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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Table of Contents

1. **Introduction**.....4

2. **Argument**.....5

   2.1 **No Washington cases have addressed the issue of whether there is a remedy for unreasonable damage caused by the trimming of overhanging roots and branches.**..... 5

   2.2 **Jurisdictions that have addressed the issue have held that the right of self-help is limited by a reasonableness standard.**..... 6

      2.2.1 **Many of the cases cited by Jordan and Ma do not address the issue presented in this case and can largely be disregarded.**..... 6

      2.2.2 **Those cases that have addressed the issue have applied a reasonableness standard.** 10

   2.3 **Washington's softening of the common enemy doctrine is an apt analogy for this Court to follow.**.....13

3. **Conclusion**..... 15

Table of Authorities

Table of Cases

Cass v. Dicks, 14 Wash.75, 44 P. 113 (1896) 13

Currens v. Sleek, 138 Wn.2d 858, 983 P.2d 626 (1999) 13, 14

Forbus v. Knight, 24 Wn.2d 297, 163 P.2d 822 (1945) 5

Gostina v. Ryland, 116 Wash. 228, 199 P. 298 (1921) 5, 13

Karasek v. Peier, 22 Wash. 419, 61 P. 33 (1900) 6, 14

Sandberg v. Cavanaugh Timber Co., 95 Wash. 556, 164 P. 200 (1917) 6, 14

Cases From Other Jurisdictions

Alvarez v. Katz, 2015 VT 86, __ A.3d __ (June 19, 2015) 6, 7, 11, 12

Booska v. Patel, 24 Cal.App.4th 1786, 30 Cal.Rptr.2d 241 (1994) 10, 11, 14

Fliegman v. Rubin, 2003 NY Slip Op 51542(U), 1 Misc. 3d 127(A),
781 N.Y.S.2d 624 (App.Div.2003) 11

Harding v. Bethesda Reg'l Cancer Treatment Ctr., 551 So.2d 299 (Ala. 1989) ..11, 12

Herring v. Lisbon, 823 N.W.2d 493 (N.D. 2012) 8

Higdon v. Henderson, 304 P.2d 1001 (Okla. 1956) 12, 14

Jones v. Wagner, 624 A.2d 166 (Pa.Super. 1993) 10

Lane v. W.J. Curry & Sons, 92 S.W.3d 355 (Tenn. 2002) 9, 14

Melnick v. C.S.X Corp., 540 A.2d 1133 (Md. 1988) 9

Rababy v. Metter, 30 N.E.3d 1018 (Ohio Ct. App. 2015) 8, 14

Yellow Book of Ny L.P. v. Dimilia, 188 Misc.2d 489,
729 N.Y.S.2d 286 (Dist.Ct. 2001) 11

1. Introduction

The Brief of Respondents re-frames the issue on appeal and, in doing so, entirely misses the point. The issue before the court is not a landowner's right to self-help; it is whether Mustoe has a remedy for unreasonable damage to her trees. Mustoe acknowledges that a property owner has a right to engage in self-help to trim overhanging roots and branches. Mustoe's appeal asks the Court to recognize that this right of self-help is limited by a duty to act in good faith and in such a way as not to cause unnecessary damage to the trees themselves, giving Mustoe a remedy for Jordan and Ma's breach of that duty.

This is especially true when undisputed testimony shows Mr. Jordan's acts in this matter were done intentionally to cause harm to Jennifer Mustoe and her property. There is evidence and testimony in this case to support that the actions of the Respondents were done out of spite. (CP at 137)

It is a basic principle of law that a property owner must so use his own property as not to injure that of others. An unlimited right of self-help regardless of damage or the manner of the self-help is performed would conflict with this principle. Jordan and Ma should be liable for the injury their use of Ma's property unreasonably caused to Mustoe's property. The trier of fact should weigh the evidence and determine whether or not Ma and Jordan are liable or not. This Court should reverse and remand for further proceedings.

2. Argument

2.1 No Washington cases have addressed the issue of whether there is a remedy for unreasonable damage caused by the trimming of overhanging roots and branches.

In *Gostina v. Ryland*, 116 Wash. 228, 199 P. 298 (1921), the Washington Supreme Court approved the general proposition that a landowner can engage in self-help to 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"). Contrary to Respondents' arguments, neither *Gostina* nor any other Washington case immunizes a property owner against liability for damage to the trimmed trees. *Gostina* held only that the property owner's remedy for overhanging branches was limited to self-help, not injunction. *Gostina* said nothing about whether the owner of the trees has a remedy for damages to the tree itself.

Forbus v. Knight, 24 Wn.2d 297, 163 P.2d 822 (1945), adds nothing to the analysis. *Forbus* involved a claim by the neighbor for damage caused by allegedly encroaching roots. There is no such claim here. *Forbus* does not provide any insight as to whether the owner of a tree has a remedy for damage caused by self-help trimming of roots or branches.

What is certain is that Washington law recognizes the general principle that every landowner "owes a legal duty, as well as a moral

obligation, [to] 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).[1] This principle should apply to the trimming of overhanging roots and branches. A property owner has a right to engage in self-help to trim overhanging roots and branches, so long as he does so in a manner that does not cause unreasonable damage to his neighbor's property, including the remainder of the tree.

2.2 Jurisdictions that have addressed the issue have held that the right of self-help is limited by a reasonableness standard.

2.2.1 Many of the cases cited by Jordan and Ma do not address the issue presented in this case and can largely be disregarded.

Jordan and Ma rely heavily on the recent decision of the Vermont Supreme Court in *Alvarez v. Katz*, 2015 VT 86, ___ A.3d ___ (June 19, 2015). In *Alvarez*, Alvarez, the owner of the tree, sued Katz for an injunction prohibiting Katz from trimming the roots of the tree in order to construct a two-story addition on the Katz home, because such cutting would cause the premature death of the tree. *Id.* at ¶¶ 2-5. The court vacated the injunction and affirmed the right of self-help to trim overhanging roots and branches,

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[1] Jordan and Ma criticize Mustoe's citation of these two cases, arguing they are factually distinguishable. *Sandberg* involved a fire; *Karasek* involved a spite fence; both involved the principle that every landowner owes a duty to avoid causing unreasonable injury to neighboring property. The same principle and duty should apply to Jordan and Ma.

but expressly did not address whether the right might be limited by a duty of care or rule of reasonableness:

> The law in Vermont, and overwhelmingly from other jurisdictions, resolves these competing interests in favor of the right of Berger and Katz to enjoy the use of their land by allowing them the right to remove the encroaching roots and branches. **Potential limitations requiring that such removal be done reasonably and not negligently are not before the Court here.**

Id. at ¶ 21 (emphasis added).

The *Alvarez* court was correct that the issue was not before it. Alvarez had not sued for damages resulting from actual cutting. There was no evidence that cutting had been done unreasonably, negligently, or in bad faith, because no cutting had been done yet. Rather, Alvarez had sued for an injunction to prevent imminent harm for which damages would be an inadequate remedy. *See Id.* at ¶ 23. There is evidence in the record that Mr. Jordan's activities were negligent, reckless, or done intentionally to cause harm to Ms. Mustoe and her property. Because the issue that Mustoe has presented in this appeal was expressly not addressed by the *Alvarez* court, *Alvarez* cannot benefit this Court's analysis.

Neither can the majority of other cases cited by Jordan and Ma. The following cases fail to address the issue presented in this case. Here, Mustoe, the owner of the trees, has sued for damages to the trees caused by unreasonable trimming of overhanging roots. In contrast, the cases below universally involve the neighboring owner suing for damages caused by the encroaching trees. The analysis in these cases simply does not apply here.

The one useful principle that can be gleaned from these cases actually favors Mustoe: a property owner cannot use his own land in a manner that causes unreasonable injury to his neighbor. This duty of reasonable care should apply to the manner in which a property owner trims overhanging roots and branches.

In *Rababy v. Metter*, 30 N.E.3d 1018 (Ohio Ct. App. 2015), Rababy, the owner whose land was encroached upon, sued Metter, the owner of the trees, for damages allegedly caused by the overhanging branches. *Id.* at 1021. The court adopted what it called the "Massachusetts Rule," under which "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." *Id.* at 1024. In doing so, the court noted principles of premises liability in the Restatement 2d of Torts, which states that a possessor of land is subject to liability to others outside the land for acts that involve an unreasonable risk of harm. *Id.* at 1023.

In *Herring v. Lisbon*, 823 N.W.2d 493 (N.D. 2012), Herring, the owner whose land was encroached upon, sued Lisbon Partners, the owner of the trees, for damages caused by the overhanging branches. *Id.* at 495. The court identified the issue before it as whether a landowner has a duty to trim his own trees that encroach and cause damage on adjoining property. *Id.* at 496. The court adopted the "Hawaii Rule," under which, in addition to self-help, a property owner has a judicial remedy for encroaching trees that cause actual harm or pose imminent danger of actual harm. *Id.* at 501-02. The court based its decision, in part, on the common law duty of a landowner "to

ensure that the use of his property does not materially harm his neighbor." *Id.* at 500.

In *Lane v. W.J. Curry & Sons*, 92 S.W.3d 355 (Tenn. 2002), Lane, the owner whose land was encroached upon, sued W.J. Curry & Sons, the owner of the trees, for damages caused by overhanging roots and branches. *Id.* at 358. The court identified the issue before it as "whether a landowner can bring a nuisance action against an adjoining landowner when tree branches and roots from the adjoining landowner's property encroach upon and damage the neighboring landowner's property." *Id.* at 356. The court adopted the Hawaii Rule, which, the court reasoned, "voices a rational and fair solution, permitting a landowner to grow and nurture trees and other plants on his land, balanced against the correlative duty of a landowner to ensure that the use of his property does not materially harm his neighbor." *Id.* at 363.

In *Melnick v. C.S.X. Corp.*, 540 A.2d 1133 (Md. 1988), Melnick, the owner whose land was encroached upon, sued B&O Railroad, the owner of the trees, for damages caused by overhanging branches and vines. *Id.* at 1134. The court identified the issue before it as "whether a landowner has a cause of action against an adjoining landowner when trees, vines, roots, and other plants or plant debris from the adjoining landowner's property encroach upon and cause damage to the landowner's property." *Id.* The court adopted the Massachusetts Rule, refusing to impose liability on the tree owner for the "natural processes and cycles" of plant life and allowing self-help as the only remedy against overhanging vegetation. *Id.* at 1138.

In *Jones v. Wagner*, 624 A.2d 166 (Pa. Super. 1993), Jones, the owner of the trees, sued Wagner, whose land was encroached upon, for the restoration value of trees that Wagner trimmed to the property line, on the theory that Wagner did not have a right of self-help because the trees did not cause any damage. *Id.* at 167. The court held that Wagner had a right of self-help even where the trees had not caused any damage, and therefore held that Jones could not recover for the trimmed branches. *Id.* at 171. Jones, unlike Mustoe, did not claim any damage to the trees beyond the trimming itself. *See Id.* at 167. Jones, unlike Mustoe, sought to limit the right of self-help based on whether the encroaching trees were causing damage. *Jones* is unhelpful because it does not address the issue that is before this Court.

2.2.2 Those cases that have addressed the issue have applied a reasonableness standard.

The briefing in this case has disclosed four cases that do address Mustoe's issue—whether the right of self-help is limited by a duty to act in good faith and in such a way as not to cause unnecessary damage to the trees themselves. Three of the four cases expressly applied a reasonableness standard. The fourth declined for lack of evidence but did not foreclose the possibility of such a rule in a proper case.

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 when doing so would foreseeably destroy the neighboring tree. The court reasoned that any rights a property owner has in the management of his own land "are tempered by his duty to act reasonably." *Id.* at 1791.

Jordan and Ma criticize *Booska*, arguing that it "conflicts with other California decisions on this subject." This assertion is unsupported. Jordan and Ma do not cite any conflicting California decisions, and a Shepherd's search of *Booska* reveals none. The only other criticism of *Booska* raised by Jordan and Ma is *Alvarez*, which, as shown above, expressly did not address the issue of whether the right of self-help is limited by a rule of reasonableness.

In *Fliegman v. Rubin*, 2003 NY Slip Op 51542(U), 781 N.Y.S.2d 624 (App. Div. 2003) (unpublished), the New York Appellate Division similarly held that "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.'" *Id.* at 624. Jordan and Ma's only criticism of *Fliegman* is that it allegedly violates Washington's GR 14.1(b). However, that rule allows citation to unpublished opinions from other jurisdictions "if citation to that opinion is permitted under the law of the jurisdiction of the issuing court." GR 14.1(b). In New York, unreported decisions may be cited "from the most available source." NY CLS CPLR R 5529. "[U]npublished decisions may be considered as persuasive authority." *Yellow Book of Ny L.P. v. Dimilia*, 188 Misc. 2d 489, 490, 729 N.Y.S.2d 286, 287 (Dist. Ct. 2001). Thus, this Court may also properly consider *Fliegman* as persuasive authority.

In *Harding v. Bethesda Reg'l Cancer Treatment Ctr.*, 551 So. 2d 299 (Ala. 1989), Hardings, the owners of the tree, sued Bethesda and its contractors for damage caused when the tree fell because its root system had been cut

and undermined. *Id.* at 300. The court held that a property owner has a right to excavate and remove roots extending onto his property. *Id.* at 302. As to Hardings' claim for damages, the court held that there was no evidence that the excavation and cutting was unreasonable or negligent and affirmed dismissal of the claim. *Id.* The court did not erect an absolute bar to recovery based on the neighbor's right of self-help. Rather, the court appears to have been open to an award of damages for unreasonable or negligent cutting and held only that the Hardings had failed to prove such a claim.

In *Higdon v. Henderson*, 304 P.2d 1001 (Okla. 1956), Higdon, the co-owner of a boundary-line tree, sued Henderson for killing the tree by cutting its roots while excavating to build a residence. *Id.* at 1002. The court based its decision on "the right of an abutting owner to use his property in a reasonable way and conversely, not in an unreasonable way." *Id.* The court affirmed dismissal of Higdon's claim, holding that Henderson "was excavating on his own lot to build a residence and nothing more, which was not an unreasonable use of [Henderson's] property." *Id.* The court applied a reasonableness standard to Higdon's claim for damages, but found on the facts of the case that Henderson was not liable because he acted reasonably.

Unlike *Harding* and *Higdon*, here there is evidence that Jordan's cutting of the roots was unreasonable and in bad faith. Jordan, a self-proclaimed tree expert, knew that the trees would be damaged and were likely to fall. (*see* CP at 137). Unlike the landowners in *Harding*, *Henderson*, or *Alvarez*, Jordan's purpose was not to improve Ma's property, but to "piss off" Mustoe. *See Id.*

This evidence was undisputed. Jordan's actions were not only negligent and unreasonable, but malicious.

2.3 Washington's softening of the common enemy doctrine is an apt analogy for this Court to follow.

The common enemy doctrine was, originally, a strict common-law rule that allowed a landowner to engage in unlimited self-help against surface waters even if injury resulted to others. *Currens v. Sleek*, 138 Wn.2d 858, 861, 983 P.2d 626 (1999). If the owner of Blackacre channeled all surface waters and discharged them onto Whiteacre, causing flood damage to Whiteacre, it was *damnum absque injuria*. *See Cass v. Dicks*, 14 Wash. 75, 78-79, 44 P. 113 (1896). "The rule [was] based upon the principle that such water is a part of the land upon which it lies, or over which it temporarily flows, and that an owner of lands has a right to the free and unrestrained use of it, above, upon and beneath the surface." *Id.* at 78. This is the same basis underlying the common law right of self-help against overhanging roots and branches. *Gostina*, 116 Wash. at 232.

Courts have recognized, over the years, that strict adherence to the common enemy doctrine works injustice against landowners who are unreasonably injured by their neighbors' management of surface waters. *See Currens*, 138 Wn.2d at 862. The same is true of strict adherence to a rule of absolute self-help against overhanging roots and branches. Under the absolute rule advocated by Jordan and Ma, the owner of Blackacre is free to kill a tree on Whiteacre by removing the roots that cross over to Blackacre; the loss of the tree and any damage caused when the tree falls would be

damnum absque injuria. Such a rule works injustice against the owner of Whiteacre, who has every right to cultivate a tree on his own property.

In *Currens*, the court adopted the "due care" exception to the common enemy doctrine, tempering the landowner's right of self-help against surface waters with a duty of reasonable care to prevent unnecessary damage to neighboring property. *Id.* at 868. Courts across the country have done likewise to soften the harsh effects of the common enemy doctrine. This Court should do the same for the rule of self-help against overhanging roots and branches. A duty of reasonable care would still allow the owner of Blackacre to trim overhanging roots and branches without liability, so long as he did so "both in good faith and in such a way as not to cause unnecessary damage." *Id.*

A rule of absolute self-help without liability recognizes only the rights of the owner of Blackacre. A duty of reasonable care balances those rights against the rights of the owner of Whiteacre. It recognizes that both owners have a duty to use their respective properties in a manner that does not injure the property 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); *Rababy v. Metter*, 30 N.E.3d 1018, 1023 (Ohio Ct. App. 2015); *Herring v. Lisbon*, 823 N.W.2d 493, 500 (N.D. 2012); *Lane v. W.J. Curry & Sons*, 92 S.W.3d 355, 363 (Tenn. 2002); *Booska v. Patel*, 24 Cal.App.4th 1786, 1790, 30 Cal.Rptr.2d 241 (1994); *Higdon v. Henderson*, 304 P.2d 1001, 1002 (Okla. 1956).

3. Conclusion

This Court should hold that the right of self-help to trim overhanging roots and branches is limited by a duty of reasonable care to act 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 beyond the trimmed roots. Additionally, Jordan and Ma's use of the Ma property constituted a nuisance, and the cutting of a tree's roots without good cause destroyed the trees in question and as a result 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 7th day of August, 2015.

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CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the State of Washington, that on August 7, 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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