STATUS OF RESIDENTIAL SIDEWALK LIABILITY

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The liability of a landowner for injuries arising out of tree roots affecting residential sidewalks is a common issue handled by the defense bar. Residential property owners have long enjoyed the benefit of sidewalk immunity. Our courts have repeatedly affirmed sidewalk immunity, while at times noting its archaic origins.

In Scannavino v. Walsh, 445 N.J. Super. 162 (App. Div. 2016), decided April 14, 2016 and approved for publication, the Appellate Division further developed the case law addressing a residential landowner's liability for tree roots. Relying upon the distinction between artificial and natural conditions addressed in Deberjeois v. Schneider (a case briefed and argued by Ed Thornton of Methfessel & Werbel in 1991), the Appellate Division expanded the doctrine to include immunity against claims for property damage.

In Deberjeois v. Schneider, 254 N.J. Super. 694 (Law Div. 1991), the court imposed liability on residential property owners for injuries arising from tree roots on the abutting sidewalk emanating from a tree planted on the owner's front yard by either an owner or predecessor in title. Citing the Restatement (Second) of Torts, the court recognized a distinction between artificial and natural conditions of land, imposing liability only for the former. The court explained that "the rule of non-liability for natural conditions of land is premised on the fact that it is unfair to impose liability upon a property owner for hazardous conditions of his land which he did nothing to bring about just because he happens to live there." Id. at 702-03. Consistent with this rationale, a residential owner is liable in cases where he plants the subject tree at a particular location since that would constitute an affirmative act of the property owner. Furthermore, the same affirmative action (i.e. planting a tree) cannot be negated and the planted tree cannot be transformed into a natural condition simply due to the growth of the tree roots. Ibid. Thus, "only those natural causes brought about solely by the elements" may exempt the property owner from liability. Ibid.

In Maloy v. Schneider, 2012 N.J. Super. Unpub. LEXIS 1706 (App. Div. July 17, 2012), a 2012 unpublished New Jersey Appellate Division case, the plaintiff was injured as a result of a trip and fall on a raised public sidewalk. In Maloy, it was unquestioned that the condition was caused by the growth of tree roots from a nearby tree located on the defendant's property. Relying on the holding in Deberjeois, the trial court granted summary judgment, finding that there was no evidence that defendants had planted the tree; nor was there any evidence that defendants had

undertaken any affirmative conduct that may have produced the dangerous condition. The Appellate Division affirmed.

The concurring opinion in Maloy discussed the prospective implications of the forthcoming Restatement (Third) of Torts. Had Section 54 of the Restatement been adopted prior to the trial judge's grant of summary judgment, the concurrence explained, the defendants may not have been entitled to summary judgment unless they could demonstrate that they either did not know of the risk from the tree roots or that the risk was not "obvious." More importantly, the concurring opinion further articulated that even if the defendants or their predecessors in title had not planted the tree, that alone arguably would not be sufficient to eliminate a duty of care under Section 54 of the Third Restatement.

The concurring opinion noted that under Section 54 a residential owner—with knowledge that infiltrating roots from a tree located on his or her property caused the abutting public sidewalk to be hazardous—may be in the best position to take precautions against that ongoing hazard. This is a stark distinction from the current state of residential sidewalk law. The concurrence opined that as a matter of public policy, it may be appropriate to impose responsibility on a residential owner who derives benefit from a tree (i.e., shade, aesthetics, privacy, and soil retention) to remedy a danger posed to pedestrians by the tree's roots on the public sidewalk. Additionally, application of Section 54 would eliminate any need to identify a predecessor in title who may have planted the tree, since the residential owner's actual knowledge of the "hazard" would be the critical issue allowing for liability on the property owner.

Notwithstanding the policy argument in favor of abrogating immunity, the concurring opinion also recognized that the proposed imposition of liability on residential property owners under Section 54 of the Third Restatement may be too burdensome for homeowners. On a realistic level it also would provide an inroad to reverse the historic immunity since if the court were required to focus on the obviousness of the risk as a threshold to liability, the very obviousness of the condition could operate to undermine longstanding immunities for injury caused by such obvious dangers as snow and ice accumulation, debris not attributable to the homeowner and other transient conditions.

Recently, in Scannavino v. Walsh, an Appellate Division case approved for publication on April 14, 2016, and handled by the co-author, James Foxen of Methfessel and Werbel, the court addressed sidewalk immunity in the context of a property damage action.

In Scannavino, the plaintiff filed suit against the defendants after underground roots from a mulberry tree and vegetation on the defendant's property allegedly caused a collapse of the four-foot retaining wall separating the parties' adjoining properties. It was undisputed that the mulberry tree did not exist in 2004 when the defendants purchased the property. Furthermore, while the defendants did not plant any of the vegetation, defendants trimmed and maintained it.

The trial court found that the trees, bushes, and other vegetation near the retaining wall were a "naturally occurring condition" and therefore defendants could not be held liable for the condition of the wall. The trial court also found that the periodic trimming of branches and other vegetation was not an affirmative act capable of transforming the natural condition into an artificial one, the latter of which could result in the imposition of liability on the residential property owner.

On appeal and at the trial level the plaintiffs argued that the court should adopt Section 54 of the Restatement (Third) of Torts and find defendants liable for the damage to the retaining wall for their failure to exercise reasonable care in preventing the growth of their tree's roots.

Declining to apply this standard, the Appellate Division relied on the distinction between nuisances resulting from artificial and natural conditions of land under the Restatement (Second) of Torts to reach its decision. The court held that "a possessor of land is not liable to persons outside the land for a nuisance resulting solely from a natural condition of the land," including "trees, weeds, and other vegetation on land that has not been made artificially receptive to it by act of man." The Appellate Division upheld the trial court's grant of summary judgment since the tree roots and vegetation were deemed to be a natural condition.

The Appellate Division reasoned that defendants cutting back the trees did nothing to "bring about" the root growth; nor did the defendant's actions precipitate the collapse of the retaining wall – notwithstanding defendant's awareness of both the condition of the vegetation and its likely impact on the retaining wall.

The holding in Scannavino marks the first published Appellate Division case wherein the principles of artificial vs. natural conditions articulated in Deberjeois have been applied to a claim of property damage. It also marks an affirmative rejection of the Restatement (Third) of Torts in the context of sidewalk liability claims involving overgrown tree roots. At the same time, the thoughtful concurrence in Maloy, while not authoritative on the issue, may foreshadow the future of New Jersey residential sidewalk liability law and the impact that adoption of the Restatement (Third) of Torts would have on the field of premises liability for plaintiffs and residential property owners.

Adoption of the Restatement (Third) of Torts "obviousness" standard could create an issue of fact in most cases involving tree roots and essentially abrogate decades of residential sidewalk immunity. Should the Third Restatement be adopted, the language embodied within Section 54 as it pertains to residential sidewalk liability would result in a vast change for the defense bar and the insurance industry moving forward.

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