



Out on a Limb

Stephen W. Brewer

WILLCOX SAVAGE

Trees provide building materials, firewood, food, beauty, shade, and pollen (at least for some of us). Falling trees and falling tree limbs are a source of danger and sometimes litigation. Although trees have been around longer than we have, the Virginia law of trees is surprisingly sparse.

The Common Law. Under the common law, a landowner has no responsibility to adjoining landowners for damage caused by trees in a natural state, regardless of any potentially dangerous condition. The common law imposes no duty on a landowner to discover and remedy potential hazards arising from trees in a natural condition.

Self-Help as a Remedy. An important part of the common law rule is that the adjoining landowner may cut and trim branches and roots that intrude into his property from a tree or hedge on his neighbor's property. The adjoining property owner is not required to stand idly by while a neighbor's tree or hedge causes potential or actual harm. In the absence of any legal duty upon the tree owner, the adjoining property owner has self-help as a remedy.

Smith v. Holt. In 1939, the Virginia Supreme Court considered a complaint for injunctive relief and monetary damages arising from the invasion of the adjoining property by the branches and roots of a hedge planted by the adjacent property owner along the boundary line between two lots. *Smith v. Holt*, 174 Va. 213, 5 S.E.2d 492 (1939). Because the hedge was not "noxious" in nature and because the property owner was not suffering "sensible injury," the Court ruled that the only relief available to the adjoining property owner was the self-help

remedy of cutting and trimming intruding roots and branches to protect his property. The Court observed that the result might have been different if the adjoining landowner had continued to suffer "sensible injury" after giving notice of that injury to the owner of the hedge.

Fancher v. Fagella. In *Fancher v. Fagella*, 274 Va. 549, 650 S.E.2d 519 (2007), the Virginia Supreme Court abandoned the "noxious" plant and "sensible injury" principles set forth in *Smith v. Holt*. The Court held that an adjoining property owner may bring suit when encroaching tree roots and overhanging branches cause actual harm or pose an imminent danger of actual harm to the adjoining property owner. The Court discussed the remedies that might be available to the adjoining property owner including, in appropriate cases, injunctive relief to compel the tree owner to protect his neighbor from injury and damage and the remedy of self-help described in *Smith*. The willingness of the Court to permit the adjoining property owner to seek relief may have been influenced by the substantial damage incurred by the adjoining property owner from a large, sweet gum tree --



damaged and displaced retaining wall, buckled patio, blocked water and sewer pipes, and impaired townhouse foundation, which could not be adequately remedied through the use of self-help.

Cline v. Dunlora South. In *Cline v. Dunlora South, LLC*, 284 Va. 102, 726 S.E.2d 14 (2012), the Virginia Supreme Court again considered the potential liability of a tree owner. In this case, a tree located on private property fell onto a public highway and injured the passengers in a passing automobile. In a 4-3 decision, a majority of the Court rejected the argument that principles of ordinary negligence should apply to natural conditions on the land. The Court refused to extend the rule in the *Fancher* case to impose a general duty on landowners to inspect and cut down dead or decayed trees.

McDiarmid Associates v. Yevdokimov.

On July 23, 2022, the Virginia Supreme Court considered an interlocutory appeal in connection with a tree on private property that fell onto a public highway and injured a passing motorist. *McDiarmid Associates v. Yevdokimov*, ___ Va. ___, ___ S.E.2d ___, 2022 WL284337 (2022). The Court held that the Circuit Court erred in overruling the defendant's demurrer to the plaintiff's claim of ordinary negligence. While the Court remanded the case to the trial court for further consideration, the Court found that a property owner could not be liable for ordinary negligence in connection with a falling tree unless the property owner engaged in an "affirmative act" that altered the tree from its natural state and caused it to be more dangerous than it would have been in its natural state. In so holding, the Court declined to reconsider its opinion in *Cline* that under the common law a property owner owes no duty to those outside the land with respect to the natural conditions existing on the land, regardless of the potential danger presented by those natural conditions.

So, What about that Tree in My Backyard?

The Virginia Supreme Court has not yet addressed the liability of the owner of a dead or decayed tree on private property to an adjoining private property owner. Under the common law rule, the adjoining property owner will not have a remedy against the tree owner arising from damage caused by the death or decay of the tree. Under *McDiarmid Associates*, the adjoining property owner will not have a remedy against the tree owner unless the tree owner committed an "affirmative act" that led to the potentially dangerous condition. In the absence of any duty on the part of the tree owner, the only remedy available to the adjoining property owner may be a form of self-help -- requesting permission to come onto the property of the tree owner and trim or remove the tree at the adjoining property owner's cost and expense.

Stephen W. Brewer
Willcox Savage
440 Monticello Avenue, Suite 2200
Norfolk, Virginia 23510
sbrewer@wilsav.com
(757) 628-5595