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Appellate Division Clarifies Standard for Property Nuisance Claims

The Superior Court, Appellate Division, in *Scannavino v. Walsh et al.* (App. Div., April 14, 2016, Docket No. A-0033-14T1), a precedential decision issued on April 14, 2016, clarified that the Restatement (Second) of Torts [as opposed to the Restatement (Third) of Torts] governs property nuisance claims in New Jersey. The *Scannavino* case involved a claim by an adjoining property owner that the "careless, negligent and grossly negligent maintenance" of his neighbor's trees caused damage to a retaining wall on his property. Specifically, the plaintiff alleged the defendants "improperly allowed the roots of trees on their property to cause damage to a retaining wall between the parties' properties." The trial court held that because the defendants did not plant or preserve the trees, they constituted a "naturally occurring condition" for which the defendants were not liable. The Appellate Division affirmed.

The trial record indicated that the trees naturally grew on the land and that the defendants had not planted the trees. The plaintiff argued that the intervening act of "maintenance and nurturing" the trees changed the "natural" condition, resulting in the defendants' liability for the damage to the plaintiff's retaining wall.

The Appellate Division noted that the Restatement (Second) of Torts, § 363 comment b, permits liability for damages caused by a tree not planted by the possessor of land when the possessor "preserved" the tree. However, "preservation" in this context connotes some sort of affirmative action by the property owner but not "its failure to act." The only evidence in the trial record was that the defendants "simply cut back the trees above the ground," but there was no evidence that the defendants conducted any "nurturing" such as fertilizing or maintenance, which would have been intended to "keep the trees alive or growing." The court found there was no evidence that the defendants' trimming had "improved the trees' health or accelerated the growth of their roots," and there was no indication that any of defendants' actions resulted in damage to the wall. The court reasoned that because the defendants' trimming of the trees did nothing to cause the root growth, neither the trees nor the damage was "brought about" or "precipitated by" the defendants' affirmative act of trimming. Moreover, the trees and the damage caused to the wall were not "conditions which have arisen as the result of some human activity," nor was the growth of the roots "changed by any act of a human being," citing to the Restatement (Second) of Torts, § 840 comment a. The result suggested by the plaintiff would lead to an anomaly of imposing liability upon a party who takes affirmative action to cut back wild growth but precluding liability of an adjacent landowner who allows a natural condition to continue unabated.

The plaintiff also argued the court should apply the Restatement (Third) of Torts, which would imply liability. The Appellate Division did not opine whether liability would result if the Third Restatement were applied but concluded that the New Jersey Supreme Court, in a decision issued following the publication of the Third Restatement, held that nuisance claims are "guided by the principles set forth in the Restatement (Second) of Torts," citing *Ross v. Lowitz*, 222 N.J. 494, 505 (2015). Therefore, the Appellate Division was bound to be guided by the Second Restatement, as opposed to the Third, with regard to nuisance claims.

The key takeaway from this decision is that for a property owner to be liable for nuisance caused by a natural condition, the property owner must have taken some affirmative action to cause or perpetuate the nuisance, and there must be a causal link between the action and the nuisance.

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