



Virginia High Court Breaks New Ground on Tree Liability

by Brigid Schulte,

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In the suburbs, there are few issues that can cause as much rancor and neighborhood discord as a deep-rooted, mature tree that has no regard for the neat boundaries of a property line.

Who pays if your neighbor's tree damages your house?

Yesterday, the Virginia Supreme Court weighed in on the contentious issue with a decision that overturns a nearly 70-year-old precedent. Now, for the first time, homeowners can sue to force a neighbor to cut back branches or roots or take out the tree altogether if it poses a risk of "actual harm" or an "imminent danger" to their houses, the court ruled. Tree owners can now be held liable for any damage caused by the tree.

The reasoning? The court realized just how much Virginia has changed.

The justices ruled in a Fairfax County case that the old law made perfect sense in a rural world, but now, with townhouse and condo developments springing up on former farmland, with infill development in cities and densely packed neighborhoods, the law "is unsuited to modern urban and suburban life."

Virginia is the latest state to make such a change. And in other states, it has resulted, at least initially, in far more than heated over-the-back-fence negotiations.

"This is the trend around the country, as we go from having arbitrary distinctions that made more sense in a rural economy," said Steven J. Eagle, a law professor and property rights expert at George Mason University law school. "This is a better line of reasoning. The problem is, it probably will result in more litigation.

"Will there be people who will use this as a cudgel in a battle of spite against neighbors? Sure."

Erik Saunders, a certified arborist, said tree quarrels are among the most common disputes he has seen in his 21 years in the business. "It happens all the time," he said. "And this is a big change. It's going to set in motion more changes."

It all started back in 2003, when Richard A. Fancher bought a townhouse in Cambridge Station in Fairfax. He had noticed the big sweetgum tree in his next-door neighbor's 17-by-17-foot back yard, but, being in a hurry to buy, he didn't give it much thought.

Then he started noticing that his sunken patio, which sat at a lower elevation than his neighbor's, began to crack, he said in court papers. And the brick retaining wall between the two houses began to lean. Fancher got married in 2005, and he and his wife wanted to renovate. That's when, he says, engineers found tree roots from the sweetgum tree in the sewer pipes. They found tree roots in the electrical system. They found that the pressure from the mass of tree roots was cracking the foundation, the court papers say.

"We kept fixing stuff, but the problems kept coming right back, because of the weight of the tree and the roots," said Michelle Cook-Walker-Fancher. "Sweetgum roots are very aggressive. They look like baseball bats, like those things that the cavemen in those Geico ads carry."

The Fanchers called Saunders to trim the branches to the property line. He told them that the 60-foot tree was only at mid-maturity and could grow to be 140 feet. They foresaw years and years of continuing problems.

The Fanchers said they asked their neighbor, Joseph Fagella, to cut the tree down. Fagella, who did not return phone calls for comment, declined. The Fanchers decided to sue. But under the old precedent, they didn't have much recourse.

In the past, most states used the "Massachusetts rule," which held that if a tree grew on your property but the branches hung into your neighbor's yard, that neighbor could cut them back as far as the property line. If the roots cracked the neighbor's patio or if the branches ripped their siding, it was their problem. And if the neighbors' pruning killed your tree, you could sue them for damages.

Maryland and the District still follow the Massachusetts rule, according to officials there.

Virginia's 1939 law was slightly different. Under that law, which was overturned yesterday, a landowner could sue a neighboring tree-owner only if the tree was "noxious" and caused "sensible injury." A big problem, however, was that no one ever defined a "noxious tree."

The Fanchers argued that the sweetgum was "noxious" because of its location. They petitioned for an injunction to make their neighbor remove the tree and roots and sued for damages. Fairfax County Circuit Court denied the injunction in 2006, citing the old rule. The Fanchers appealed to the Virginia Supreme Court.

"We're living in a very densely populated subdivision in Northern Virginia," Cook-Walker-Fancher said. "Virginia is growing in leaps and bounds – the roads are testimony to that with all the traffic. We can't have 17-foot back yards with 90-foot trees."

Yesterday, the court adopted a new rule and sent the Fanchers' suit back to Circuit Court. The rule, modeled after a 1981 case in Hawaii, says that a neighbor can't sue a tree owner for the little annoying things – "casting shade or dropping leaves, flowers, or fruit." But it's a different story if the tree becomes a nuisance. The owner of a nuisance tree "may be held responsible for harm caused to [adjoining property], and may also be required to cut back the encroaching branches or roots, assuming the encroaching vegetation constitutes a nuisance," the court said.

The case at Cambridge Station has turned acrimonious, with allegations and defamation-of-character countersuits pending. And just a few weeks ago – as a jury was about to hear testimony in the Fanchers' claim for \$662,000 in damages on each of four counts of trespass, noxious private nuisance, boundary dispute and negligence – Fagella cut down the old sweetgum tree.