

No. 47245-7-II

**Court of Appeals, Div. II,
of the State of Washington**

Jennifer Mustoe,

Appellant,

v.

Xiaoye Ma and Anthony Jordan,

Respondents.

Brief of Appellant

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1. Introduction

This case presents a question of first impression in Washington: Is a landowner's privilege to engage in self-help to trim overhanging roots and branches limited by a duty to act in good faith and in such a way as not to cause unnecessary damage to the trees themselves? In this case, Anthony Jordan dug a trench at the boundary line of the property of Xioye Ma and cut overhanging roots from two trees that stood on the neighboring property of Jennifer Mustoe. Jordan severed nearing 50 percent of the root systems of the trees, rendering the trees a total loss. The trial court dismissed Mustoe's claims for damages on summary judgment. Mustoe appeals.

2. Assignments of Error

Assignments of Error

1. The trial court erred in dismissing Mustoe's claims on summary judgment where there were material issues of fact and Jordan and Ma were not entitled to judgment in their favor as a matter of law.

2. The trial court erred in not recognizing that property owners doing work on their own property have a duty to act in good faith and avoid excessive damage to the property of their neighbors.

Issues Pertaining to Assignments of Error

Whether a landowner's privilege to engage in self-help to trim overhanging roots and branches is limited by a duty to act in good faith and in such a way as not to cause unnecessary damage to property of another (assignments of error 1 and 2).

Whether Jordan and Ma's conduct constituted a private nuisance (assignment of error 1).

Whether cutting overhanging roots or branches in a manner that directly injures trees on the land of another implicates the timber trespass statute, RCW 64.12.030 (assignment of error 1).

3. Statement of the Case

Jennifer Mustoe, a single woman, moved to 109 Raintree Loop in Rainier, Washington, around December 2006. Anthony Jordan, who was living with Xiaoye Ma at 111 Raintree Loop, was quite friendly to Mustoe at first, offering to come over and help her with work in her home. In time, Mustoe grew uncomfortable with Jordan's attention. Jordan would walk on Mustoe's property without permission. (CP at 155) Eventually, Mustoe made it clear she did not want Jordan on her property.

Jordan has been hostile to Mustoe ever since. For example, during a July 4th party at the Mustoe home, Jordan yelled obscenities at Mustoe and her guests from the roof of Ma's home. Jordan also caused a commotion in the front of the property regarding parking. (CP at 218-19 and CP at 220-21)

Around October 2013, without advance notice to Mustoe, Jordan dug a trench along the common property line, approximately 12 feet long and about 2 feet deep, exposing the roots of two Douglas Fir trees that stood on the Mustoe property. (CP at 156, ¶ 5) Jordan severed the roots with a chain saw. Jordan later told a neighbor that Jordan was building a structure to "piss

off” Mustoe and that he hoped the trees would fall on Mustoe’s home and not his. (CP at 137).

Mustoe hired an arborist, Galen Wright, to inspect the trees. (CP at 156, ¶7) Both Wright and Tom Hanson, Ma and Jordan’s arborist, concluded that Jordan had removed about 40 percent of the trees’ roots, rendering the trees a total loss.¹ (CP at 55-76).

Jordan claimed he cut the roots because they were undermining the foundation of Ma’s home.(CP at 124). However, structural engineer, Vince McClure, found no evidence of roots of the trees in question undermining the foundation. The only defect he found on the foundation was a small shrinkage crack unrelated to the tree roots. (CP at 139-154).

Jordan’s neighbor, Michael Cameron, testified to Jordan’s real motivation:

On or about October 20, 2013, Anthony “Tony” Jordan stopped me on the road and asked if I could do some welding for him. Tony Jordan pointed out the tree on Jennifer’s property and said he is an expert on trees. Tony Jordan said the trees were damaged and diseased. He said he was doing a structure to protect his house. He said he wanted the tree to fall on Jennifer Mustoe’s house. We discussed pouring a footer for the structure, but he said he could not do that because that would require a permit. Mr. Jordan said he was doing structure to “piss off” Jennifer Mustoe.

¹ (“It is my observation of the custom and practice in the residential and urban tree service industry and community that while an adjoining owner can prune roots and branches from neighboring trees that encroach into their property, that such pruning must be conducted in a reasonable and prudent manner and not done in a manner to destroy or significantly harm the tree on the other property.”) (CP at 56, ¶ 4 , Galen Wright Dec)

(CP at 137).

Mustoe brought this action against Ma and Jordan, seeking damages for injury to trees pursuant to common law and to RCW 64.12.030 and other applicable statutes. (CP at 6-7). She later amended her complaint to include damages for nuisance.(CP at 31). Ma and Jordan brought a motion for summary judgment, arguing that Mustoe's claims were baseless. (CP at 14-29.) Mustoe brought a cross-motion for partial summary judgment, arguing that Jordan had a duty to use reasonable care in trimming the roots to avoid causing damage to Mustoe's trees. (CP at 125).

The trial court dismissed Mustoe's claims, agreeing with Ma and Jordan that there was no Washington precedent supporting Mustoe's claims where there was no trespass onto Mustoe's land. (RP, Dec. 5, 2014, at 16-17).

4. Summary of Argument

The trial court erred in dismissing Mustoe's claims on summary judgment. Jordan and Ma were not entitled to judgment in their favor as a matter of law. The trial court failed to recognize that Jordan and Ma owed a duty to Mustoe to exercise reasonable care to avoid damage to Mustoe's property. This Court should formally recognize, as a matter of first impression in this state, that a landowner's right to engage in self-help to trim overhanging roots and branches is limited by a duty to act in good faith and in such a way as not to cause unnecessary damage. Mustoe presented evidence that Jordan and Ma breached this duty, causing unreasonable

damage to her trees. This Court should reverse summary judgment dismissal of Mustoe's claims and remand for further proceedings.

Jordan and Ma's excavation was a nuisance because it was unreasonable in relation to the harm it caused to Mustoe's trees. Because a reasonable fact finder could have found in Mustoe's favor, this Court should reverse summary judgment dismissal of Mustoe's nuisance claim.

Finally, the plain language of the timber trespass statute applies where the cutting of the overhanging roots injured and destroyed the trees standing on Mustoe's property. This Court should reverse summary judgment dismissal of Mustoe's timber trespass claim.

5. Argument

5.1 Summary judgment orders are reviewed *de novo*.

This Court reviews summary judgment orders *de novo*, engaging in the same inquiry as the trial court. *Failla v. FixtureOne Corp.*, 181 Wn.2d 642, 649, 336 P.3d 1112 (2014). Summary judgment is only proper where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). A material fact is one on which the outcome of the litigation depends, in whole or in part. *Schmitt v. Langenour*, 162 Wn. App. 397, 404, 256 P.3d 1235 (2011). The court views the facts in a light favorable to the nonmoving party, and the motion should be granted only if the evidence supports only one reasonable conclusion. *Failla*, 181 Wn.2d at 649.

5.2 The trial court erred in dismissing Mustoe’s claims because Jordan had a duty to act in good faith and avoid excessive damage to Mustoe’s neighboring property.

Washington courts have not yet directly addressed the central issue in this case: whether a property owner can be liable for cutting tree roots that cross the property line when it is reasonably foreseeable that the trees on the neighboring property will suffer serious damage as a result. In *Gostina v. Ryland*, 116 Wash. 228, 199 P. 298 (1921), the court voiced approval for the general proposition that an adjoining landowner can engage in self-help and trim overhanging branches and roots. *Id.* at 233 (“His remedy in such cases is to clip or lop off the branches or cut the roots at the line.”). However, the court also acknowledged that the right of self-help does not extend to removing the tree itself. *Id.* at 232 (“but he may not cut down the tree, neither can he cut the branches thereof beyond the extent to which they overhang his soil”). *Gostina* does not immunize a landowner against liability for damage to the trimmed trees. Whether the landowner owes a duty of care to prevent damage to the trees themselves is an issue of first impression in Washington.

Other Washington cases provide guidance on this issue. “[I]t is now generally recognized that each member of society owes a legal duty, as well as a moral obligation, to his fellows. He must so use his own property as not to injure that of others.” *Sandberg v. Cavanaugh Timber Co.*, 95 Wash. 556, 561, 164 P. 200 (1917); *see also, Karasek v. Peier*, 22 Wash. 419, 426, 61 P. 33 (1900) (*sic uteretur, ut alienum non laedas*: every one must so use his own property

as not to injure the rights of others). In *Sandberg*, the court held that a timber company and its employees had a duty of care to prevent the spread of fire onto neighboring property where it caused damage. *Id.* at 561-63. In *Karasek*, the court held that a property owner could be enjoined to remove a fence he maliciously built to annoy his neighbor and damage his neighbor's property. These cases demonstrate, generally, a duty of reasonable care to prevent unnecessary damage to neighboring property.

The Washington Supreme Court has recognized this duty as an exception to the common enemy doctrine in water trespass cases. *Currens v. Sleek*, 138 Wn.2d 858, 983 P.2d 626 (1999). Under the common enemy doctrine, in its original form, a landowner could engage in unlimited self-help against surface waters even if injury resulted to others. *Currens*, 138 Wn.2d at 861. Courts in Washington and other states have softened the doctrine with exceptions under which a landowner **can** be held liable for resulting damage to a neighbor. *See Id.* at 862. In *Currens*, the court adopted the “due care” exception, under which “a landowner will be shielded from liability only where the changes in surface water flow are made both in good faith and in such a way as not to cause unnecessary damage.” *Id.* at 868.

The *Currens* court noted that this duty of due care “serves to cushion the otherwise harsh allocation of rights under the common enemy doctrine,” which would otherwise allow unlimited self-help against surface waters regardless of any damage to neighboring property. *Id.* at 864. Similarly, here, a landowner's right to self-help against overhanging roots and branches

should be cushioned by a duty of due care to prevent damage to the neighbor's trees themselves.

A duty of due care is consistent with the general principles in *Gostina*, 116 Wash. 228. As explained in *Gostina*, a landowner's right of self-help against overhanging roots and branches allows the landowner to trim the offending limbs, but does not allow the landowner to remove the tree itself. A duty of due care ensures the landowner cannot constructively remove the tree by trimming the limbs in a manner that could foreseeably cause damage to the tree itself.

Other states have directly addressed this issue and recognized the same duty of due care. In *Booska v. Patel*, 24 Cal.App.4th 1786, 30 Cal.Rptr.2d 241 (1994), the California appellate court held that a landowner could not cut back branches or roots so as to destroy the neighboring tree in question.

In *Booska*, the roots of a 30- to 40-year old Monterey pine tree on Booska's land had grown across the property line into Patel's land. *Booska*, 24 Cal. App. 4th at 1788. Patel hired a contractor to excavate along the boundary to a depth of three feet, severing the roots of the tree. *Id.* Booska's expert testified that the cutting of the roots compromised the safety of the tree, requiring its removal. *Id.* Booska had the tree removed at his own expense and sued Patel for damages. *Id.*

The appellate court rejected Patel's argument that he had "an unlimited right to do anything he desires on his property regardless of the consequences to others." *Id.* at 1791. The court emphasized, "No authority so holds. No person is permitted by law to use his property in such a manner

that damage to his neighbor is a foreseeable result.” *Id.* Rather, the court held that the privilege of cutting overhanging branches and roots is limited by principles of reasonableness:

[A landowner] has a privilege to make use of the land for his own benefit, and according to his own desires ... but it has been said many times that this privilege is qualified by a due regard for the interests of others who may be affected by it. **The possessor’s right is therefore bounded by principles of reasonableness, so as to cause no unreasonable risks of harm to others in the vicinity...** Each owner of adjoining land may trim on his own side trees and plants standing on the boundary line, **provided he does so without unreasonable injury to the interest of his neighbor...** The proper test to be applied to the liability of the possessor of land ... is whether in the management of his property he has acted as a reasonable person in view of the probability of injury to others. ... **Thus, whatever rights Patel has in the management of his own land, those rights are tempered by his duty to act reasonably.**

Id. (citing authorities) (emphasis added). The same reasoning applies to the Washington authorities cited above. A landowner’s right to trim overhanging branches and roots is limited by a duty of due care to avoid unnecessary damage to the tree itself.²

² The courts of New York have reached the same conclusion. “At common law, adjoining property owners, such as the Rubins, are permitted to trim tree branches and roots which encroach onto their property from a neighboring property... However, the right to self-help is limited, in that an adjoining landowner’s right to engage in self-help ‘does not extend to the destruction or injury to the main support system of the tree.’” *Fliegman v. Rubin*, 2003 NY Slip Op 51542(U), ¶¶ 2-3, 781 N.Y.S.2d 624, 624 (App. Div. 2003) (unpublished) (quoting 1 NY Jur 2d, Adjoining Landowners § 57).

The *Booska* case is factually very similar to this case. The roots of Mustoe's trees had grown across the property line. Jordan, unilaterally and without any notice, excavated the property line and removed almost 50 percent of the roots of Mustoe's trees. The trees were a total loss. (CP at 7, 31, 73, 466) Mustoe incurred thousands of dollars to remove the trees. Jordan, a self-proclaimed tree expert, knew that the trees would be damaged and were likely to fall. (*see* CP at 137). Jordan's actions were not only negligent, but malicious. *See Id.* (The purpose of Jordan's excavation and building project was to "piss off" Mustoe.)

Just as in *Booska*, Mustoe has presented evidence of Jordan's negligent or malicious acts, in breach of his duty of due care to prevent unnecessary damage to Mustoe's property. Just as in *Booska*, this Court should reverse summary judgment and remand for further proceedings.

Jordan tried to justify his actions by claiming the trees damaged the foundation of Ma's house. There is no evidence the roots of Mustoe's trees were causing any damage to Ma's home. (CP at 140-141) There **is** evidence that the cracks in the foundation resulted from causes unrelated to Mustoe's trees. *Id.* The evidence reveals that the real purpose of Jordan's root cutting was to intentionally or recklessly damage the trees on Mustoe's property in order to harass and annoy Mustoe. (CP at 155-169, 229, 137-138) Even if there was evidence of damage to Ma's house, it would only create a dispute of material fact regarding the reasonableness of Jordan's actions, precluding summary judgment. Jordan and Ma's privilege to trim overhanging roots and branches was limited by a duty of reasonable care to prevent unnecessary

damage to Mustoe's trees. The trial court failed to recognize this duty. This Court should reverse and remand for further proceedings.

5.3 The trial court erred in dismissing Mustoe's nuisance claim because Jordan and Ma's acts on the Ma property unreasonably interfered with Mustoe's use of her own property.

"A nuisance is an unreasonable interference with another's use and enjoyment of property." *Vance v. XXXL Dev., LLC*, 150 Wn.App. 39, 42, 206 P.3d 679 (2009) (holding a property owner could sue neighbor for nuisance due to a retaining wall constructed on a neighbor's property that negatively impacted the sale of the home). Nuisance is statutorily defined as follows:

Nuisance consists in unlawfully doing an act, or omitting to perform a duty, which act or omission either annoys, injures or endangers the comfort, repose, health or safety of others, offends decency, or unlawfully interferes with, obstructs or tends to obstruct, or render dangerous for passage, any lake or navigable river, bay, stream, canal or basin, or any public park, square, street or highway; or in any way renders other persons insecure in life, or in the use of property.

RCW 7.48.120.

The existence of a nuisance is determined on "two broad factors, neither of which may in any case be the sole test to the exclusion of the other: (1) the reasonableness of the defendant's use of his property, and (2) the gravity of harm to the complainant." *Vance*, 150 Wn.App. at 43 n. 3. Even a landowner operating lawfully and by best practices available can still be liable for a nuisance if the activity is an unreasonable use relative to those of a neighbor. *Jones v. Rumford*, 64 Wn.2d 559, 562-63, 392 P.2d 808 (1964).

A private nuisance plaintiff can recover damages for restoration costs and for discomfort and annoyance. *Riblet v. Spokane-Portland Cement Co.*, 45 Wn.2d 346, 354, 274 P.2d 574 (1954).

Even if Jordan and Ma's excavation was not negligent, it was still actionable as a nuisance because it was unreasonable in relation to the harm it caused to Mustoe's trees. Whether a defendant's actions are reasonable or not in a private nuisance action is a factual question for the jury and not subject to summary adjudication. *Riblet v. Ideal Cement Co.*, 54 Wn.2d 779, 784, 345 P.2d 173 (1959); *see also Security State Bank v. Burk*, 100 Wn.App. 94, 102, 955 P.2d 1272 (2000) (whether something was done in a commercially reasonable manner precluded summary judgment). There were disputed issues of material fact on Mustoe's nuisance claim. Because a reasonable fact finder could have concluded that Jordan and Ma's excavation was unreasonable in relation to the harm it caused Mustoe's trees, summary judgment dismissal of Mustoe's nuisance claim was improper. This Court should reverse and remand for further proceedings.

5.4 The trial court erred in dismissing Mustoe's alternative claim for damages under the timber trespass statute.

Washington's timber trespass statute, RCW 64.12.030, states in pertinent part (emphasis added):

Whenever any person shall cut down, girdle, or otherwise injure, or carry off any tree, [...] on the land of another person, [...], without lawful authority, in an action by the person, city, or town against the person committing the

trespasses or any of them, any judgment for the plaintiff shall be for treble the amount of damages claimed or assessed.

As noted in Part 5.2, above, a landowner's lawful authority to engage in self-help intrimming overhanging branches and roots does not extend beyond the property line. Unreasonable trimming that injures those portions of the tree that do not cross the property line fits within the plain language of the timber trespass statute. It is injury to a tree on the land of another, without lawful authority. Although the statute uses the word "trespass," it does not require entry on the land of another person; it only requires injury to a tree that is on the land of another. Thus, even cutting of overhanging roots and branches, if done in a manner that damages the portion of the tree that stands on the land of another, implicates the statute.

This result is consistent with the decision in *Happy Bunch, LLC v. Grandview N., LLC*, 142 Wn. App. 81, 173 P.3d 959 (2007). In *Happy Bunch, Grandview*, a property development company, felt it was necessary to construct a retaining wall on the boundary line with the neighboring property, owned by Happy Bunch. *Id.* at 85-86. However, there were twelve trees standing on or near the property line, mostly on the Happy Bunch side. *Id.* "Because the roots and trunks of the trees extended onto Grandview's property, Wammack [Grandview's contractor] believed that they would interfere with the construction of the retaining wall. Accordingly, he decided to remove the trees." *Id.* at 86. Happy Bunch did not agree to the removal of the trees. *Id.* Grandview removed the trees anyway. *Id.* at 86-87.

The court affirmed Grandview’s liability under the timber trespass statute, holding that “a tree, standing directly upon the line between adjoining owners, so that the line passes through it, is the common property of both parties, whether marked or not; and trespass will lie if one cuts and destroys it without the consent of the other.” *Id.* at 93. This is consistent with the principle of self-help for overhanging roots and branches but liability for unreasonable resulting damage to that portion of the tree that stands upon land of another.

Here, as in *Happy Bunch*, Jordan apparently believed it was necessary to remove nearly 50 percent of the trees’ root systems in order to build a structure on Ma’s property—a structure he was building for the specific purpose of annoying Mustoe and in the hope that the trees would fall on Mustoe’s house. Even though Jordan’s intentional cutting of the roots took place on the Jordan/Ma side of the property line, “trespass will lie” where the cutting injured and destroyed the trees on Mustoe’s property. This Court should reverse summary judgment dismissal of Mustoe’s timber trespass claim and remand for further proceedings.

6. Conclusion

Jordan and Ma’s privilege to engage in self-help to trim overhanging roots and branches was limited by a duty to do so in good faith and in such a way as not to cause unnecessary damage. Mustoe presented evidence that Jordan and Ma breached that duty, causing damage to her trees. Additionally, Jordan and Ma’s use of the Ma property constituted a nuisance, and the

cutting falls within the plain language of the timber trespass statute. All of Mustoe's alternative claims should have survived summary judgment. This Court should reverse the trial court's order and remand for further proceedings.

Respectfully submitted this 8th day of June, 2015.

S/ Joseph Scuderi
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CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the State of Washington, that on June 8th, 2015, I caused to be served a true copy of the foregoing document, by the method indicated below, and addressed to each of the following:

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s/ M. Katy Kuchno
Legal Assistant to Joseph Scuderi

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