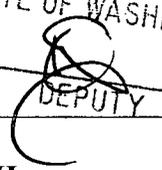


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DIVISION II

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STATE OF WASHINGTON

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No. 47245-II

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON

JENNIFER MUSTOE

Appellants

v.

XIAOYE MA and ANTHONY JORDAN

Respondents

BRIEF OF RESPONDENTS

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I. INTRODUCTION

Acting entirely on property he lived on, respondent Anthony Jordan severed encroaching roots which originated from two trees located on adjoining property owned by appellant Ms. Jennifer Mustoe. Ms. Mustoe claims this harmed her trees and she sought damages from Mr. Jordan and from respondent Xiaoye Ma, who owned the property she and Mr. Jordan lived on. The trial court properly dismissed Ms. Mustoe's claims on summary judgment.

This case does not present any issues of first impression as asserted by Ms. Mustoe. Rather, Washington, as well as virtually every other jurisdiction in the country, has determined that a party has a right to self-help to remove encroaching roots and branches coming from adjoining property. This has been the rule going back to the common law of England.

II. ISSUE PRESENTED ON APPEAL

Does a party have a right to self-help to remove encroaching roots coming from trees on adjoining property?

III. COUNTER-STATEMENT OF THE CASE

In October of 2013 Anthony Jordan decided to dig a trench parallel to the property line between the property he lived on and the adjacent property owned by Ms. Mustoe. During this process, he encountered roots from two trees located on Ms Mustoe's property. He severed the roots and removed them (CP at page 36, specifically at page 31, lines 9-15 of Mr. Jordan's deposition). Critically important is that in doing this work, he never crossed the property line onto Ms. Mustoe's property and she has admitted this fact (CP at page 39, specifically at page 17, lines 9-16).

Asserting she has a right to maintain trees with roots that encroached onto her neighbor's property, Ms. Mustoe sued Mr. Jordan and Ms. Ma for causing damage to her trees. No such right exists.

The material submitted by Ms. Mustoe to the trial court, and to a lesser extent to this court, is replete with claims about various personal issues which have arisen in the past between Mr. Jordan and Ms. Mustoe and she claims this is what motivated his actions. Mr. Jordan did not respond to those assertions in the trial court other than through the

declaration of his counsel (CP pages 222-228). He will not do so here as these issues are irrelevant. Suffice it to say that there are always two sides to a neighbor dispute and if it was relevant, Mr. Jordan would be only too happy to relate his side to the court.

IV. STANDARD OF REVIEW

An appellate court reviews a summary judgment order de novo, engaging in the same inquiry as the trial court. *Anderson v. Weslo, Inc.*, 79 Wn. App. 829, 833, 906 P.2d 336 (1995). Summary judgment should be granted where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Kuhlman v. Thomas*, 78 Wn. App. 115, 119, 897 P.2d 365 (1995). The court considers the facts in the light most favorable to the nonmoving party and summary judgment should be granted if reasonable minds could reach but one conclusion. *Kuhlman v. Thomas*, 78 Wn. App. 115, 119-120, 897 P.2d 365 (1995).

V. SUMMARY OF JORDAN AND MA'S ARGUMENTS

The owner of a parcel of land has no right to maintain trees on it with roots or branches that encroach across the property line onto adjacent

parcels. When roots or branches do so, the owner of the adjacent parcel always has the absolute right to self-help to remove the encroaching roots or branches up to the property line, whether the act of removal damages the trees or not. The alleged motive behind removal of the roots is irrelevant.

The self-help rule goes back to the common law of England and was first recognized in the state of Washington in the case of *Gostina v. Ryland*, 116 Wash. 228, 199 Pac. 298 (1921). As will be shown, the right to self-help is the rule in virtually every jurisdiction which has addressed the issue. Washington has gone further than most holding that the owner of the tree actually has an affirmative duty to prevent the roots from invading the adjoining property and causing damage. *Forbus v. Knight*, 24 Wn.2d 297, 313, 163 P.2d 822 (1945).

The only published case supporting Ms. Mustoe's position is from an intermediate California Court of Appeal, *Booska v. Patel*, 24 Cal.App.4th 1786, 30 Cal.Rptr.2d 241 (1994) and it conflicts with other California decisions on this subject as well as a multitude of decisions

from other states. [She also cites the unpublished decision of *Fliegman v. Rubin*, 2003 Slip Op 51542 (U), 781 N.Y.S.2d624 (App. Div. 2003) in a footnote on page 9 of her brief. This citation violates GR14.1(b) and *Fliegman* will not be discussed in this brief].

In the 21 years since *Booska* was decided, no appellate court has followed it. Just three weeks ago, the Vermont Supreme Court unanimously rejected *Booska* in *Alvarez v. Katz*, 2015 VT 86, _____ A.3d _____, WL 3795939, (June 19, 2015). In addition, More than forty published appellate cases from other jurisdictions support the trial court's ruling here. These cases were cited in the "DEFENDANTS REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT" (CP pages 469-470). Since that pleading was filed in the trial court, *Alvarez*, cited above and *Rababy v. Metter*, 2015 Ohio 1449; 30 N.E.3d 1018 (2015) have also recognized the rule that allows self-help in this type of factual setting, thus adding more support to the trial court's ruling.

VI. ARGUMENT

A. Washington Recognizes the Right of Self-Help to Remove

Encroaching Roots and Branches.

Ms. Mustoe's primary contention in this case is that Mr. Jordan and Ms. Ma could only remove encroaching roots from her trees if they did so while acting "in good faith" and in a manner which avoided "excessive damage" to her trees. Other than perhaps *Booska*, no case in this or any other jurisdiction has been identified that ever imposed these two duties on an adjoining landowner. In fact, the well settled law virtually everywhere is just the opposite.

Starting with Washington, the Supreme Court first looked at this issue in *Gostina v. Ryland*, 116 Wash. 228, 199 Pac. 298 (1921). In that case, the plaintiff sued an adjoining landowner alleging that overhanging tree branches and encroaching ivy were a nuisance and sought an injunction from the court requiring the neighbor to abate the nuisance or allow the sheriff to do so. The defendant opposed this suit asserting that "...the action (suit) by respondents was merely for spite and vexation..." and the encroachment was never objected to until "...they had some sort of personal disagreement..." with their neighbors. In other words, this is the

same situation presented here except instead of relying on self-help and simply cutting the overhanging branches and removing the encroaching ivy, the plaintiffs in *Gostina* sought a court order requiring the defendants to go to that effort.

The trial court rejected all of the defendant's evidence that the lawsuit was brought merely for spite and vexation as irrelevant and ruled that the defendants had to abate the nuisance (overhanging tree branches and ivy) within 60 days or the sheriff would be ordered to do so. On appeal, the Washington Supreme Court reviewed and cited a number of decisions dating back to the common law of England. In doing so, the court decided that absent proof that the overhanging branches were "poisonous or noxious in [their] nature" the plaintiff's *only remedy* was "...to clip or lop off the branches or cut the roots at the line." *Gostina v. Ryland* 116 Wash. 228, 233, 199 Pac. 298 (1921) citing and quoting with approval, 1 C.J. 1233, SS 94 and further citing cases from New York, England, Connecticut, Vermont, Iowa and Missouri. The court specifically noted that the landowner "...may himself cut off the offending growth" even if

there was no claim for damages or injunctive relief available. *Gostina* supra, at page 232. Thus, while *Gostina* rejected the idea that overhanging branches or invading roots would form a basis for injunctive relief in every case, it clearly established the landowner's right to engage in self-help to remove them in Washington. It is especially important to note that the motivation for that suit, alleged spite and vexation, was irrelevant to the absolute right to relief from the encroachments.

Gostina was followed by *Forbus v. Knight*, 24 Wn.2d 297, 313, 163 P.2d 822 (1945). In that case, roots from an adjoining landowner invaded and blocked a sewer line on the plaintiff's property. The court held:

“It is not the law that the owner of premises is to be charged with negligence if he fails to take steps to make his property secure against injury by an adjoining landowner. It is the duty of the one who is the owner of the offending agency to restrain its encroachment upon the property of another....”

Forbus, supra at page 313. Thus, *Forbus* allowed a claim by an adjacent landowner when a neighbor's roots crossed the property line causing

damages. Under *Forbus*, the duty to remove encroaching roots that are causing damage is on the owner of the tree.

Between *Gostina* and *Forbus*, the law in Washington is clear that a party always has the right of self-help to remove encroaching growth no matter what the alleged motive for the action is. As will be shown, this is the law in virtually every jurisdiction.

B. The Right to Self Help Is Universally Recognized
Throughout the Country.

Disputes between adjacent landowners over encroaching roots and branches have always been a part of the judicial landscape. The issue normally comes up when the landowner whose property has been invaded by roots or overhanging branches sues for damages and/or injunctive relief. On occasion however, it is the party who owns the offending agency who initiates litigation such as occurred here.

The competing interests which arise in situations like the instant one were recently discussed at length by the Vermont Supreme Court in *Alvarez v. Katz* 2015 VT 86, _____ A.3d_____, WL 3795939, (June 19,

2015). There the court said:

“On the one hand, Berger and Katz have an interest in using their land, which they have purchased and upon which they pay taxes, as they see fit, within permissible regulations, free from limitations imposed by encroaching roots and branches from the neighbors’ tree, which they did not invite and for which they receive no benefit. The Alvarezes seek to restrict the use of the Berger/Katz property by preventing the removal of branches and roots on land that is not theirs and for which they have given nothing of benefit to Berger and Katz for suffering the encroachment. On the other hand, the Alvarezes wish to continue to enjoy their tree, which has been there for many years, without placing its viability in peril due to the construction that Berger and Katz wish to undertake.

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. If the Alvarezes had the right to have their tree encroach onto the Berger/Katz property, the obvious next question would be to what extent the encroached-upon property owner must suffer such an encroachment. We would be hard pressed to create a workable rule which would serve to limit encroachments in number, extent, or distance that a property owner must tolerate from neighboring trees before allowing the property owner to exercise self-help. Although we are cognizant that on some occasions the exercise of self-help may result in

the immediate or eventual loss of an encroaching tree, given the long-recognized rule in Vermont and its widespread support elsewhere, we decline to depart from the common law rule in favor of the approach adopted by the superior court.

Alvarez at page 4, paragraphs 20 and 21. (Wherever a citation to *Alvarez* appears in this brief, it will refer to the page and paragraph of the WestLaw copy of this opinion included in the appendix since the official reporter version is not yet available).

Many, many, cases decided before *Alvarez* support the trial court's result here. At least four approaches to this type of dispute have been identified by appellate courts across the land. Some of the approaches allow for injunctive relief and damages while others do not except in certain situations, *but all of these approaches uniformly allow self-help as a remedy to the landowner whose property is encroached on regardless of the landowner's motive or whether or not the encroaching trees or roots are causing any damage.*

The following is a sample of what the courts across the country have held:

“Although the four rules create varying degrees of liability for the owner of an encroaching tree, they do have one common characteristic: Each of the four rules recognizes the right of the neighboring landowner to engage in self-help. (Citing *Lane*, supra). Thus, no matter which rule is adopted, the neighboring landowner retains the right to cut back the intruding branches or roots to the property line at his own expense.”

Herring v. Lisbon Partners, 2012 N.D. 226, 823 N.W.2d 493, 498 (2012).

“...the adjoining landowner may, at his own expense, cut away the encroaching vegetation to the property line whether or not the encroaching vegetation constitutes a nuisance or is otherwise causing harm or possible harm to the adjoining property.”

Lane v. W.J. Curry, 92 S.W.3d 355, 364 (Tenn., 2002).

“Courts uniformly hold that a landowner has a self-help remedy. Thus, the landowner has a right to cut encroaching branches, vines, and roots back to the property line.”

Melnick v. C.S.X. Corp., 312 Md. 511, 540 A.2d 1133, 1135 (1988).

Jones v. Wagner, 425 Pa. Super. 102, 624 A.2d 166 (1993), is closely on point with the facts here. In *Jones*, the plaintiffs owned a number of trees which hung over the property line with their neighbor. While the plaintiffs were not home, the neighbor cut all of the overhanging

branches from twenty-six trees. The plaintiffs sued and sought the replacement value for all twenty-six trees. The court recognized the virtually undisputed rule that a property owner always has the right to self-help to remove overhanging branches and intruding roots stating:

“Appellants’ contention that appellees were required to suffer sensible harm before availing themselves of a remedy is only relevant if the appellees seek their remedy in a court of law or equity. Under the laws of the jurisdictions who have confronted the issue, and henceforth ours, a showing that encroaching tree limbs, branches, or roots have caused sensible damage is not a precondition to exercising a self-help remedy.”

Jones, supra at page 168. *Jones* cited and quoted the Washington case of *Gostina v. Ryland* 116 Wash. 228, 233, 199 Pac. 298 (1921) at length in support of its holding.

Other cases have also refused to recognize a claim against a party who removes encroaching roots or branches. In *Harding v. The Bethesda Regional Cancer Treatment Center* 551 So.2d 299 (Ala.,1989) the defendant excavated on its property and in the process severed the encroaching roots from a tree on the plaintiff’s property. The tree later fell

over in a wind storm. The court held that the owner of the tree could not recover for its loss because the defendant had the right to excavate on its own property. See also *Higdon v. Henderson*, 304 P.2d 1001 (Ok., 1956).

C. No Court Has Imposed a Duty of “Good Faith” and
“Reasonableness” Before the Right to Self-help Is
Available.

Ms. Mustoe argues that this court should impose a duty of good faith and reasonableness upon someone before they can remove encroaching roots or branches. She suggests Washington should address this issue as it does the common enemy doctrine set forth in *Currens v. Sleek*, 138 Wn.2d 858, 983 P.2d 626 (1999) and impose a duty of “reasonableness” upon any landowner before allowing the removal of encroaching roots.

The common enemy doctrine deals with surface waters that are a natural phenomenon beyond the control of the parties. Unlike Ms. Mustoe’s trees, no one owns surface waters and can predict or control their coming and going. Ms. Mustoe has complete dominion and control over

her trees. Indeed, she has a duty in Washington under *Forbus* to control them and keep them from encroaching onto her neighbor's property. She simply has no right in this or any other jurisdiction to use her neighbor's property to support trees on her own property. When she fails to fulfil her duties, this jurisdiction and almost every other gives her neighbors the absolute right of self-help to remedy her failing.

As additional claimed support for her position, Ms. Mustoe also cites the case of *Karasek v. Pieer*, 22 Wash. 419, 61 P.3d 33 (1900). This case merely upheld the validity of a spite fence statute and has no application here.

Similarly, her reference to *Sandberg v. Cavanaugh Timber*, 95 Wash. 556, 164 Pac. 200 (1917) is to no avail. That case dealt with the duty of one to use reasonable care to put out a fire their property to keep it from spreading to adjacent lands.

D. Jordan's Actions Do Not Constitute a Nuisance.

Ms. Mustoe's also puts forth the novel proposition in her brief that one who exercises their common law right to self-help to remove

encroaching roots or branches may be held liable to the adjoining landowner under a nuisance theory. As with all of her arguments, she has it backwards. Her claim of nuisance presupposes that she has some legal right to maintain trees on her property whose roots encroach onto her neighbor's property. Ms. Mustoe has cited no authority to this court which indicates she has any such legally recognized right. Nuisance claims only arise if a legally recognized right of a plaintiff is invaded.

In *Collison v. John L. Scott, Inc.* 55 Wn.App. 481, 778 P.2d 534 (1989), the court was faced with a claim that construction of a building on the defendant's property which impaired the view from the plaintiff's property was a nuisance. The court noted that construction of the building was lawful and further held that the plaintiff had no legal right to an unobstructed view. Because no view right existed, the actions of the defendants in constructing a building which impaired the view did not constitute a nuisance. This same ruling was followed in *Pierce v. Northeast Lake Washington Sewer and Water District*, 69 Wn.App. 76, 847 P.2d 932 (1993) where it was undisputed that construction of a water

tank on the defendant's property reduced the value of the plaintiff's property by \$30,000.00. Even when substantial damages result from lawful actions on a defendant's property, they do not create a nuisance cause of action unless they invade some legal right of the plaintiff.

Here, Ms Mustoe had no legal right to maintain encroaching roots on the defendant's property. Indeed, under Washington law, it was her obligation to remove them under *Forbus v. Knight*, 24 Wn.2d 297, 313, 163 P.2d 822 (1945). Thus Jordan's actions cannot constitute a nuisance because he did not invade any legally protected right.

In addition, under nuisance law, a party generally cannot be held liable for lawful actions on their property. RCW 7.48.120 provides the specific definition of a nuisance in Washington as "Nuisance consists in *unlawfully* doing an act..."(Emphasis added). In this case, Mr. Jordan was not acting unlawfully. Rather, he was exercising the lawful right to use self-help to remove encroaching roots. By this simple measurement alone, his actions could not constitute a nuisance.

In addition to the fact that no legal right of Ms. Mustoe was

invaded by removal of the encroaching roots and that Mr. Jordan was acting lawfully when he did so, most courts hold that a single act generally cannot form the basis for a nuisance claim in any event. Thus, the single act by Mr. Jordan of removing the encroaching roots can not constitute a nuisance for that reason as well even if it was unlawful or invaded an interest of Ms. Mustoe. See *Echard v. Kraft* 159 Md.App. 110, 858 A.2d 1018 (2004) where the court noted:

“...the authorities are in agreement that for there to be a nuisance there must be a ‘continuous or reoccurrence of the things, facts or acts, which constitute the nuisance.’ See, e.g. *United States v. Cohen*, 268 F. 420, 422 (D. Ct. Eastern D. Mos., 1920). See also *Reese v. Wells*, 73 A.2d 899 (D.C. App., 1950). The authorities appear to be in agreement that ‘one act of misconduct, though it causes discomfiture or inconvenience to others in the use and enjoyment of property, is not actionable as a nuisance. .’
Id.”

Careful research has not revealed any case in Washington where a nuisance claim was sustained based on a single act of alleged misconduct. In fact, the only Washington case found to date which even peripherally touches on the question of multiple vs single acts constituting a nuisance is

Washington v. Ceglowske, 103 Wn.App. 346, 12 P.3d 160 (2000) which held that a criminal nuisance statute related to “drug houses” required more than a single sale of drugs before the statute would apply. Just as a continuing pattern of behavior was required in order for that statute to have been violated, a continuing pattern of behavior or ongoing damages must be present before a private nuisance claim exists.

Ms. Mustoe cites four cases in support of her nuisance claim.

Vance v. XXXL Dev., LLC, 150 Wn.App 39, 206 P.3d 679 (2009); *Jones v. Rumford*, 64 Wn.2d 559, 392 P.2d 808 (1964); *Riblet v. Spokane-Portland Cement Co.*, 45 Wn.2d 346, 274 P.2d 574 (1954); and *Security State Bank v. Burk*, 100 Wn.App. 94, 955 P.2d 1272 (2000). None dealt with a situation even remotely similar to the facts or rights involved in this appeal and all are easily distinguishable.

In summary, Ms. Mustoe’s assertion that Mr. Jordan’s single and lawful act of severing and removing encroaching roots constitutes a nuisance is fatally flawed. That claim fails for many of the same reasons her other claims fail. First and foremost, her claim presupposes she has

some recognized and protected right to maintain an encroachment on Ms. Ma's property. She does not. Absent the invasion of some protected right, she has no nuisance or other claims. In addition, Mr. Jordan's actions were lawful and courts generally do not recognize a nuisance claim based on a single act.

E. The Timber Trespass Statute, RCW 64.12.030 Is
Inapplicable in this Matter.

Ms. Mustoe's last argument is that the timber trespass statute allows her claims against Mr. Jordan and Ms. Ma to go forward. It does not and she has cited no case that has applied it in a similar factual setting.

There is a very clear reason why this statute does not apply to a person removing encroaching roots. By its terms, it only applies to persons acting "without lawful authority". As the above authorities show, a person exercising self-help to remove encroaching roots on their property is acting with lawful authority as *Gostina v. Ryland* 116 Wash. 228, 233, 199 Pac. 298 (1921) has so held.

The only case Ms. Mustoe cites in support of her unique

interpretation of RCW 64.12.030 is *Happy Bunch, LLC v. Grandview N., LLC* 142 Wn. App. 81, 173 P.3d 959 (2007). But that case is easily distinguishable.

Happy Bunch involved the destruction of a “boundary line” tree jointly owned by both the plaintiff and the defendant. As was noted in *Alvarez*, “[T]he law recognizes a distinction in treatment between trees that are on the boundary line (“line trees”) and those on one side of a property line that intrude via branches, roots, or both onto neighboring property.” *Alvarez* at page 2, paragraph 10. That is because in the case of a boundary line tree, most states recognize that both adjacent property owners own a boundary line tree usually under a tenancy in common. In that setting, one co-owner has no right to damage or destroy jointly owned property. See for example, *Young v. Ledford*, 37 So.3d 832 (Ala, 2009). Most courts have held that for this reason, the right of self-help does not apply to boundary line trees. A few however have extended the self-help rule to even boundary line trees. See *Higdon v. Henderson*, 304 P.2d 1001 (Ok., 1956).

Even in *Happy Bunch*, the court did not hold that RCW 64.12.030 applied to a boundary line tree, contrary to what Ms. Mustoe suggests. Rather, it merely accepted the trial courts application of the statute because Grandview did not appeal that issue.

“However, given that Grandview did not file a notice of appeal, it may not obtain affirmative relief in this court. Thus, we may not disturb the trial court’s determination of liability under RCW 64.12.030.”

Happy Bunch v. Grandview North, 142 Wn.App. 81, 173 P.3d 959 (2007).

Thus, *Happy Bunch* did not hold that RCW 64.12.030 applies to even boundary line trees, let alone to the lawful removal of encroaching roots or branches from a non-boundary line tree. This case and the statute simply provide no relief to Ms. Mustoe.

VI. CONCLUSION

Ms. Mustoe has no legally protected right to encroach on her neighbor’s property. Because she has no legally protected right to allow her trees to encroach onto her neighbor’s property, her neighbor has the absolute right to exercise self-help and remove any encroaching roots and

branches. That is the law in this state and indeed in virtually every jurisdiction that has looked at this issue.

To impose a requirement of good faith before a party may remove an encroachment has no support in this or any jurisdiction. The same may be said for her suggestion that the court should also apply a duty of reasonable care. If the court were to accept these suggestions and impose these requirements, it would have the potential to spawn an endless number of needlessly complex suits where parties would be required to litigate these issues over simple yard maintenance. That is why no court, save the possible exception of the court in *Booksa v. Patel*, has denied a party the right to self-help.

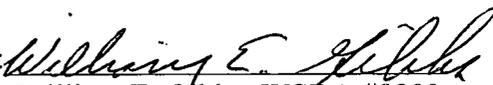
Mr. Jordan's conduct does not provide for any recovery under a nuisance theory. He did not act unlawfully in removing the encroaching roots and never entered Ms. Mustoe's property. As noted above, his actions did not violate any legally protected interest of Ms. Mustoe's as she has no right to allow her trees to encroach onto the Ma property. Even if his actions might otherwise constitute a nuisance, Ms. Mustoe has cited

no case from this or any jurisdiction that upheld a nuisance theory over a single act or even multiple acts of severing encroaching roots or branches located on one's own property.

The timber trespass statute, RCW 64.12.030 does not apply unless a party is acting without lawful authority. A party removing encroaching roots from their own property is acting with lawful authority. No case has ever applied this statute to a person exercising their lawful right to self help to remove encroaching roots. If the statute applied, every act of removing encroaching roots or overhanging branches would result in a lawsuit by the owner of the encroaching tree. There is no indication in the statute that this result was ever intended by the legislature when it was passed.

Respectfully submitted this 8th day of July, 2015.

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APPENDIX

APPENDIX

a.

Alvarez v. Katz, 2015 VT 86, _____ A.3d _____, WL 3795939, (June 19, 2015).

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Alvarez v. Katz

Supreme Court of Vermont. June 19, 2015 --- A.3d --- 2015 WL 3795939 2015 VT 86 (Approx. 5 pages)

2015 WL 3795939
Supreme Court of Vermont.

Bruce ALVAREZ and Janet Alvarez

v.

Sheldon M. KATZ and Claudia Berger.

No. 2014-385. June 19, 2015.

On Appeal from Superior Court, Chittenden Unit, Civil Division, Dennis R. Pearson, J.

Attorneys and Law FirmsNorman Williams and David A. Boyd of Gravel & Shea PC, Burlington, for Plaintiffs
–Appellees.

Claudia Berger and Sheldon M. Katz, Pro Ses, South Burlington, Defendants–Appellants.

Present: REIBER, C.J., DOOLEY, SKOGLUND, ROBINSON and EATON, JJ.

Opinion

¶ 1. EATON, J.

New England poet Robert Frost once observed that “[g]ood fences make good neighbors.” Robert Frost, *Mending Wall*, in *North of Boston* (Edward Connery Latham ed., 1977). The same, it appears, cannot be said of good trees. This is a case of protracted litigation, with extensive motion practice, between neighbors over a maple tree. For the reasons stated herein, we vacate the injunction and remand to the trial court for entry of judgment in favor of appellants Claudia Berger and Sheldon Katz and for determination of the form of declaratory relief in their favor regarding removal of the encroaching roots and branches from the Berger/Katz property.

¶ 2. Berger and Katz own property at 54 Central Avenue in South Burlington in the Shelburne Bay area. The Alvarezes own the adjoining lot just to the north at 52 Central Avenue. The property is part of a residential neighborhood consisting of shallow lots with a limited view of Lake Champlain.

¶ 3. The maple tree in question is about sixty-five years old and stands about sixty-five feet tall. The trunk or stem of the tree is located entirely on the Alvarez property, approximately two feet from the property line. Although the superior court considered the tree to “effectively” be on the property line, the parties agree that the property line does not pass through the trunk of the tree, but lies to the south of the tree trunk. Further, there is no evidence that the tree was either planted as, or intended to be depictive of, the property boundary. When the Alvarezes bought their property approximately twenty-five years ago, the tree was already about one foot in diameter at the base. Approximately half of the branches and roots from the tree now cross the property boundary and encroach onto the Berger/Katz lot. Some roots extend under the existing deck on the Berger/Katz home.

¶ 4. For several years Berger and Katz have sought to expand their home by constructing a two-story addition on the rear which would occupy roughly the same existing footprint as the house and deck at present. Berger and Katz have received the necessary permits for construction of the addition. The plans for the construction of the addition to the Berger/Katz residence would necessitate cutting the roots and branches that are encroaching onto their property. This could encompass up to half of the tree’s roots and branches.

¶ 5. Efforts to amicably resolve the problem of the maple tree in light of the planned Berger/Katz addition went for naught. In 2013, when Berger and Katz considered taking unilateral action to trim the tree’s roots and branches, the Alvarezes filed for and received a temporary injunction, and later a permanent one. The superior court found it more likely than not that removal of 50% of the tree’s roots and branches as contemplated would result in the premature death of the tree, perhaps within five years and probably within ten from the time of cutting. The final injunction barred the trimming of more than 25% of the roots and branches of the tree.

SELECTED TOPICS

Removal of Buildings, Fences, or Other Structures

Removal of an Encroachment of Mandatory Injunction

Secondary Sources**Injunction against repeated or continuing trespasses on real property**

32 A.L.R. 463 (Originally published in 1924)

...The general rule, supported by many cases, is that a court of equity will not restrain a mere trespass. See 14 R. C. L. § 143. This rule appears to be based on the theory of the adequacy of the legal r...

Mandatory injunction to compel removal of encroachments by adjoining landowner

28 A.L.R.2d 679 (Originally published in 1953)

...This annotation covers the cases discussing the remedy of mandatory injunction to compel the removal of encroachments by an adjoining landowner, and supersedes the annotations in 14 A.L.R. 831, 31 A.L.R.

Injunction against repeated or continuing trespasses on real property

60 A.L.R.2d 310 (Originally published in 1958)

...This annotation considers the question whether an injunction will issue to restrain repeated or continuing trespasses to real property. It supplements an annotation in 32 A.L.R. 463, dealing with the s...

See More Secondary Sources

Briefs**Petition for Writ of Certiorari**2011 WL 381116
Proctor v Huntington
Supreme Court of the United States.
February 01, 2011

...Petitioner: Noel Proctor Respondents: Robert “Ford” Huntington Christina Huntington After a three day bench trial beginning September 12, 2006, the trial court ordered petitioner, Noel Proctor, to conv.

Joint Appendix1990 WL 10022997
THE BOARD OF EDUCATION OF OKLAHOMA CITY PUBLIC SCHOOLS, INDEPENDENT SCHOOL DISTRICT NO. 89, OKLAHOMA COUNTY, OKLAHOMA, Petitioner, v. Robert L. DOWELL, ET AL., Respondents
Supreme Court of the United States.
June 01, 1990

...FN* Counsel of Record Filed Complaint—with prayer for injunction—and THREE JUDGE COURT Filed Pltff’s First Amended Complaint Ent trial before 3-judge court; parties appear by counsel; plttf presents ca...

Brief for Appellee1995 WL 17057693
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. George W. BAGWELL, Defendant-Appellant.
United States Court of Appeals, Eleventh Circuit
December 21, 1995

...The government respectfully submits that oral argument is not necessary in this case. The issues and positions of the parties, as

¶ 6. The trial court granted the temporary injunction, employing what it dubbed as the “urban-tree rule.” The moniker attached to this theory stemmed from the trial court’s belief that California, New York, and New Jersey place restrictions on the right of an adjoining landowner to trim roots or branches intruding onto their land from a neighbor’s property due to the urban nature of those states. Under the “urban-tree rule,” as described by the trial court, trimming the roots or branches of an encroaching tree may be proscribed if the trimming will destroy the tree. Although the judge hearing the permanent injunction questioned the validity of the “urban-tree rule,” he felt it improper to apply a different legal analysis, relying upon it as the “law of the case.”

¶ 7. This appeal from the permanent injunction followed. We review the superior court’s decision to grant injunctive relief for an abuse of discretion. *Obolensky v. Trombley*, 2015 VT 34, ¶ 18, — Vt. —, — A.3d —. “We will not reverse the trial court’s decision if the record below reveals any legal grounds that would justify the result.” *Alberino v. Balch*, 2008 VT 130, ¶ 7. 185 Vt. 589. 969 A.2d 61 (mem.).

¶ 8. Appellants allege the superior court erred in granting an injunction because the common law allows for an absolute right of a landowner to trim intruding branches and roots regardless of the impact on the offending tree; because there is no showing that the cutting would cause irreparable harm sufficient to support an injunction; and because injunctive relief results in a taking of appellant’s property without compensation. Because we reaffirm Vermont’s long-standing right of a property owner to trim branches and roots from an encroaching tree without regard to the impact that such trimming may have on the health of the tree, and vacate the injunction on that basis, we do not reach appellant’s other arguments.

¶ 9. Vermont has long recognized ownership of property to include the ownership of that which is below the ground and that which is attached overhead. *Stratton v. Lyons*, 53 Vt. 641, 643 (1881) (“[W]hoever is in possession of the surface of the soil is in law deemed to be in possession of all that lies underneath the surface. Land includes not only the ground or soil, but everything attached to it, above or below.”). The right of a property owner to trim non-boundary trees back to the property line cannot be gainsaid. This right has been clear for at least the last 100 years. *Cobb v. W. Union Tel. Co.*, 90 Vt. 342, 344, 98 A. 758, 759 (1916) (“[I]t is a sound principle that where a tree stands wholly on the ground of one and so is his tree, any part of it which overhangs the land of an adjoining owner may be cut off by the latter at the division line.”). The superior court considered this case to be one of first impression in Vermont because of the anticipated adverse—and likely fatal—effect the proposed root-and-branch cutting would have on the encroaching tree, distinguishing this situation as an exception to the *Cobb* rule. The attempt to distinguish *Cobb* is inconsistent with its holding. Further, the “urban-tree rule” does not enjoy the support attributed to it by the superior court.

¶ 10. As a starting point, the law recognizes a distinction in treatment between trees that are on the boundary line (“line trees”) and those on one side of a property line that intrude via branches, roots, or both onto neighboring property. A tree standing on the division line between adjoining proprietors, such that “the line passes through the trunk or body of the tree above the surface of the soil, is the common property of both proprietors as tenants in common.” *Skinner v. Wilder*, 38 Vt. 115, 116–17 (1865). Neither may hew down his part of the tree to the property line and destroy the part belonging to the other. *Id.* at 117.

¶ 11. The property line here does not pass through the trunk or body of the tree, a distinction which affects the rights each party has concerning the tree. The superior court was incorrect that this tree is “effectively” a line tree. A line tree enjoys clarity under the law; either the property line passes through the stem of the tree or it does not. The former is a line tree, the latter is not. Absent the property line passing through the tree trunk, it cannot be considered a “line tree,” and thus it is not owned by the parties as tenants in common. *Id.* at 116–17. The tree belongs to the Alvarezes and is not commonly owned.

¶ 12. The superior court’s determination that this case is one of first impression requires an exceptionally narrow reading of *Cobb*. *Cobb* involved the trimming of two trees belonging to Cobb but encroaching into the right of way of the Rutland Railroad. The trees were on the Cobb property, a short distance from the right-of-way line, with branches from both trees and the main trunk of one overhanging into the right of way. At the direction of the railroad, agents of Western Union cut off the branches of one tree and the main trunk of the other where they overhung into the right of way. No trespass onto Cobb’s land occurred during the cutting.

presented in the record and briefs, are sufficient to enable the Court ...

See More Briefs

Trial Court Documents

In re Ernest Communities, LLC

2011 WL 6014986
In re Ernest Communities, LLC
United States Bankruptcy Court, S.D. Georgia,
September 05, 2011

...CHAPTER 11 This matter came before the Court on the 25 day of January, 2011, for a hearing upon the application of ERNEST COMMUNITIES, LLC, debtor and debtor in possession (Applicant), for leave to sel...

In re Investors Lending Group, LLC

2012 WL 5464465
In re Investors Lending Group, LLC
United States Bankruptcy Court, S.D. Georgia,
November 06, 2012

...CHAPTER 11 This matter came before the Court on 12 day of Oct, 2012, for a hearing upon the application of INVESTORS LENDING GROUP, LLC, debtor and debtor in possession (Applicant), for leave to sell c...

In re J & J Developments, Inc.

2013 WL 1088980
In re J & J Developments, Inc.
United States Bankruptcy Court, D Kansas
March 14, 2013

...SO ORDERED. SIGNED this 5th day of March, 2013. <<signature>> Robert E Nugent United States Chief Bankruptcy Judge Chapter 11 This matter comes on for hearing on the 20 day of February, 2013, on the M...

See More Trial Court Documents

¶ 13. In considering Cobb's claim for damages for the cutting of his trees, this Court stated: "we are satisfied that it is a sound principle that where a tree stands wholly on the ground of one and so is his tree, *any part* of it which overhangs the land of an adjoining owner may be cut off by the latter at the division line ." *Cobb*, 90 Vt. at 344, 98 A. at 759 (emphasis added). *Cobb* did not suggest any limitation on the right to cut encroachments—in fact, quite the opposite is true: *any* encroaching part of the tree may be removed. *Id.* The *Cobb* Court recognized the right to cut off the main trunk of one of the trees where it entered the right of way. Any limitation in *Cobb* to "non-fatal" cutting as construed by the court below is not supported by the language or facts of that case.

¶ 14. In the ninety-nine years since *Cobb* was decided, our legislature has not seen fit to modify its holding by enacting any statute imposing a limitation on the cutting of encroaching trees. The right to cut encroaching trees where they enter the land of another, without regard to the impact on the encroaching tree by such cutting, is well-established under Vermont law.

¶ 15. Appellants assert that every jurisdiction to consider the issue has universally recognized the *Cobb* rule of self-help by permitting cutting of the encroaching tree to the extent of encroachment. While courts have imposed limitations in a few cases, the *Cobb* rule enjoys extremely widespread support. See, e.g., *Harding v. Bethesda Reg'l Cancer Treatment Ctr.*, 551 So.2d 299, 302 (Ala.1989); *Cannon v. Dunn*, 700 P.2d 502, 503 (Ariz.Ct.App.1985); *Bonde v. Bishop*, 245 P.2d 617, 620 (Cal. Dist. Ct.App.1952); *McCrann v. Town Plan & Zoning Comm'n*, 282 A.2d 900, 906 (Conn.1971); *Sterling v. Weinstein*, 75 A.2d 144, 148 (D. C.1950); *Gallo v. Heller*, 512 So.2d 215, 216 (Fla. Dist. Ct.App.1987) (per curiam); *Whitesell v. Houlton*, 632 P. 2d 1077, 1079 (Haw.Ct.App.1981); *Lemon v. Curington*, 306 P.2d 1091, 1092 (Idaho 1957); *Toledo, St. Louis and Kan. City R.R. Co. v. Loop*, 39 N.E. 306, 307 (Ind.1894); *Pierce v. Casady*, 711 P.2d 766, 767 (Kan.Ct.App.1985); *Melnick v. C.S.X. Corp.*, 540 A.2d 1133, 1135 (Md.1988); *Michalson v. Nutting*, 175 N.E. 490, 491 (Mass.1931); *Holmberg v. Bergin*, 172 N.W.2d 739, 744 (Minn.1969); *Jurgens v. Wiese*, 38 N.W.2d 261, 263 (Neb.1949); *Wegener v. Sugarman*, 138 A. 699, 700 (N.J.1927); *Loggia v. Grobe*, 491 N.Y.S.2d 973, 974 (Dist.Ct.1985); *Jones v. Wagner*, 624 A.2d 166, 168 (Pa.Super.Ct.1993); *Rosa v. Oliveira*, 342 A.2d 601, 605 (R.I.1975); *Lane v. W.J. Curry & Sons*, 92 S.W.3d 355, 364 (Tenn.2002); *Gostina v. Ryland*, 199 P. 298, 301 (Wash.1921). It is clear, however, that the right to self-help extends only to the property line. Under the self-help remedy, a landowner subject to encroachment may not cross the property line and cut or remove that part of a tree or hedge which has not encroached. *Wegener*, 138 A. at 700.

¶ 16. On the other hand, what the superior court dubbed the "urban-tree rule" has received limited support. One California decision imposes a duty to act reasonably in exercising the self-help remedy. *Booska v. Patel*, 30 Cal.Rptr.2d 241, 245 (Ct. App.1994). Without discarding the self-help rule, *Booska* holds that in exercising it one must act reasonably toward the neighboring property owner. *Id.*

¶ 17. An unreported New York decision from a lower court limits the right of self-help removal of encroaching branches and roots to situations where the exercise of that right does not destroy or injure the main support system of the tree. *Fliegman v. Rubin*, 781 N.Y.S.2d 624 (N.Y.App. Term 2003) (unreported). *Fliegman* has received scant support since its issuance.

¶ 18. Examination of the common law reveals that the right to cut encroaching boughs and roots historically counterbalanced a landowner's right to grow shade trees on his land, regardless of the impact those trees may have in casting shade or encroaching upon the neighboring property.

As against adjoining proprietors, the owner of a lot may plant shade trees upon it, or cover it with a thick forest, and the injury done to them by the mere shade of the trees is *damnum absque injuria* [loss without injury]. It is no violation of their rights. We see no distinction in principle between damage done by shade, and damage caused by overhanging branches or invading roots. The principle involved is that an owner of land is at liberty to use his land, and all of it, to grow trees. Their growth naturally and reasonably will be accompanied by the extension of boughs and the penetration of roots over and into adjoining property of others....

The neighbor, [though] without right of appeal to the courts if harm results to him, is, nevertheless, not without remedy. His right to cut off the intruding boughs and roots is well recognized. His remedy is in his own hands. The common sense of the common law has recognized that it is wiser to leave the individual to protect himself, if harm results to him

from this exercise of another's right to use his property in a reasonable way, than to subject that other to the annoyance, and the public to the burden, of actions at law, which would be likely to be innumerable and, in many instances, purely vexatious.

Michalson, 175 N.E. at 490–91 (quotations and citations omitted). Thus, at the common law, there was no claim for damages caused by encroaching roots or branches. The remedy was one of self-help, allowing the cutting of roots and branches to the extent of encroachment.

¶ 19. Where other jurisdictions have departed from the common-law rule and allowed actions for damages as a result of encroaching roots or branches, they have generally relied upon nuisance principles. See, e.g., *Curry & Sons*, 92 S.W.3d at 360–63 (surveying approaches from across the country regarding the availability of remedies beyond self-help). Even where such actions have been permitted, those jurisdictions continue to recognize the right to self-help. See, e.g., *id.* at 360 (“Although the jurisdictions uniformly agree that self-help is an appropriate remedy, they are divided on the availability of any remedy beyond self-help.”).

¶ 20. Of course, the issue of whether a nuisance claim might exist for the encroachment of roots and branches from the Alvarezes' tree is not presently before the Court. Rather, this case presents the competing interests of neighboring property owners. On the one hand, Berger and Katz have an interest in using their land, which they have purchased and upon which they pay taxes, as they see fit, within permissible regulations, free from limitations imposed by encroaching roots and branches from the neighbors' tree, which they did not invite and for which they receive no benefit. The Alvarezes seek to restrict the use of the Berger/Katz property by preventing the removal of branches and roots on land that is not theirs and for which they have given nothing of benefit to Berger and Katz for suffering the encroachment. On the other hand, the Alvarezes wish to continue to enjoy their tree, which has been there for many years, without placing its viability in peril due to the construction that Berger and Katz wish to undertake.

¶ 21. 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. If the Alvarezes had the right to have their tree encroach onto the Berger/Katz property, the obvious next question would be to what extent the encroached-upon property owner must suffer such an encroachment. We would be hard-pressed to create a workable rule which would serve to limit encroachments in number, extent, or distance that a property owner must tolerate from neighboring trees before allowing the property owner to exercise self-help. Although we are cognizant that on some occasions the exercise of self-help may result in the immediate or eventual loss of an encroaching tree, given the long-recognized rule in Vermont and its widespread support elsewhere, we decline to depart from the common-law rule in favor of the approach adopted by the superior court.

¶ 22. The Alvarezes also argue that 13 V.S.A. § 3606 prevents Berger and Katz from “destroying” the maple tree. This timber statute did not create a cause of action, but rather allowed cumulative damages for injuries actionable at common law. *Vaillancourt v. Dutton*, 115 Vt. 36, 38, 50 A.2d 762, 764 (1947) (citing *Hathaway v. Goslant*, 77 Vt. 199, 59 A. 835 (1905)). This statute is based upon trespass. *Id.* at 37–38, 50 A.2d at 763–64 (noting that statutory modification of common-law action of trespass does not introduce a new cause of action). The Alvarezes do not allege that trespass occurred here, and the timber statute creates no bar to the remedies available to Berger and Katz under the common law.

¶ 23. The superior court issued both a temporary and permanent injunction, finding that damages for wrongful injury to or destruction of the tree, if proven, would not provide an adequate remedy due to the difficulty of replacement and the value to the landowner. Because of our disposition of this case we need not reach this issue.

¶ 24. Lastly, Berger and Katz seek a declaration that the Alvarezes must either remove the offending branches and roots or compensate Berger and Katz for doing so. Consistent with this opinion, Berger and Katz are entitled to the declaratory relief requested. We leave to the trial court upon remand the task of determining the form of declaratory relief concerning removal of the encroaching roots and branches.

The decision of the superior court, civil division granting injunctive relief is reversed. The injunction is vacated and the case remanded for entry of judgment in favor of Berger and

Katz and for determination of the form of declaratory relief in their favor regarding removal of encroaching roots and branches.

All Citations

--- A.3d ---, 2015 WL 3795939, 2015 VT 86

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APPENDIX

b.

RCW 7.48.120

RCW 7.48.120

Nuisance defined.

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.

[Code 1881 § 1235; 1875 p 79 § 1; RRS § 9914.]

Notes:

Crimes

malicious mischief: Chapter 9.61 RCW.

nuisances: Chapter 9.66 RCW.

APPENDIX

c.

RCW 64.12.030

RCW 64.12.030

Injury to or removing trees, etc. — Damages.

Whenever any person shall cut down, girdle, or otherwise injure, or carry off any tree, including a Christmas tree as defined in *RCW 76.48.020, timber, or shrub on the land of another person, or on the street or highway in front of any person's house, city or town lot, or cultivated grounds, or on the commons or public grounds of any city or town, or on the street or highway in front thereof, 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.

[2009 c 349 § 4; Code 1881 § 602; 1877 p 125 § 607; 1869 p 143 § 556; RRS § 939.]

Notes:

*Reviser's note: RCW 76.48.020 was recodified as RCW 76.48.021 pursuant to 2009 c 245 § 29.

Trespass, public lands: Chapter 79.02 RCW.

CERTIFICATE OF SERVICE

I, William E. Gibbs, hereby certify that on July 8, 2015, I mailed a true and correct copy of the foregoing Brief of Respondents by United States Mail, postage prepaid to the following address:

Joseph Scuderi
Kevin Hochhalter
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Olympia, WA 98501

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COURT OF APPEALS
DIVISION II
2015 JUL 10 PM 1:28
STATE OF WASHINGTON
BY _____
DEPUTY

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 8th day of July, 2015.


William E. Gibbs, WSBA #8903