptable way of determining damages in the case.

The appraised value of the trees may not necessarily be the same as restoration cost, the Court said. While there was no change in the market value of plaintiffs' property as a result of the tree cutting, certainly, the Court said, the three trees "had some value, especially the swamp white oak, in that it was located in a federally protected wetland on plaintiffs' property, and plaintiffs testified credibly that the trees form part of an ecological system of personal value to them." The Court found the plaintiffs were entitled to $12,843.00 in reasonable restoration costs and reasonable value of the lost use of the property between the time of injury and the restoration.

UTILITIES – LIABILITY:

RUBE GOLDBERG GOES TO COURT



In our years in the business, we have see negligence claims that run from the ridiculous to the absurd: such as, the corrections officer who sued cellphone carriers because inmates made calls during which they conspired to shoot him, or the victim of a falling limb who sued an electric utility because its tree trimmer should have noticed that a tree that the company had no right to trim was dangerous.

The case we're looking at here features a tortuous and complex argument that would make Rube Goldberg envious. A tree branch fell in a storm and knocked out power to a subdivision. Matthew Phillips and his father decided to fire up their standby generator and plug it into the house system, a few hours of darkness being too big an inconvenience for them to bear.

Something happened. No one's sure what. But, if you believe the Phillips' lawsuit, the downed branch crossed some wires, which fed power past and around a transformer, bypassing several shorts to ground, into the house, into the power lines, bypassing other ground circuits, into and through meter boxes, into the ground line of the home but not safely to ground, but rather into the power line leading to the generator, where the electricity finally leapt into Matthew, seriously injuring him.

Of course it's unlikely that Matt or his Dad did anything stupid, like failing to disconnect the master switch connecting the house to the power grid. Much more likely that electricity defied several laws of physics, and that the blame rested with the tree trimming company for not having pruned back the branches that fell in the storm. Or maybe it was ball lightning. Or Zeus throwing lightning bolts.

The problem was a practical one: Matt's family didn't have the wherewithal to pay the medical expenses. Neither did Zeus. But the electrical utility and its vegetation management contractor did. Thus, the inevitable lawsuit followed.

Fortunately for all of us, common sense prevailed. The courts pointed out that Asplundh, the tree trimming company, had a contract with AEP, and that the contract did not create a duty between Asplundh and Matt.

The contract only let Asplundh cut where the utility told it to cut. The Court very reasonably pointed out that if Asplundh had what Matt said it should have done – that is, to trim trees on the Phillips property – it would have been a trespasser and subject to treble damages.

Where the claim is nonfeasance – that is, where the defendant is alleged to have wronged the plaintiff by not doing something it should have done – the law demands that the duty the defendant owes the plaintiff must be very clear. Where the contract does not permit the tree trimmer to do anything other than what the utility tells it to, the trimmer lacks the ability to exercise any independent authority. In that case, the fact that it did not do that which it was not allowed to do doesn't make the trimmer wrong. Instead, it makes it prudent.

Sadly, in this litigious society, it doesn't make it lawsuit proof.

Phillips v. American Electrical Power, 2011 Ohio 6731 (Court of Appeals, Jefferson County, 2011). An early March thunderstorm rolled through Wintersville, Ohio. During the storm, the power went out when a tree branch fell across an Ohio Power electrical distribution line. Matt and his father tried to power their house with a portable electric generator. In the process of trying to operate the portable generator, Matthew received an electrical shock and suffered very severe injuries, including permanent brain damage.

Matt sued American Electric Power Company, Inc. and a laundry list of affiliates and subsidiaries, as well as Asplundh (which had a tree maintenance contract with AEP) for negligence. His reasoning, as far as the courts were able to surmise, was that one or more rotten trees were blown down in the storm, which caused the power to go out, which caused the Phillips men to try to connect their portable generator to power the house wiring. Matt claimed that the power line wires had became coupled due to the fallen branches, creating a completed electrical circuit, which sent electricity around the electrical transformer on the pole outside the Phillips residence – bypassing the grounding wires located at the pole – and down the service line to the house, through the meter box into their breaker box (somehow bypassing the grounding line at the breaker box), into the ground circuit wiring of the house, then around an electrical generator transfer switch the Phillips had installed, then through the grounding line to a secondary electrical outlet box, where it connected to the box's metal chassis. Matt posited a variety of theories as to how the electricity passed through him via the outlet box, the portable generator, or from the ground.

At some point, the Phillips settled with everyone except Asplundh. The tree service then filed a motion for summary judgment, arguing it owed no duty of care to Matthew because AEP determined the locations where Asplundh was assigned to work, and because AEP never assigned Asplundh to inspect or service the area at issue in this case. The trial court granted summary judgment, finding no evidence that AEP assigned "Asplundh to work on the portion of the electrical circuit in the area of the tree which allegedly caused the injuries to the Plaintiff. Nor have the Plaintiffs produced evidence that it was the responsibility, or duty, of … Asplundh to determine which parts of the AEP distribution circuit were to be trimmed. Rather the evidence establishes that … AEP … determined what trimming was to be done and then would assign that work to … Asplundh." Finally, the trial court said, no evidence showed that Asplundh created a condition which caused the tree to fall or failed to trim the tree after being put on notice of the need to do so.

Matthew appealed.

Held: Asplundh was not liable for Matt's injuries.

Matt's lawyers fired a blunderbuss of claims against Asplundh: ordinary negligence, failure to maintain AEP's easement, failure to remove foreseeable safety hazards, and failure to fulfill its contractual duties to inspect and manage vegetation for AEP. Matt claimed he subjected to an ultra-hazardous danger by Asplundh's recklessness, and that Asplundh breached a duty imposed by safety statutes and regulations regarding electrical and hazardous substances, and vegetation management. He also claimed Asplundh failed to warn, prevent or remedy unnamed defects, and that Asplundh caused them to be exposed to hazardous or toxic substances.

No one knows exactly what happened, but it was a cinch that Asplundh Tree Service wasn't to blame.

The Court of Appeals noted that Matt's allegations against Asplundh "are intrinsically connected to the contract to perform right of way maintenance. Thus, the overall claim is for negligent or reckless performance of a contract," and every issue on appeal boiled down to one question: did Asplundh owe a duty of care to Matthew in light of the contract that Asplundh entered into with AEP.

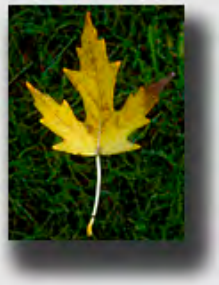
The Court noted that the existence of a duty of care is fundamental to a negligence claim: "It is rudimentary that in order to establish actionable negligence, one must show the existence of a duty, a breach of the duty, and an injury resulting proximately therefrom. The existence of a duty depends on the foreseeability of the injury." Matthew contended that Asplundh owed him a duty of care, despite the absence of anything specific in the Asplundh contract that would have required the removal of the tree that apparently fell in the Phillips' yard. Matt argued that Asplundh should have inspected the area near the Phillips home because there had been many prior electrical outages in that general area. He maintained that Asplundh was involved in the decision-making process to select which of AEP's circuit areas were to be trimmed each year, despite the evidence showing that only AEP made the final decisions about where Asplundh would do its vegetation maintenance and trimming. Essentially, Matt contended that Asplundh's authority to make suggestions at its annual meeting with AEP to determine vegetation maintenance was enough to give rise to a duty to protect Matt from the Rube Goldberg chain of events that began with a dangerous tree. In other words, Matt said that Asplundh's failure to convince AEP to conduct tree maintenance on or near the Phillips place was itself a form of negligence.

The Court of Appeals disagreed, holding that none of Matt's claims were supported by the record. In a case of nonfeasance, it said, the existence of a legal duty is critical and, unless a duty is established, Asplundh's failure to act cannot create liability. In this case, AEP personnel testified that Asplundh had never been directed to trim trees in the area where the Phillips lived. Asplundh was permitted by its contract to patrol for danger trees only where AEP told it to do so. AEP picked those areas according to its own internal data, devoting attention to the 8% of circuits with the worst performance in the previous year. There simply was no independent decision-making or freelancing involved on Asplundh's part. While some of Asplundh's employees may have made suggestions at the annual planning meetings, the record reflected that the final decision was made by AEP, and there is no evidence to contradict this conclusion.

The Court of Appeals agreed with Asplundh that it could not have a duty to trim a tree in the Phillips yard unless it first had a right to do so, and there are very specific statutes which prohibit a person from cutting, removing or injuring trees on private property. If Asplundh had no contractual authority to act as AEP's agent and enter the area where the tree was located, the Court said, it would have been trespassing had its personnel entered the property, and would have been committing a fourth degree misdemeanor crime and setting itself up for treble damages under O.R.C. § 901.51.

Matt argued that his injury was so foreseeable that the foreseeability of the injury alone created a duty for Asplundh to remove the dangerous trees. The Court rejected this argument, holding that foreseeability alone is not always sufficient to establish the existence of a duty, especially in nonfeasance situations in which the injured party is alleging that the defendant failed to affirmatively act to come to aid of a person in danger or failed to prevent a third party from harming another. In such situations, a duty arises only if the defendant shares a "special relation" with the injured party that justifies the imposition of the duty. Here, the Court said, the alleged relationship between Asplundh and Matt "only exists by virtue of the tree-trimming contract between Asplundh and AEP. No amount of foreseeability can create a contractual duty where none otherwise exists."

The appellate court concluded trial that Asplundh was under no contractual obligation to investigate or perform tree maintenance services in the area of the Phillips residence where the accident occurred: "Because there is no proof in this record that a duty existed," the Court of Appeals held, "the trial court was correct in its judgment.



UTILITIES - LIABILITY:

SOMEBODY OWES ME MONEY

A recent creative lawsuit we covered concerned a South Carolina prison guard who sued area cellphone carriers for having recklessly built towers close to a prison. Some of the inmates obtained contraband cellphones, which a few used to arrange a hit on the unpopular Mr. Johnson. Although riddled with bullets, he survived to become a plaintiff. The cell companies were liable for his injuries, plaintiff Johnson claimed, because they built towers near the prison, enabling inmates to get 4G service. Of course, the towers also ensured excellent coverage to the motorists on I-20, only a half mile from the prison. The appellate court's tallest order was addressing all the ways that Mr. Johnson's lame attempt to find someone with a deep pocket was simply vibrating nonsense.

"OK," you say, "but that was just some ambulance chaser's attempt to shake down a phone company (an attempt most of us applaud once a month when the cell bill arrives). "But that cannot happen in the staid world of arboriculture law."

Donald Westlake could have used Lisa Huff for the dust cover model ...

In response to that sentiment, we give you the Huffs. After a tree broke off in a storm and hit Lisa Huff on the noggin, she had little to go on other than the abiding sense that someone owned her money. But who? Sure she could sue the property owner. Any regular reader of this blog knows that. But the Huffs needed a deep pocket. After all, Lisa had been injured. *Someone* had to pay.

That was when some canny lawyer noticed that the tree was located near power lines. Sweet! Power lines suggested the electric company, and everyone knows that the electric company has lots of money. Just look at how much we send them every month.

Problem: the tree wasn't exactly inside the Ohio Edison easement. But that was a mere technicality to the Huffs, who argued that Ohio Edison hired Asplundh Tree Service to keep the trees trimmed away from the power lines, and that both the power company and the tree service must have known the tree that fell on Lisa was dangerous. This was the tort claim, and it might have merit if Lisa could prove they had actual or constructive notice of the tree.

But never stop with just alleging a tort, where you can pile on other legal theories as well. The Huffs' attorney suggested a contract count, too. The Huffs, so the legal theory went, were the intended third-party beneficiaries of the contract between Ohio

Ed and Asplundh. A third-party beneficiary can sue for a contract breach just as if she had signed the document herself. Asplundh had a contractual obligation to inspect and trim the trees to as to keep the public safe, the Huffs argued, and that included the passing public, which included the walking public, which included Lisa. Anything to get Ohio Edison and Asplundh to open their checkbooks!

It was a novel theory, but the Ohio Supreme Court shot it down. The Ohio Edison – Asplundh agreement was intended to secure services that would keep the power lines clear. While the agreement did require that Asplundh perform the trimming in a safe manner so as not to hurt anyone while it was doing it, that requirement only lasted as long as Asplundh was trimming. The Court wasn't about to interpret the contract so broadly as to grant contract causes of action to millions of people who were never intended by the signatories to gain party status to a contract. You think the courts are busy now (and insurance premiums are high)? Just wait …

The takeaway here is a passing observation by the Court that parties to a contract can avoid the litigation spawned here by the Huffs simply by stating clearly that their contract is intended to benefit no one but each other. Including such a provision is a cheap preventative to the kind of nonsense lawsuit decided here.

If you think this case is on the outer fringes of causation – like the suit against the cellphone towers – just wait…

Huff v. FirstEnergy Corp., (2011), 130 Ohio St.3d 196 (Supreme Court of Ohio). During a heavy thunderstorm, a large sugar maple tree split about 25 feet above the ground. A large limb from the tree hit Lisa Huff, who was walking along a country road, causing serious and permanent injuries. Lisa G. Huff was injured during a walk along a country road.

Ohio Edison maintained an easement near the tree, but the tree was outside the easement. The tree did not present a hazard or threat to the power lines owned by the utility. Ohio Edison had hired Asplundh Tree Expert Company to inspect trees and vegetation along its power lines in this area and to remedy any situation in which trees or vegetation might affect the lines. Ohio Edison and its contractors carry out this work to ensure that adequate clearance is maintained around electric lines. Generally, Ohio Edison deferred to Asplundh's decisions regarding tree and vegetation maintenance and would perform an overview inspection only to determine whether any vegetation was growing into the electrical wires or equipment. Asplundh had last been in the area where Huff's injury occurred three years before.

Huff sued Ohio Edison and Asplundh, as well as Ohio Edison's parent company, FirstEnergy, and the people who owned the land on which the tree was located. She alleged that Ohio Edison and Asplundh were liable for her injuries based upon their failure to inspect, maintain, and remove the tree or to warn the landowner and the public of the danger raised by the tree.

Ohio Edison and Asplundh filed motions for summary judgment. Ohio Edison argued that it didn't know that the tree was dangerous, that it owed and assumed no duty to Huff regarding the tree, and that it was not negligent and did not proximately cause or contribute to Huff's injuries. Asplundh argued that it owed no duty to Huff and that its activities did not proximately cause the injury to Huff.

The Huffs argued that Ohio Edison had contracted with Asplundh to inspect and maintain trees within the easement and that Asplundh failed to recognize that the tree in question was diseased and a hazard, and failed to remove the tree when it was on site in May 2001. The Huffs also argued that Ohio Edison was responsible for maintaining trees within and around its easement, that Ohio Edison was aware of the tree based upon its location within an inspection zone, and that Ohio Edison had a duty to remove the diseased tree.

The trial court found that while the tree leaned about ten degrees away from the power lines, "there is absolutely no credible evidence about when the tree began to lean or if it was leaning because of the way it grew." It also noted that the Huffs admitted that no one knew when the tree became a hazard. With no proof that Ohio Edison or Asplundh actually inspected the tree or removed any branches, the court held that the Huffs failed to show that either company ever had actual or constructive notice of any decay of the tree. Due to the tree's location – leaning away from the power lines with no limbs near the power lines – Ohio Edison and Asplundh owed no duty to the Huffs.

After examining the contract between Ohio Edison and Asplundh, it concluded that the Huffs were not third-party beneficiaries under the contract. It accordingly granted them summary judgment.

The Court of Appeals cited the portion of the contract providing that "[Asplundh] shall plan and conduct the work to adequately safeguard all persons and property from injury" could be read in two ways: (1) a narrow reading that provides Asplundh must protect all persons from injury while Asplundh works on the site or (2) a broad reading that requires Asplundh to protect all persons from injury at all times, regardless of when the work is done. The court found the contract to be ambiguous, and reversed the trial grant of summary judgment to Ohio Edison and Asplundh.

The companies appealed to the Ohio Supreme Court.

Held: Summary judgment was granted.

The Court found that the contract between Ohio Edison and Asplundh did not create any duty to the Huffs as third-party beneficiaries. The Court employed an "intent to benefit" test. Under this analysis, if the promisee intends that a third party should benefit from the contract, then that third party is an "intended beneficiary" who has enforceable rights under the contract. If the promisee has no intent to benefit a third party, then any third-party beneficiary to the contract is merely an "incidental beneficiary," who has no enforceable rights under the contract.

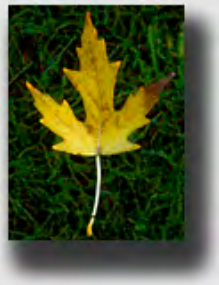
The law generally presumes that a contract's intent resides in the language the parties chose to use in the agreement. Only when contract language is unclear or ambiguous, or when the circumstances surrounding the agreement invest the language of the contract with a special meaning will extrinsic evidence be considered in an effort to give effect to the parties' intentions. For a third party to be an intended beneficiary under a contract, there must be evidence that the contract was intended to directly benefit that third party. Generally, the parties' intention to benefit a third party will be found in the language of the agreement.

In this case, the Court ruled, nothing in the agreement between Ohio Edison and Asplundh showed any intent to benefit the Huffs. The Huffs pointed to a part of the contract that they argue shows such an intent: an attachment to the agreement entitled "FirstEnergy Vegetation Management Specifications" that provided the "Contractor shall plan and conduct the work to adequately safeguard all persons and property from injury." The Huffs contended that this statement assigns to both Ohio Edison and Asplundh clearly defined duties – to safeguard the public – for the Huffs' benefit.

The Court held however, that the contract wasn't entered into for the general benefit of the public walking on public roads, but instead was designed to support Ohio Edison's electrical service. The purpose of the contract is to ensure that Ohio Edison's equipment and lines are kept free of interference from trees and vegetation. The remainder of the contract sets forth how this work is to be carried out, including the standards by which Asplundh is to perform its work, the limits on liability for the performance of the work, and the necessary qualifications for the Asplundh employees who were to perform the work. The contract contains no language establishing an ongoing duty to the general public on behalf of either Ohio Edison or Asplundh.

The vegetation management provision incorporated into the contract provides that "[t]he objective of all work covered by these documents is to maintain reliable and economical electric service, through effective line clearance and satisfactory public relations." The Court observed that working near electrical lines has its inherent hazards, and it was thus "clear that this portion of the agreement establishes safety guidelines designed to protect persons and property from injury while the contractor performs its work. This period is finite: until the work has been completed … [T]he agreement cannot be plausibly read to require Ohio Edison or Asplundh to safeguard *all* persons from injury at all times, regardless of when the work is completed."

The Supreme Court concluded that the Huffs thus failed to qualify as intended third-party beneficiaries of the Ohio Edison – Asplundh agreement.



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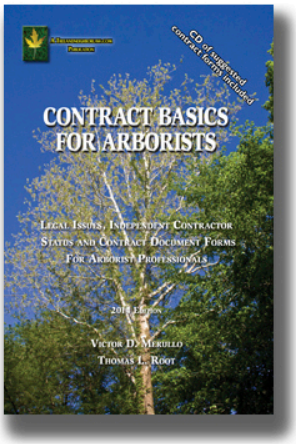

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He has been a featured speaker on legal issues relating to the law of trees across the United States and Canada. He studied horticulture at The Ohio State University while working in his family's business, devoted primarily to arboriculture and interior and exterior landscaping.

Victor Merullo is considered a leading expert in the law of trees and authored the first publication devoted exclusively to the law of trees, *Arboriculture & the Law*, in 1992. Other publications include *Contract Basics for Arborists*.

Thomas L. Root holds a masters degree in journalism and a juris doctor degree from The Ohio State University. He has been writing on arboriculture law topics for over a decade, and works with Mr. Merullo on the arboriculture blog treeandneig orlaw log.com. He co-authored include *Contract Basics for Arborists* with Mr. Merullo.