

# WASHINGTON CASE UPDATE

## The Encroaching Tree: Is a Duty of Care Owed to an Adjacent Owner When Removing Tree Roots or Branches?

**From the desk of Kyle D. Riley:** When a landowner engages in self-help to remove encroaching tree roots or branches from his property, is a duty of care owed to the adjacent landowner to ensure the tree is not unnecessarily damaged? Find out how the Washington Court of Appeals recently decided this issue in this week's case update.

**Claims Pointer:** The Washington Court of Appeals held that the landowner acted lawfully in trimming the encroaching roots and, further, that the plaintiff was not owed a duty of care to prevent damage to the Douglas Fir Trees.

*Mustoe v. Ma, No. 74166-7-1*, Washington Court of Appeals, Div. I. (April 4, 2016).

neighbor's tree that encroach onto his or her property.

Jennifer Mustoe ("Mustoe") purchased real property in Rainer, Washington. Her neighbors to the south were Xiaoye Ma ("Ma") and Anthony Jordan ("Jordan"). Ma owned the neighboring property and Jordan resided with her there. Mustoe had two large Douglas Fir trees located entirely on her property, about 2.5 feet from the property line. While digging a ditch on Ma's property and along the border of Mustoe's property, Jordan exposed and removed the trees' roots. This resulted in a loss of nearly half of the trees' roots. The damaged trees posed a high risk of falling onto Mustoe's home. The landscape value of the trees was estimated to be \$16,418; the cost of their removal was estimated to be \$3,913.

Mustoe argued that while landowners can engage in self-help to trim encroaching tree branches and roots, self-help did not extend to removing the tree itself. She suggested that the court extend Washington law and hold that in exercising self-help a landowner owes a duty of care to prevent damage to the trees themselves. She also referenced a landowner's broader legal duty not to use his own property to the injury of others. Mustoe analogized the exception to the common enemy doctrine in water trespass cases. The common enemy doctrine allows landowners to dispose of unwanted surface water without liability for resulting damage to one's neighbor. However, a due care exception provides that a landowner's changes in surface water flow must be made in good faith and in a way that does not cause unnecessary damage. According to Mustoe, a similar duty of care should be extended in the present scenario where a landowner engaged in self-help to remove encroaching tree roots in order to prevent unnecessary damage to the tree itself.

Mustoe filed suit against Ma and Jordan, asserting Jordan had negligently, recklessly and intentionally excavated and damaged her trees. The trial court granted summary judgment in favor of Ma and Jordan, dismissing Mustoe's claims. Mustoe appealed.

The court declined to extend Washington law, reasoning that Mustoe cited no authority to extend the exception to anything other than surface water. According to the court, tree roots and branches, unlike surface water, are not a force of nature which indiscriminately wreaks havoc among adjoining landowners. As such, the manner in which a landowner may defend

Finding no error, the Washington Court of Appeals affirmed the trial court's ruling. The court held that Mustoe had not shown that Jordan acted unlawfully in trimming the encroaching roots and, further, Mustoe was not owed a duty of care from Ma or Jordan to prevent damage to the trees. In Washington, an adjoining landowner can engage in self-help and trim the branches and roots of a

case in point...



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against tree roots and branches, as opposed to surface water, is analyzed differently.

Mustoe also argued that her nuisance action was viable due to Jordan's unreasonable excavation and removal of tree roots in relation to the harm it caused her trees. The court rejected this argument because Mustoe did not establish that she had any legal cause for complaint or interference with the lawful removal of the roots on Ma's property. While Jordan acted lawfully in removing the tree roots, Mustoe might still have a viable nuisance action if in removing the tree roots Jordan unreasonably interfered with Mustoe's use and enjoyment of her property. However, because Mustoe's negligence claim failed, her nuisance claim also failed. Where the alleged nuisance is a result of the alleged negligent conduct, the rules of negligence applied. In this case, a duty was not owed where Jordan lawfully removed the encroaching tree roots on Ma's property.

The court also rejected Mustoe's argument that she was entitled to damages under the timber trespass statute because the statute only applies to persons acting without lawful authority. Therefore, the claim failed because Mustoe did not show that Jordan acted unlawfully.

The trial court's ruling dismissing Mustoe's claims was affirmed

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