8/16/12 - cc: Rptr. Jud. Dec., Blackburn Stuart (Pltf.), Manchester Corp. Counsel, Connolly & Torrans (D).

DOCKET NO. CV 10-6011394-S	:	SUPERIOR COURT
CAMBRIDGE MUTUAL FIRE INSURANCE COMPANY	:	J.D. OF HARTFORD
VS.	:	AT HARTFORD
MICHAEL TUPPER, ET AL.	:	AUGUST 16, 2012

MEMORANDUM OF DECISION

This case is about a large tree that fell on a house, after the tree was inspected by the tree warden for the Town of Manchester. The plaintiff , Cambridge Mutual Fire Insurance Company, is the insurance carrier for the homeowners who suffered property damage as a result of the tree that fell . It has brought this subrogation action against the defendants Michael Tupper, the tree warden for the Town of Manchester, the Town of Manchester (municipal defendants), and the defendant Connecticut Light & Power Company(CL&P). The plaintiff has alleged claims of negligence against all three defendants. The defendants have denied that they were negligent. All defendants have file a special defense of contributory negligence on the part of the plaintiff's insureds and the municipal defendants have filed a special defense of governmental immunity. The parties have stipulated that the plaintiff's damages are $110,000.00.

The parties presented evidence on June 21 and June 22, 2012. From the evidence the court finds the following facts; The plaintiff's insureds are John Trifari and Allison Trifari, who

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reside at 129 North Elm Street, Manchester, Connecticut. John Trifari stated that there was a very large, old oak tree, adjacent to the roadway, in his front yard. In November 2008, he noticed a crack in the curb of the roadway in front of the tree. He did not consider the issue significant and he took no action.

In March of 2009 Mr. Trifari noticed that the pavement in front of the tree appeared to be heaving and it appeared to him that the tree looked like it was tilting. As a result of this tilting, Mr. Trifari noticed that utility wires, which ran through the branches of the tree, had now come in contact with the tree and were being pushed aside or deflected by the tree. At this time Mr. Trifari determined that the town should be notified and he directed his wife to call the town. His wife called the town on March 10, 2009 which is a Tuesday.

After his wife notified the town about the tree, Mr. Trifari took numerous photographs of the tree to document its condition. These photographs were taken on the Wednesday after his wife notified the town, which would have been March 11, 2009. Eleven of these photographs constitute plaintiff's Exhibit 1. The court has carefully examined these photographs and finds that they corroborate Mr. Trifari's testimony concerning the tilt of the tree, the branches coming in contact with the wires, and the heaving of the roadway in front of the tree. These photographs are significant and probative. They clearly show the condition of the tree at the time the town

was notified, as well as the condition of the tree when it was inspected by various witnesses. The tree fell on the evening of April 5, 2009. At the time the tree fell there were no unusual weather conditions such as rain or high wind.

Mrs. Trifari's testimony establishes that she left a message for Mr. Tupper, the tree warden on March 10, 2009. She never met with Mr. Tupper, but did have conversations with him. In the course of those conversations Mr. Tupper never asked specific details about when the changes in the tree.

Michael Tupper, the tree warden, is not a licensed arborist. He inspected the tree on March 11, 2009. At his first inspection, he did not deem the tree an immediate hazard. Thereafter he never deemed the tree an immediate hazard. Shortly after this first inspection it was determined that the tree was the town's responsibility since it was located within the street right of way. [1]Mr. Tupper testified that the tree could have been removed within a week after the

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[1] The duties of the tree warden are contained in General Statutes § 23-59 which provides in part: "The town or borough tree warden shall have the care and control of all trees and shrubs in whole or in part within the limits of any public road ... within the limits of his town..... Whenever, in the opinion of the tree warden, the public safety demands the removal or pruning of any tree or shrub under the tree warden's control, the tree warden may cause such tree or shrub to be removed.

first inspection, if it had been deemed an immediate hazard. He also testified that because of the location, tilt, and size of the tree, if the tree fell, it would fall on the Trifari's house.

Within a few days of the first inspection, Mr. Tupper met with Robert Allen, a representative of the defendant CL&P. The purpose of this meeting was to determine if the town and CL&P could enter into a cost share arrangement regarding the removal of the tree. At that meeting, it was agreed that CL&P would assume the responsibility of removing the tree under a cost sharing arrangement with the town. Another meeting at the site was conducted shortly thereafter. The purpose of that meeting was to introduce Barry Croke to Mr. Tupper. Mr. Allen was leaving CL&P and Mr. Croke was taking over his position. Both Mr. Allen and Mr. Croke are licensed arborists. They both testified, in their opinion, the tree did not constitute an immediate hazard. CL&P arranged to have Tennett Tree Service remove the tree. The tree was scheduled to be removed on or about April 7, 2009; the tree fell on April 5.

The plaintiff's expert, Dennis Panu, has been a licensed arborist since 1987. Mr. Panu's opinions were based upon his review of the photographs contained in plaintiff's Exhibit 1, and the deposition testimony of the Trifaris, Messrs. Tupper, Croke and Allen. It was his opinion that the tree constituted an immediate hazard when it was first inspected by Mr. Tupper on

March 11, 2009. It was his further opinion that the tree should have been removed as soon as possible after the inspection.

The court has carefully considered the testimony and exhibits submitted at trial and concludes that the plaintiff has established by a preponderance of the evidence that all the defendants, Michael Tupper, the Town of Manchester and CL & P were negligent.

"It is well established that [i]n a case tried before a court, the trial judge is the sole arbiter of the credibility of the witnesses and the weight to be given specific testimony . . . The credibility and the weight of expert testimony is judged by the same standard, and the trial court is privileged to adopt whatever testimony [it] reasonably believes to be credible . . . On appeal, we do not retry the facts or pass on the credibility of witnesses." (Internal quotation marks omitted.) United Technologies Corp. v. East Windsor, 262 Conn. 11, 26, 807 A.2d 955 (2002). "[I]n its consideration of the testimony of an expert witness, the [trier of fact] might weigh, as it sees fit, the expert's expertise, his opportunity to observe the defendant and to form an opinion, and his thoroughness. It might consider also the reasonableness of his judgments about the underlying facts and of the conclusions which he drew from them . . . [T]he [trier of fact] can disbelieve any or all of the evidence . . . and can construe that evidence in a manner different from the parties'

assertions . . . It is the trier of fact's function to consider, sift and weigh all the evidence . . ." State v. Griffin, 78 Conn.App. 646, 656-57, 828 A.2d 651 (2003).

The court credits Mr. Panu testimony and accepts his opinion that the subject tree constituted an immediate hazard when it was first inspected on March 11, 2009. Mr. Panu's opinion is supported by the court's examination of the photographs in plaintiff's Exhibit 1.They clearly show the heaving pavement on the side of the tree opposite from where the it fell and the deflection in the utility wires caused by the tilt of the tree. It is obvious that as the tree tipped to one side, toward the Trifari house, the root structure on the opposite side would move upward and cause the pavement to heave.

It is acknowledged that the defendant's experts, Mr. Tupper, Mr. Croke, and Mr. Allen opined that the tree was not in an immediate hazard at the time it was inspected in March 2009. The court does not accept these opinions. The defendant's experts either overlooked, or failed to appreciate the fact that the tree was leaning to the extent that it had caused utility lines running through the tree to deflect. Furthermore, the defendant's witnesses failed to appreciate or investigate the obvious movements of the tree's roots which caused the heaving of the roadway and curb depicted in plaintiff's Exhibit 1. It is reasonable to infer from the small bits of asphalt located on one side of the pothole in front of the tree, that recent heaving of the tree caused

disturbance of the asphalt roadway in front of the tree. The lean of the tree, its contact with utility wires, and the heaving of the roadway support Mr. Panu's testimony that the tree was beginning to tip and fall.

Ironically, Mr. Panu's opinion was buttressed by a document which the defendant Town of Manchester admitted. Specifically, defendant's Exhibit I, which was a course manual entitled "Tree Risk Assessment in Urban Areas and the Urban/Rural Interface." Chapter Four of the manual deals with risk assessment. Risk is assessed using a twelve point scale. The lowest possible risk being zero, and twelve points representing extreme risk. Points are assigned based upon probability of failure, size of the tree, and the target area. Mr. Panu assessed the risk for this particular tree at twelve points. He assigned the maximum five points for probability of failure, because it was a leaning tree with recent root failure and soil mounding. This opinion is supported by the evidence. He also gave the maximum of three points for size, because of the large size of the tree. He also assigned the maximum of four points for the target area, because the Trifari home was within striking range of the tree. At a risk rating of twelve points, the tree fell into the extreme risk category, and the manual indicates immediate action is required. The evidence shows that immediate action was not taken in this case.

As noted earlier, the defendants Tupper and the Town of Manchester have filed a special defense of governmental immunity. The plaintiff does not dispute that, ordinarily, municipal defendants would not be liable to the plaintiff under General Statutes § 52-557n (2) (b), which exempts municipal defendants from liability for negligent acts which require the exercise of judgment or discretion. The plaintiff maintains that the facts of this case bring it within the imminent harm/identifiable victim exception.

In the case of *Doe* v. *Peterson*, 279 Conn. 607 (2006), our Supreme Court stated: "We have identified three exceptions to discretionary act immunity. Each of these exceptions represents a situation in which the public officials "duty to act is so clear and unequivocal" that the policy rationale underlying the discretionary act immunity - to encourage municipal officers to exercise judgment - has no force." Id. at 615. In this case the exception to immunity that is implicated provides "[d]iscretionary act immunity is abrogated when the circumstances make it apparent to the public officer that his or her failure to act would be likely to subject an identifiable person to imminent harm. By its own terms this test requires three things: (1) an imminent harm; (2) an identifiable victim; and (3) a public official to whom it is apparent that his or her conduct is likely to subject that victim to that harm." Id. at 616.

In this case the court finds that all three requirements are satisfied. The imminent harm that existed was the large oak tree which had begun to lean, heaving the roadway, as it began its fall onto the plaintiff's insured's house. The insured were identifiable victims, and the potential harm was apparent to Mr. Tupper.

In the case of *Purzycki* v. *Fairfield*, 244 Conn. 101 (1998), the court discussed the imminent harm component of the exception. In reviewing its prior decisions, the *Purzycki* court stated "In *Burns* it was critical to our conclusion that governmental immunity was not a defense, that the danger was limited to the duration of the temporary condition and that *the potential for harm was significant and foreseeable."* (Emphasis added.) The *Purzycki* court also stressed that the situation involved a limited geographical area. Id. p. 110.

This case presents a similar factual situation in that the geographical area is limited to the fall zone of the subject tree . The duration of the harm was limited to the time it took, after the inspection of March 11, 2009, for the leaning tree to complete its fall . The plaintiff's expert testified the tree was in imminent danger of falling when it was inspected on March 11, 2009, and in fact it did fall twenty-five days later.

This case is factually different than the case of *Evon* v. *Andrews*, 211 Conn. 501 (1989). That case involved a claim that municipal officers had been negligent in failing to reasonably

inspect and enforce statutes concerning a rental unit that the decedent was occupying when it was destroyed by fire. The *Evon* court stated that the risk of fire "implicates a wide range of factors that can occur, if at all, at some unspecified time in the future." Id. at 508. In this case the risk for harm from the ultimate fall of the tree was significant and foreseeable. Here, there was evidence of imminent harm and an identifiable victim that was not present in *Evon.*

The defendants Michael Tupper and Town of Manchester have failed to sustain their burden of proof regarding their special defense of governmental immunity.

The defendant Connecticut Light & Power Company assumed the responsibility of removing the tree. They did this at the request of, and as an accommodation to, the Town of Manchester. It is a "recognized principle of Connecticut law that one who gratuitously undertakes an act will be liable for performing it negligently. If one undertakes to perform an act and performs it negligently . . . it makes no difference whether . . . the act was performed gratuitously . . . . *Zatkin* v. *Katz*, 126 Conn. 445, 450, 11 A.2d 843 (1940). One who gratuitously undertakes a service that he has no duty to perform must act with reasonable care in completing the task assumed." (Internal quotation marks omitted.) *Coville* v. *Liberty Mutual Ins. Co.*, 57 Conn. App. 275, 281-82, 748 A.2d 875, cert. granted on other grounds, 253 Conn. 919, 755 A.2d 213 (2000) (appeal withdrawn March 30, 2001); see also *Cedar Mountain, LLC* v. *D &*

M Screw Machine Products, LLC, 135 Conn.App. 276, 289 n.9, 41 A.3d 1131 (2012) ("[o]ne who undertakes to do an act gratuitously is still required to use reasonable care").

The same factors that compel a conclusion that Michael Tupper and the Town of Manchester were negligent apply also to CL&P. The court finds that it was negligent in failing to appreciate the danger that the tree presented, and in failing to take appropriate action to promptly remove the tree after it had first been inspected by a representative of CL&P. In considering the negligence of the municipal defendants, Michael Tupper and the Town of Manchester, and the negligence of C L & P, the court finds that the municipal defendants and C L & P were equally negligent.

The defendants have alleged the defense of comparative negligence on the part of the Trifaris. The court concludes that they have failed to sustain their burden of proof with regard to this issue. The conduct of Mr. and Mrs. Trifari was reasonable under all of the circumstances. Although the Mr. Trifari noticed a crack in the curb in November, it was not until March that he observed the condition of the roadway , the heaving, and the deflection of the wires caused by the leaning tree. The Trifaris promptly notified the town upon observing these conditions. They were not negligent.

CONCLUSION

Judgment may enter for the plaintiff in the amount of $110,000.00. The court allocates negligence as follows: fifty percent to the defendants Tupper and the Town of Manchester and fifty percent to the Connecticut Light & Power Company.

Domnarski, J.

State of Connecticut
Judicial Branch

HHD-CV10-6011394-S CAMBRIDGE MUTUAL FIRE INS COMPANY v. TUPPER, MICHAEL

Prefix/Suffix: [none] **Case Type:** T90 **File Date:** 05/28/2010 **Return Date:** 06/22/2010

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Parties & Appearances

Party		No Fee Party
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D-51	**MANCHESTER TOWN OF** **Attorney:** MANCHESTER CORPORATION COUNSEL (035618) 41 CENTER STREET MANCHESTER, CT 06040	File Date: 06/24/2010
D-52	**CONNECTICUT LIGHT AND POWER COMPANY** **Attorney:** CARMODY & TORRANCE (008512) PO BOX 1110 WATERBURY, CT 067211110	File Date: 09/09/2010
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Motions / Pleadings / Documents / Case Status

Entry No	File Date	Filed By	Description	Arguable
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