

Jim's Perspective...

Lincoln's Recent Severe Windstorm

As many of you know, on Wednesday, July 31, Lincoln experienced a very strong and damaging windstorm. I was not in town that day, but when I returned home late afternoon on Thursday, August 1, I could not believe all of the tree damage in town. Fortunately, the two ash trees and river birch tree on our residential property did not sustain any serious damage. All of this reminded me of a snow storm many years ago that hit Lincoln and also caused significant damage to trees. The snow was very wet, and it piled up on limbs which eventually caused the limbs to break. The July 31 storm also reminded me of an old Nebraska Supreme Court case involving very strong wind in Omaha. The case is McGinn v. City of Omaha, 217 Neb. 579, 352 N.W.2d 545 (1984). This case was tried in district court in Omaha. During the strong windstorm, about half of a tree, located on the city right-of-way, fell on a parked car occupied by Mr. McGinn. As a result of the limb falling on his car, Mr. McGinn was rendered quadriplegic. The district court judge entered judgment in favor of the plaintiff, Mr. McGinn, in the amount of \$5 million. The city appealed this trial court judgment to the Nebraska Supreme Court. The Court reversed the trial court verdict and entered judgment in favor of the City of Omaha.

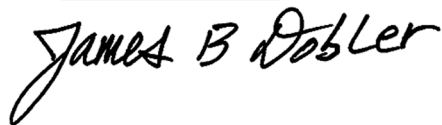
The Court held that the standard of care for liability for injuries resulting from a falling tree is one of ordinary care under the circumstances. The Court simply stated, "what ought to be done (with the trees on your property) is fixed by the standard of reasonable prudence . . .". The Court also said, "The fact that a tree branch falls, does not, by itself, prove negligence." The Court also noted that the city of Omaha had a tree inspection program that was managed by a city forester and staffed by 26 tree inspectors.

The McGinn case was important to me back in the late 1980's because we had a Farmers Mutual insured with a homeowners policy whose tree was blown over in a storm and landed on two vehicles (unoccupied) owned by the insured's next door neighbor. The neighbor believed the insured should pay for the damage to his vehicles simply because the damage was caused by the insured's trees.

In most jurisdictions, where a landowner's tree falls and damages property of a neighbor, the general rule is that a landowner is liable for conditions occurring on his property (dead or unhealthy tree), where the landowner failed to exercise "reasonable care" to prevent an unreasonable risk of harm to adjoining owners of property, from unhealthy trees on his property. 62 Am. Jur. 2d, Premises Liability, Section 747. The reasonable care standard encompasses a duty to make a visual inspection of trees in a developed area such as a residential neighborhood. The landowner's breach of that duty is usually a failure to take reasonable measures to prevent a tree from falling onto property of another after the landowner has notice of visible, apparent and patent decay in the tree, making it dangerous by itself or in combination with other forces such as high winds. However, if the defect is not visible, apparent or patent, the landowner cannot be said to have breached a duty of reasonable care. Barker v. Brown, 236 Pa. Super 75, 340 A2d 566 (Pa. Super. 1975).

According to the McGinn case, the burden of proof is upon the plaintiff to prove that the defendant failed to observe visible signs of decay and that if the defendant had made a careful inspection upon observance of the signs, he should have known that the extent of decay warranted removal of the tree.

There were always liability claims asserted against an insured that resulted from an insured's tree falling and damaging property of a neighbor or someone else who happened to be in the neighborhood. I found that in most cases of a property owner's tree falling and causing damage to property of a neighbor, the neighbor almost always thought the owner of the tree was simply required to compensate the neighbor for damage sustained by the neighbor due to the fallen tree (that's being a "good neighbor"!). Most folks did not consider that civil tort law determined whether the tree owner owed anything to the neighbor who sustained damage. In the case of a claim for damage caused by the insured's fallen tree, if possible, we always had a forester, or nurseryman, or someone else with knowledge about trees, inspect the tree to determine whether the tree was alive, or in such poor condition that it should have been removed. This person who inspected the fallen tree, was our expert witness should the tree damage claim end up in court.



James B Dobler

Jim Dobler, CPCU

PIA Legislative Coordinator

Questions or Comments? Please email jbdobler@outlook.com



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