

Goodbye “Virginia Rule” Aloha “Hawaii Approach”

Fancher v. Fagella Modernizes Tree Law in Virginia

By Jeremy R. Moss, ESQ.

Fancher v. Fagella, the Case

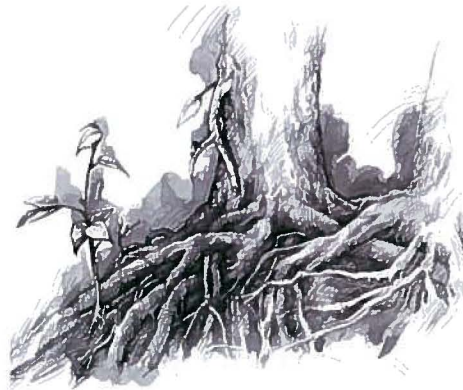
Richard Fancher and Joseph Fagella became neighbors in 2003 when Fancher moved into a connected townhouse in the Cambridge Court neighborhood of Fairfax County, VA. Mr. Fagella’s property sits elevated above Mr. Fancher’s property, with a masonry retaining wall separating the two properties and supporting the grade from the elevation difference of the two backyards. In Fancher’s backyard sits a patio covered by masonry pavers. In Fagella’s backyard lived a 60-foot tall American Sweetgum tree. On the surface, things were normal; under the surface, things were quite different.

Fagella’s tree was only at mid-maturity when its invasive root system began to damage the retaining wall, located about three feet from the tree, and Fancher’s patio pavers below. The root system of the tree also infiltrated Fancher’s sewer system, electrical network, and damaged Fancher’s foundation.

Fancher asked Fagella to remove the tree, but Fagella declined. Under existing Virginia law, Fancher was limited to self-help (cutting the roots back to his property line) as his only remedial measure. Fancher repaired the retaining wall, foundation, and cut back several branches overhanging his property. The repairs proved to be temporary and roots continued to damage his property. Despite existing limitations in Virginia law, Fancher brought suit in Fairfax County Circuit Court, asking the Court to grant an injunction requiring Fagella to remove the Sweetgum tree and its root system.

At trial, the testimony of an arborist and two engineers established that the root system of the Sweetgum tree was the cause of the damage to Fancher’s retaining wall, pavers, and foundation. Despite this testimony, the Circuit Court was limited by

existing Virginia law and denied the relief requested by Fancher. Under the existing “Virginia Rule,” from the 1939 Virginia Supreme Court case *Smith v. Holt*, a plaintiff was limited to the remedy of self-help, unless the roots and branches were “noxious in nature” and had caused “sensible injury.”



Despite the 68 year-old precedent, Fancher appealed the Circuit Court’s decision. The Supreme Court of Virginia granted Fancher’s appeal to address, “whether an injunction may [be] issue[d] to compel an adjoining landowner to remove a tree, the roots of which intrude into, and cause significant, continuous and increasing structural damage to the plaintiff’s property.”

A unanimous Virginia Supreme Court overruled *Smith v. Holt*, 174 Va. 213 (1939), the case relied upon by Fairfax County Circuit Court. The court criticized *Smith v. Holt* for its “unworkable standard for determining the rights of neighboring landowners.”

In place of the “Virginia Rule,” from *Smith v. Holt*, the Supreme Court adopted the “Hawaii Approach” from the Intermediate Court of Appeals of Hawaii’s decision in *Whitesell v. Houlton* (632 P.2d 1077 (Haw. Ct. App. 1981) as expressed in *Lane v. W.J. Curry & Sons*.¹ Under this approach, “en-

croaching trees and plants may be regarded as a nuisance when they cause actual harm or pose an imminent danger of actual harm to adjoining property.”² As nuisances, a court can enjoin encroaching plants and roots and compel their removal.

Granting injunctive relief (order requesting the tree, roots, or branches be removed)

Under this approach, “encroaching trees and plants may be regarded as a nuisance when they cause actual harm or pose an imminent danger of actual harm to adjoining property.”

rests solely on the discretion of the judge and requires a balancing of the benefit on the plaintiff if the injunction was granted, and the injury the injunction would impose on the defendant, as well as any burden imposed on the public.

In a case involving encroaching vegetation, a judge will consider the conditions of the adjoining land and whether it is reasonable to issue an injunction. This balancing of the benefits and burdens will certainly require an evaluation of whether the land in question is, or has been, traditionally forested or agricultural, or if it was, as in this particular case, from a situation involving adjoining residential lots.

Impact on Community Associations

Any time long-standing legal precedent is overturned, it is prudent for community leaders and managers to assess the impact

the change in law will have on how their community associations operate. Under the "Virginia Rule," a landowner could be relieved from liability for damage done by trees and vegetation on the landowner's property unless the vegetation was "noxious in nature," or unless one could prove that the landowner was negligent in maintaining vegetation (that the landowner knew, or should have known, that the vegetation presented a danger to the property of others). Now, however, a landowner can be held liable for any actual harm caused by the branches and roots of vegetation sitting on the landowner's property.

Virginia community associations should take several steps to prevent potential liability for damages resulting from vegetation on common areas or common elements. A visual inspection of the perimeter of common property should be conducted by a certified arborist or specialist. The inspector should observe carefully for over-hanging branches or any above-ground indications of invasive or overgrown root systems. Further, the inspector should identify any potential trouble spots that may cause future problems. These trouble spots may include common or party walls, other masonry or concrete, the foundation of an adjoining home, or any other

structure near the property line.

If the inspection identifies potential problems, the association should take the appropriate action recommended by the arborist. Trees with limbs over-hanging another's property should be removed or trimmed-back. Potential root problems should be analyzed by the arborist to determine whether the root system could cause harm to the property of adjoining landowners. Roots should be cut back or the tree removed (depending on the circumstances), if the arborist determines that the root system will likely cause actual harm, or if the roots appear to be an "imminent danger of actual harm to adjoining property."

Finally, if the inspection identifies trees or vegetation on an adjoining landowner's property that pose potential problems, the association should notify the landowner of the potential for harm and determine the appropriate course of action.

Prior to the removal of any trees from association property, it is important for the association board of directors to consult with the arborist or legal counsel to ensure that removal of the tree does not violate any local, state, or federal rule, as well as any covenants and restrictions or special conservation easements. Many localities

have specific rules or proffer conditions restricting the removal of trees on private property. ☐

¹ 92 S.W. 3d 355 (Tenn. 2002). The Virginia Supreme Court relied heavily on the analysis in *Lane* and frequently cited to the *Lane* opinion in its holding in *Fancher v. Fagella*.

² Along with the general rule expressed in *Lane*, the Virginia Supreme Court adopted the limitation to the "Hawaii Approach" which provides that "encroaching trees and plants are not nuisances merely because they cast shade, drop leaves, flowers, or fruit, or just because they happen to encroach upon ad



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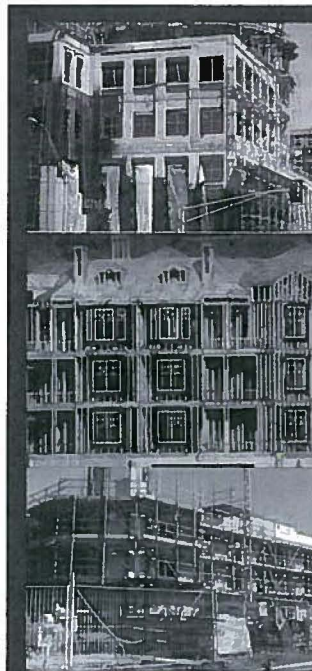
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