ENDORSED FILED
SUPERIOR COURT
NOV 28 2018
COWLITZ COUNTY
STACI L. MYKLEBUST, Clerk

SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF COWLITZ

SAFECO INSURANCE COMPANY OF AMERICA, as subrogee for John P. and Cheryl L. Vanderwerf,

Plaintiff,

v.

CITY OF LONGVIEW, a municipal corporation,

Defendant.

No. 17-2-00138-5

ORDER ENTERING JUDGMENT ON ARBITRATION AWARD

This matter was arbitrated through Washington Arbitration and Mediation Services ("WAMS"), H. Scott Holte presiding, on September 26, 2018. The plaintiffs appeared through their attorney of record, Laura Evezich. The defendants appeared through their attorney of record, John E. Justice.

The arbitrator received the evidence and testimony offered by the parties, considered the pleadings filed in this action and heard the oral argument of the parties' counsel. At the conclusion of the arbitration, the arbitrator returned a decision in favor of the plaintiff on plaintiff's claim of negligence. A copy of that Arbitration Award is attached as exhibit "A."

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By stipulation of counsel, the plaintiff's damages are $70,086.63.

Consistent with the arbitrator's award, the Court enters judgment as follows:

1. Plaintiff is awarded judgment against the defendant, the City of Longview, for $70,086.63.

2. This judgment is entered in the Execution Docket by the Clerk of the Court.

Done in open court this _____ day of _____, 2018

ANNE M. CRUSER

_____
The Honorable

Presented by:

EVEZICH LAW OFFICES, PLLC

By: _____ #20957
Laura Evezich, WSBA No. 20990
Attorney for Plaintiffs

Agreed as to form and content;
notice of presentation waived:

LAW, LYMAN, DANIEL, KAMERRER & BOGDANOVICH, P.S.

By: _____ #2095 Via Authorization
John E. Justice, WSBA No. 23042
Attorney for Defendant

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EXHIBIT "A"

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IN THE BINDING ARBITRATION INVOLVING:

Safeco Insurance Company of America, as subrogee for John P. Vanderwerf and Cheryl L. Vanderwerf,

v.

City of Longview, a Municipal Corporation.

ARBITRATION DECISION

Arbitration File No: 180710001

ARBITRATOR: Scott Holte

HEARING DATE: September 26, 2018

The above-named arbitrator hereby states:

As the duly appointed Arbitrator in the above entitled matter, I have reviewed the submitted pre-hearing statements of proof, including all attachments, considered the testimony and argument presented at the hearing, reviewed the case decisions cited and deliberated upon all of the foregoing in reaching the decision which follows.

This case involves, solely, the question of whether the Defendant is liable for property damage from a tree branch, which fell onto the Plaintiffs' property on August 14, 2015. The parties have stipulated (Plaintiffs' Ex. 12) to total damages of $70,086.63, if liability is found.

It is undisputed that the tree in question, an "overly mature" Scarlet Oak, failed at the "Y" juncture of a main branch overhanging the Vanderwerf home because of rot. But, confirmation of the rot and the hazard the tree presented occurred **after** the failure.

Accordingly, the issues to be determined are whether the Defendant had actual notice and/or constructive notice of the hazard; and, as Plaintiffs argue, whether the Defendant "created" the hazard, in which case notice is not necessary.

Defendant is a "Tree City USA," with 14,000 urban trees, and takes great pride in the national designation. Defendant has a full time crew, with certified arborists, to oversee the care and maintenance of its urban forest; and an Urban Forest Management and Maintenance Plan (Pl's Ex. 4). The Plan states that the City has a "large proportion of over mature trees" which will require "large numbers of removals and costly pruning to renovate and stabilize hazardous trees … over a relatively short period of time." The Plan further states that "since Longview has a

predominantly over mature population and the visual inspection cannot detect hidden defects, ... (a) tree hazard assessment is recommended to prioritize the hazardous trees."

The Plan references an inspection/survey in 1990, which found "conks" "significantly present" in big-leaf maple, Oregon ash, and purple-leaf plum trees. "The presence of trunk conks indicates columns of decay and advanced state of decline. Even though the crowns may be green and full, the trees should be prioritized and planned for removal."

The Plan, however, does not address whether the presence of "conks" in a Scarlet Oak tree indicates decay and decline, calling for prioritization and removal. In fact, the Plan lists Scarlet Oak as a tree with "Low Maintenance Need."

Defendant employs the "ISA Basic Tree Assessment Form" (Pl's Exb. 5) in determining whether a tree is hazardous, including "tree health," "load factors," "defects and conditions affecting the likelihood of failure," "target assessment," and "risk categorization."

An arborist can obtain certification as an ISA Qualified Tree Risk Assessor. Plaintiffs presented the testimony of Favero Greenforest, an arborist with such a certification since the 1990s. Defendant presented the testimony of Curt Nedved, Defendant's Parks & Urban Forest Manager, also a certified arborist, who obtained certification as a Tree Risk Assessor in 2016 **after** the date of the failure of the "Subject Tree."

Mr. Greenforest testified as an expert with opinions on a more probable than not basis that:

1. The "Subject Tree's" three primary branches (including the one which failed) attach at the same height on the trunk, with large diameters compared to the diameter of the trunk, which results in the branches carrying enormous loads. (The branch, which failed had a base diameter of over 40 inches, a length of over 55 feet, and, according to Mr. Greenforest's estimate weighed 14 tons.)
2. This is problematic because there is less space for "holding," being attached to each other (the three branches) resulting in a higher load at the attachment.
3. According to ISA Risk Assessment the "target" (Plaintiffs' home) was at the highest occupancy risk ("constant") because of the 14-ton overhanging branch.
4. "Conks" on the adjacent Scarlet Oak were at least 10 years old and indicated the presence of decay, which would trigger at least a level 2 assessment of the "Subject Tree."
5. The branch, which failed was over-extended, being too long for the ratio of its diameter to the trunk diameter, indicating the need for a level 2 assessment.
6. The risk to the "target," because of the overhanging branch, could have been eliminated by cutting the branch in half, without damaging the tree itself.

Mr. Nedved testified that, to his knowledge, there were no reports of any problems with the "Subject Tree," prior to the failure. He also testified that the Defendant's Tree Maintenance Work History for the "Subject Tree" (Pl's Ex. 14) would have identified any problems with the tree, and no problems were identified. Specifically, "Crown Cleaning" on 8/23/2011, involving 4.5 man-hours of work, with both lift truck and on the ground crews, didn't identify any problems. Likewise he would have expected "Sucker/Elevate" removal on 4/12/2012 to report

any problems; and none were reported. I think, however, it is important to note that the time involved on 4/12/2012 is reported as ".2" man-hours, or 12 minutes.

Mr. Nedved also testified that the extension of the branch over the house did not fall within the criteria for removal. Further he disagreed with Mr. Greenforest testifying that cutting the overhanging branch in half would jeopardize the health of the entire tree. On cross-examination Mr. Nedved testified that if he had seen conks on the adjoining tree he would have done a level 2 assessment on the "Subject Tree;" and that he has seen conks on the adjacent tree, but has not done a tomography risk assessment on the tree.

John Vandenwerf testified that he has been involved in the timber industry his whole work life, including hazardous tree removal and working as a scaler, where he identifies rots in timber, including conks. He observed, prior to the failure, problems with the "Subject Tree" including rotten limbs, conks on the "backside" of the tree (not shown in the photographs,) and a crack/separation at the Y on the backside of the branch, which failed. He was concerned about the weight of the branch, which overhung his home.

He expressed these concerns on two different occasions to Martin Pietsch, one of Defendant's arborists, in the time frame of 2012 to 2014. Mr. Pietsch told him to call the City and "get on the list." During one or both of these conversations Mr. Vandenwerf told Mr. Pietsch about his background in the timber industry. He followed up these conversations with calls to the City, but there was no follow up by the Defendant. Mrs. Vandenwerf testified by deposition that she also made calls to the City, including expressing concerns about the weight of the overhanging branch, but there was no follow up by the Defendant.

Mr. Pietsch testified by deposition (Pl's Ex. 8) that he did not recall seeing any evidence of conks on the "Subject Tree." He did recall speaking to John Vanderwerf, including John telling him about his experience in the timber industry, but did not recall John telling him about his concerns. I think a reasonable inference from Mr. Pietsch's testimony is that he was told about the concerns, he just doesn't recall.

Based upon all the foregoing, although it is a very close question, I think the Plaintiffs have met their burden of proof that the Defendant had actual or constructive notice that the "Subject Tree" posed a hazard to the Vanderwerf home. Further, whether actual or constructive notice is legally required in these circumstances poses an interesting question.

As discussed above, Defendant (justifiably so) takes great pride in its **urban** forest. Defendant's distinguished "Tree City USA" designation is because of its 14,000 **urban** trees. Its management plan is entitled an **Urban** Forest Management and Maintenance Plan, etc. I think a liability analysis should include whether actions or inactions by an owner of an **urban** tree can **create** a hazard to adjacent property.

Defendant cites the case of Lewis v. Krussel, 101 Wash. App. 178 (2000) for the proposition that Defendant here had no duty to take corrective action with respect to the tree, absent any actual or constructive notice. In the opinion, the Court cited Albin v. National Bank, 60 Wash.2d 745, 375 P.2d 487 (1962), where the Court found that there was a jury question of fact whether there was

liability for a fallen tree by an adjacent property owner who "had altered the property from its natural state by logging it." The Lewis Court stated the issue as follows:

> "In particular, Albin found it significant that the landowner had altered a natural condition that resulted in injury and it also recognized that the property was located in a rural setting. Thus, Albin supports the proposition that a rural landowner may be liable if he has actual or constructive notice that an alteration to a natural condition **creates** a hazard to persons on adjacent property." (Emphasis supplied; citations omitted).

Here, the "natural condition" of the 14-ton overhanging branch of an **urban** Scarlet Oak created the hazard. It wouldn't necessarily have posed a hazard in a rural setting. But, Defendant, as the owner of an urban tree, had actual and constructive notice that it posed a hazard to adjacent property, and didn't alter the condition to make it safe.

Accordingly, I find that the Defendant is liable to the Plaintiffs for damages in the stipulated amount of $70,086.63.

I commend counsel for a well-tried case and for their courteous professionalism.

This award is subject to any contractual or other limits on the arbitrator's authority under applicable law, but is otherwise to be considered final and binding on all parties. The costs of the arbitration are to be paid in accordance with the agreement of the parties and WAMS.

10/2/2018 at Seattle, WA
Date and Place

Scott Holte
Scott Holte, Arbitrator