SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION
Small Claims and Conciliation Branch

YVONNE F. THAYER,

Plaintiff

v.

FRANCIS DeWOLF, *ET AL.*,

Defendants

Small Claims No. 8851-03
Magistrate Judge Goodbread

MEMORANDUM ORDER

I think that I shall never see
A Small Claims case worth a single tree.
Yet, a tree whose branches once entwine
And cross the neighbor's boundary line
May, with its great trunk extended
Out of bounds, have its life ended.
For that is the rule in the case of *Sterling* [1]
For overhanging branches curling.

While courtesy and common sense
Could have avoided this charged offense,
The right to self-help still continues
In this and similarly governed venues.
Although only God can make a tree,
A mere judge is bound by prior decree.
Thus, a growth onto land abutted
Allows the neighbor to simply cut it.

Yet, unlike the tree, which at least had standing,
The Defendants can't have what they're demanding.
For, by cutting a tree before they own it,
They trespassed without having known it.
So that *sans* shade they could plant new grass,
They must now pay for their trespass.
Although they would at these rights scoff,
They went out on a limb – and sawed it off.

- With apologies to
Alfred Joyce Kilmer
(1886-1918)

[1] Sterling v. Weinstein, 75 A.2d 144 (D.C. Mun. App. 1950).

I. INTRODUCTION

This is only the latest case arising in the Small Claims Branch that proves the veracity of this Court's frequent pronouncement that, "There are no such things as 'small claims' --there are only 'small amounts.'"

In what appears to be a case of "first impression," insofar as this Court can determine from its research, the parties present competing claims stemming from the ancient right to cut off branches from a neighbor's tree intruding onto one's property. Here the Defendants did so, but with two "legal knotholes" in their actions: (1) they cut down virtually the entire tree, rather than just "trimming it back" and (2) they did so prior to acquiring formal title to the property over which the tree branches were encroaching. For these reasons the Court finds that their actions constituted a trespass and has awarded Plaintiff damages for the fair market value of her lost tree.

Alternatively, the Court has considered the theory that the tree was a "boundary line tree" and was "jointly-owned" (to the extent that the Defendants had any "ownership rights" at all at the time of the cutting), but concludes that the rights inhering in "co-tenants" would still have prohibited the Defendants from cutting down the tree, with the same result as to damages for the Plaintiff.

II. FACTUAL ROOTS [2]

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[2] This case was tried before the Court, Counsel appearing for both sides, on the afternoon of Tuesday, September 9, 2003, and concluded in a second session the following Tuesday, September 16th. The Court took the matter under advisement and has since devoted the care to the case that this comparatively long lapse of time merits. In so doing, the Court not only reviewed its own "bench notes" and the photographic and documentary exhibits in evidence, but it also obtained and listened anew to the complete trial record, which consists of six audio tapes, four of which were for the first date, and the last two for the concluding date. The tapes are cited herein by the number and side of each tape, followed by the witness; *e.g.*, (Tape 2B)(Thayer). With leave of the Court,

In this Small Claims case, replete with competing aboricultural expert witnesses, *inter alia*, the principles of good neighborliness and common sense, on one side, conflict with the right to interdict botanical property encroachment, on the other. In what has become a modern "ritual of urban self-help," the Defendants, as new homebuyers, relying on long-standing legal principles that permit such actions, cut down a large tree that was growing from the Plaintiff's yard over onto the purchase property next door. In this case, however, the purchasers were premature in their assumption of this right and must now suffer the penalty of all trespassers who, without permission, have done material damage to property not their own.

A. The Lay of the Land

For nearly 20 years, a healthy and prosperous mulberry tree lived near the center of the southwestern the boundary line between two homes on the 3300 block of Idaho Avenue, N.W.,[3] located in the historic Cleveland Park section of the District, barely two blocks away from the site of the home of the late President Grover Cleveland, for whom the neighborhood was named.[4] The tree emerged

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post-trial submissions were made by the Plaintiff on September 26, 2003 (hereinafter "Pl. Post-Tr. I"), a reply by the Defendants on October 9th (hereinafter "Def. Post.-Tr."), with a rebuttal submission by the Plaintiff on October 15th (hereinafter "Pl. Post-Tr. II"), all of which have also been considered. The Defendants' pos-trial submission may be taken as both a renewal of their Motion for Summary Judgment and their timely-made Motion for Judgment as a Matter of Law under Rule 50(a), in order to preserve all review and appal rights. *See* n.44, *post*. Both are denied herewith.

[3] *See* PX 1 (plat of properties denoting the location of tree at issue with red dot)(Tape 2B)(Thayer); Pl. Post-Tr. I at 8.

[4] *See generally*, Paul K. Williams & Kelton C. Higgins, Images of America: Cleveland Park (Arcadia Publishing Co., 2004), pp. 34-35 (Cleveland Park) & 115 (Idaho Ave.).

from ground on the homestead property owned by the Plaintiff herein ("Ms. Thayer"),[5] who had developed a fondness for the ugly tree, she testified.[6] Located approximately eight feet from the Thayer house,[7] with its trunk emerging within inches of the boundary line with the neighboring property, this mulberry had grown to approximately 52 feet in length.[8] Ms. Thayer testified that she had

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[5] Ms. Thayer is a foreign service officer at the Department of State and has lived at this address since 1977. (Tape 2A)(Thayer). She was represented at trial by Cheryl Crumpton, Esq., of the Texas Bar, an associate in the firm of Baker Botts, LLP, and who was admitted *pro hac vice* on unopposed motion for this case (though she has since been admitted to the D.C. Bar).

[6] This was a "white mulberry tree" (*Morus alba*), a description reflecting the color of its bark, rather than of its leaves or fruit. As a species, the unfortunate mulberry tree (also known as a Sycamine tree) has endured a piteous historical reputation, including that in the New Testament as a metaphor for deep-rooted obstinance. *See* Luke 17:6 (in Jesus's unflattering comparison to faith of the size of a mustard seed). On the other hand, it is the "home territory" of the Chinese silkworm of great fame and heritage. *See generally*, D'Homergue v. Morgan, 1838 Pa. LEXIS156 (Jan. 1838)(controversy over the promotion of the culture of the mulberry tree and the raising of silkworms); State v. Executors of McDonogh, 8 La. Ann. 171 (1853)(legator devises mulberry trees for silk worm cultivation); Pierce v. Daniels, 25 Vt. 624 (1853)(dispute over plan to raise mulberry trees for silk production); Stockton & V.R. Co. v. Common Council of Stockton, 41 Cal. 147 (1871)(setting aside land for railroad use that had been designated for the growing of mulberry trees and the production of silk); and Flanagan v. Marcos Silk Co., 235 P.2d 107 (Cal. App. 1951)(easement over through mulberry orchard property owned by silk mills). Notably, "The Mulberry Tree" (1889) is also the subject one of the most beautiful paintings by t the French post-impressionist Vincent Van Gough (1853-90), a glorious spread of purple and gold, which now resides in the Rijksmuseum in Amsterdam.

[7] PX 2; *see also* corroborative evidence in PX 1 (the plat diagram showing the distance from the front of the Thayer house to the property line to be 8.05 feet), which also showed that the tree was centered approximately 8.5 feet from the Thayer house. (Tapes 2A & 5B)(Thayer); *see also* DX B (non-scale oversize exhibit showing this distance to be 8' 5") and Def. Post-Tr. at 2 ¶¶ 2& 4).

[8] The repeated ***legal*** arguments of both counsel herein that this tree sat astride the boundary and was therefore "jointly-owned," *see* n.121, *post*, notwithstanding, the actual facts in evidence show otherwise and the Court therefore finds that the "base" of this tree was ***entirely*** on the Thayer property. The Court believes this to be the case for

enjoyed its comfort and shade throughout the years of her residency at this address.[9]

Unfortunately for her, and ultimately for the tree itself, it began to grow at

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the following reasons. The photographs in evidence clearly show the tree on the Thayer property. PX 4, a photo taken from the Thayer side of the property, shows the entirety of the base of the tree on the Thayer side of the fence (and angling backwards), when the facts show that the entirety of the fence is a few inches onto the adjoining property. That part of what was once a "dual trunk" (technically a large "branch," *see* n.99, *post*) once reacher over onto the neighboring property does not obviate the legal definition of the "trunk." *Id.* This is also represented in DX 3, a photo of the other side of the trunk showing the "branch protrusion" that had sawed off in previous years; it is ***that*** protrusion that reaches over onto what became the DeWolf property – but it is ***not*** the ***trunk***. Moreover, Ms. Thayer herself, repudiating her own lawyers' esoteric legal contentions, repeatedly testified, "It is my tree." (Tape 2B)(Thayer). That is the ***evidence*** at trial. No plat or survey was offered in evidence by either to show definitively otherwise. When, for example, Ms. Thayer was asked to mark the location of the tree with a "red dot" on PX 1 (the plat of the land), her placing the mark on the boundary line was taken by the Court to indicate the area of overlap, not the situs of the trunk itself. *See* n.3, *ante*. This marking by Ms. Thayer carries no greater degree of precision that do the oversize "visual aids" drawn up by Ms. DeWolf (DX B, C &D), all three of which clearly show the entire trunk of the tree on the Thayer side of the property line. *Cf.* Pl. Post-Tr. II at 13. The "legal ownership" of the tree was entirely in Ms. Thayer and the Court so finds. As discussed below, however, this is a distinction without any resultant difference because, under the pertinent case law, the DeWolfs would not have had any right to cut down the tree to this extent even if they did have some sort of actual, implied, or vicarious "joint ownership" in it. *See* Section IV(C) *post*.

[9] By the time of trial, of course, the tree was gone and no record had ever been made of its actual height or length in life. Various estimates appear on the trial record. Initially, Ms. Thayer testified that it had grown to approximately 80 feet, but revised that estimate to 60 feet, indicating that it was about as long as the courtroom. (Tape 2A)(Thayer). The Court takes judicial notice (having previously measured it) that the distance from the witness stand to the back wall of the current Small Claims Courtroom in Building B is exactly 57 feet. The Defendants' Home Inspector, Mr. Walter Mstowski, *post*, saw the tree in its prime during his inspection and his opinion was that it was 42-50 feet high. Mr. Brian Cooper, the worker whom the Defendants hired to cut the tree down, testified that his estimate was approximately 50 feet. (Tape 3B)(Cooper). Averaging this figures yields an estimated length of about 52 feet.

an increasing incline southwestward toward the neighboring yard.[10] Like the length of the tree, the evidence as to its angle of incline had to consist of estimates and deductions. Using a protractor and for actual measurement on photographs of the tree itself, [11] the Court found this angle to be 65° on the bottom or front (Defendants') side of the tree and 55°on the top or back (Plaintiff's) side – or a "median" angle of approximately 60°.[12]

In so growing, the Thayer mulberry's trunk pushed into a segment of a long-standing wooden fence and concrete retaining wall, both located on the neighboring property and running located parallel to the boundary line.[13] Eventually, the tree grew so that a good portion of its 52-foot length extended over the neighbor's yard next door, with large branches and a significant portion of its canopy hanging over the roof of the house there. Mr. Mstowski, the Home Inspector, estimated that its angle constituted a 12-14-foot incursion onto the neighboring property, and that several of its large branches hung and additional 6-8 feet over the house that he was inspecting for the new purchasers. A safe overall estimate of its extension is 20-24 feet onto the neighboring property (say, 22 feet).[14]

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[10] *See* PX 4 (photo from Plaintiff's side) and DX 3 (photo from opposite side); *see also* DX B, DX C, & DX D (oversize non-scale posters depicting the leaning tree).

[11] DX 3 & PX 4.

[12] (Tape 4A)(discussion during testimony of Mrs. DeWolf); *see also* oversize DX B (not in court jacket); *see also* Def. Post-Tr. at 4 ¶ 17).

[13] PX 4 & DX ; *see also* Def. Post-Tr. at 2 ¶ 5 (testimony of Francis DeWolf as to location of the fence on what became his property).

[14] (Tape 3A)(Mstowski); *see also* DX B (poster-size exhibit showing an intrusion of approximately 11.5 feet). One of the Defendants herself testified that the incursion was only about ten feet (Tape 4B)(Mrs. DeWolf); *see also* DX B (oversize exhibit showing

For years, however, this "inclination" elicited no complaint from Ms. Thayer's long-time neighbor there – and, in fact, because he had also benefitted from its shade, he shared expenses for the care of the tree over the years of his residency there. Implicit in the course of this neighborly conduct was a tolerance, if not outright permission, for the intrusion of the mulberry tree over the course of 12 years' time.[15]

B. The House "Under Contract"

In October 2001, however, that neighbor agreed to sell the house at issue to the Defendants herein ("the DeWolfs").[16] On Friday, November 16, 2001 – 35 days ***before*** formal transfer of title of the neighboring property to them at closing – the DeWolfs arranged for an inspection of their prospective property by an enterprise known as "Home Tech Systems" in the person of Mr. Mstowski,

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a distance of c. 11.5 feet) and the discussion on this issue between Court and Counsel for both sides (Tapes 4B & 5B)(agreeing that the incursion was in the 10-12 foot range, not counting the overhanging branches). An approximation can be readily made by a "reverse application" of the Pythagorean Theorem. Since both the general angle of incline (60°) and the length of the tree (52') are known, an scaled drawing can easily show that, by "dropping" a line straight down from the scaled 52' mark on the hypotenuse (leaving an apex of 30°) to the base of a right triangle formed by running a line from the bottom of the hypotenuse to the point where the right angle intersects it, would yield a horizontal "incursion" via that baseline onto the property next door of anywhere from 20-24 feet, depending on any twists in the "hypotenuse trunk" as it rose to the 52-foot level). The Court fixes it at 22 feet.

[15] Ms. Thayer testified that she had known the previous neighbor for that period of time and had never received any complaint from him about the mulberry tree, and, in fact, the last shared the cost for the care of the mulberry had been only four months earlier, in August 2001. (Tapes 2B & 3A)(Thayer); PX 5 ("Care of Trees" invoice).

[16] Def. Post-Tr. at 2 ¶ 8. One is reluctant to label this charming, if impatient, young couple, as "the DeWolves." They were represented by Adam Augustine Carter, Esq. of the D.C. Bar.

mentioned earlier.[17] Prior to formal closing on the sale, they visited the property with him in order to make remodeling and landscaping plans. In so doing, they looked askance at the mulberry tree angling onto their prospective property, having two major concerns regarding it.

Their first concern was the proximity of the angling tree trunk to the house, combined with the extent to which its canopy was overhanging the roof. Mr. Mstowski, advised them that, in his opinion, the mulberry tree was leaning dangerously close to the house. It was, he advised, "an accident waiting to happen" and predicted that it was "only a matter of time before a storm occurred and it fell on the house." [18] Nevertheless, what the Court found most significant about Ms. Mstowski's testimony in this regard was the extent the ***remedy*** that he recommended to the DeWolfs, which came out in a colloquy with the Court as follows:

> THE COURT: So, you recommended that it come down.
> MR. MSTOWSKI: No, sir. I recommended that it be trimmed – only the overhanging branches.[19]

As discussed more fully below, this "vicarious admission"[20] at trial by the DeWolfs'

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[17] *See* n.9, *ante*. Mr. Mstowski has been a member in good standing of the American Society of Home Inspectors since 1994, he testified. (Tape 3A)(Mstowski).

[18] DX 5 (Letter from Walter Mstowski to Mrs. DeWolf dated 01/27/03 and reciting that date of inspection). This letter reflects his "professional opinion … that this tree was a danger to the roof and framing of this house" because "the large tree is too close to the house." Note, however, that the letter also refers to his prior written report (of at least 17 pages' length) to the DeWolf's which was also not introduced into evidence for any purpose at trial. (Tape 3A)(Mstowski); *see also* Def. Post-Tr. at 3 ¶10).

[19] (Tape 3A)(Mstowski). The Plaintiff's assertion is that this was quantified during the Mstowski testimony "to trim the six feet of branches that were growing over the[] roof" of the house next door. Pl. Post-Tr. I at 4 and Pl. Post-Tr. II at 2-3 ¶ 10.

[20] *Cf.* Fed.R.Evid. 801(d)(2)(C) & (D).

expert witness is significant, if not pivotal, because it, in fact, comports entirely with the opinion of Ms. Thayer's ***own*** expert witness, that all the star-crossed mulberry tree needed under the circumstances was to be "pruned back," not cut down and destroyed outright.[21]

The second concern of these homebuyers was the shade that the mulberry tree was casting on that portion of the back yard, which they planned to re-sod. They were advised that this would be inimical to healthy growth of the new grass.[22]

Without any discussion with, or notice of any kind to, Ms. Thayer, the DeWolfs then decided that the tree must go – even before they took legal possession of the property.[23] In reaction to the situation, Mrs. DeWolf testified, "somewhere near Thanksgiving,"[24] she contacted Brian Cooper of "Tree Scape

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[21] *See* testimony of Mr. Keith Pitchford(Tape 1B)(Pitchford), more fully discussed in the text associated with nn.45-49, *post*.

[22] This deleterious prospect was a subject of the testimony of Mr. David Hall, the Defendant's expert witness at trial (Tape 2A)(Hall), and of Mrs. DeWolf herself (Tape 4A)(DeWolf). The prospective placement of this sod is shown on (DX G)(non-scale drawing on lined paper).

[23] Thayer Affidavit in Support of Opposition to Motion for Summary Judgment ("Thayer Aff.") at ¶ 4; (Tapes 2A & 3A). On cross-examination, Mrs. DeWolf conceded that prior to the cutting of the tree she had "made no prior efforts to contact Ms. Thayer." (Tape 4B)(DeWolf). The "sod issue" itself but another obvious and regrettable example of how much better it would have been had the DeWolfs attempted any realistic communication with Ms. Thayer to resolve what was then (in December) a distant problem, rather than act with the groundless haste with which they did in this matter. The testimony clearly showed, however, that the new sod was not lain until the following March of 2002, a full three-and-one-half months later. (Tape 3A)(Thayer) & (Tape 4A)(DeWolf); *see also* Thayer Aff. at ¶ 5.

[24] Thanksgiving of 2001 fell on Thursday, November 22th – still a month and half before ownership of the property passed to the DeWolfs.

Services."[25] She then retained him (in the words of the invoice/contract) to "take down [the] large mulberry tree in [the] back yard," among other similar tasks.[26] Thus, as the Plaintiff points out in her post-trial submission, there is little doubt that at all times relevant, both before and during the cutting, Ms. DeWolf knew or had reason to know, that the intent was to "take down" the mulberry tree entirely – not merely to "trim" or "prune" it back to the property line.[27]

C. The *Actus Reus* on the *Morus Alba*

At around 6:00 a.m. on the morning of Friday, December 7th, 2001,[28] Mrs. DeWolf testified, she received an unexpected telephone at her pre-Idaho Avenue residence from Mr. Cooper, informing her that he had just had a cancellation for another job and that now he had a chance to come by and do the contracted work on the Idaho Avenue property that day. Mrs. DeWolf testified that Cooper informed her that "[i]f he didn't do it then, he didn't now when he could do it – probably in about two more weeks." [29] This was three weeks after Ms. DeWolf had been advised by Mr. Mstowski to "trim" the branches, two weeks after she had retained Mr. Cooper for the tree work, but still over a month from the closing date on the

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[25] So compelled and assiduous was she to accomplish this task, Ms. DeWolf had already contacted 4-5 other tree-cutting services before selecting the Cooper enterprise. (Tape 4A)(DeWolf). This is to be measured against the protestations that, in view of the upcoming closing on the house, combined with her family's move, and her duties as a mother to two pre-schoolers and an infant she was "too preoccupied" to deal with notifying or discussing the matter with, Ms. Thayer right next door. (*Cf*. Def. Post-Tr. at 3 ¶ 11 with Pl. Post Tr. xx).

[26] Item 1 on DX 6 (invoice dated 12/01/01); see also Pl. Post-Tr. II at 11-12.

[27] Pl. Post-Tr. I at 3-4 & 6 and Pl. Post-Tr. II at 13.

[28] A time and date not without some irony under these circumstances.

[29] (Tape 4A)(DeWolf); *see also* Def. Post-Tr. at 3 ¶¶ 13-14).

property. Nevertheless, apparently little or no consideration was given to waiting any longer to deal with the leaning mulberry tree.

Mrs. DeWolf agreed to meet the Cooper crew at the property shortly before 8:00 o'clock that morning. When Mr. Cooper made his initial recommendation as to the extent of the work required as to the mulberry tree in particular, Ms. DeWolf was in a quandary – especially about cutting down Ms. Thayer's tree altogether. Her telling admission at trial was that she told Cooper that "I haven't had a chance to talk to her. ***I don't really know if she wants the whole tree removed."***[30] She then went over to Ms. Thayer's house shortly after 8:00 a.m. on a workday, having every reason to expect that, in the face of this unannounced early morning visit, Ms. Thayer would either still be asleep, getting ready to go to work, or already departed for work, but, in any event, in no position to discuss, much less resolve, this problem.[31] It turned out that, indeed, Ms. Thayer had already left for work.[32]

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[30] (Tape 4A)(DeWolf).

[31] *Id.* (emphasis added). As to why Mrs. DeWolf would take it upon herself under these circumstances to take such drastic and hasty actions, the Court is – well, stumped. Astonishingly, during her trial testimony, Mrs. DeWolf gave as her reason for not contacting Ms. Thayer prior to that point that Ms. Thayer appeared to be "a little bit older" woman and might not wish to be troubled with it. It was at that point that the Court knew that any chance of settlement, like the tree itself, had been cut off completely!

[32] (Tape 2A)(Thayer); (Tape 3B)(Cooper). Post-trial, Defendants submit that Ms. DeWolf had tried "several times during the morning" to contact Ms. Thayer, but had been unsuccessful. (Def. Post-Tr. at 4 ¶ 15). The Court finds no evidence of multiple attempts in the record (though, concededly, some of the trial tapes are faint). The Court will only say that it does not view "several" attempts at 0700 hours on the morning of an irreversible event to be much better than only one. *See* Pl. Post-Tr. I at 2 and Pl. Post-Tr. II at 2-3 ¶¶ 14-15.

When Mrs. DeWolf returned to converse with Mr. Cooper, therefore, they ***both*** knew that Ms. Thayer had ***not*** agreed to have her tree cut down and would have no knowledge of this issue whatsoever until after the deed was done. It was at that point, Ms. DeWolf testified, that Mr. Cooper suggested, "Why don't we ***just*** cut it to the property line. You can do that. Then I can come back in 2-3 weeks and remove the stump for her." [33] Mrs. DeWolf acquiesced to this suggestion.[34] Cooper then proceeded to prune other trees on the property, pursuant to Mrs. DeWolf's directions. She remained at the house for the next hour or so, while the work went on, though by the time she departed, the work crew had not yet reached the mulberry tree.[35] When Ms. DeWolf returned later in the day to view what she had wrought through her hasty action and negligent supervision of her hirelings, she, too, was astonished at the extent of the cutting of the mulberry tree. She conceded twice at trial that "I didn't think they would cut it quite that low." [36]

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[33] (Tapes 3B & 4A)(DeWolf). Implicit in this "alternative plan" was the *sub silentio* premise, as adverted to in text associated with n.30, *ante*, that the ***original*** plan was to take out the tree altogether. Defendants' post-trial submission virtually concedes this point. (Def. Post-Tr. at 4 ¶ 16).

[34] *See also* Def. Post-Tr. at 16. Thus, when Ms. Thayer testified that later Ms. DeWolf protested to her that "she didn't have time to tell me" before the cutting was done (Tapes 2A & 3A)(Thayer), it turns out what Ms. DeWolf actually meant was that, given the fact that the tree cutters had unexpectedly turned up on a date for which she had not planned, and having already determined to cut the tree without any prior notice or discussion with Ms. Thayer, anyway, the result was that she "did not have time," under those circumstances, to inform an actual property owner of the intent of a prospective property owner to cut down the former's tree.

[35] (Tape 3B)(Cooper).

[36] (Tape 3B)(DeWolf) & (Tape 4A)("I didn't know they were going to cut it quite as low."); *see also* n.101, *post*. Moreover, Ms. Thayer testified that later Ms. DeWolf had lamented to her that "she did not expect that the whole tree would be cut down, but that

This candid admission merits a review of the evidence presented at trial as to the size of the tree, the extent of its incursion onto the neighboring property, and the size of the remaining stump. As discussed earlier, the length of the mulberry trees was approximately 52 feet, rising at an angle of approximately 60° and projecting approximately 22 feet onto the neighboring yard.[37] This means that a full 30 feet of the mulberry tree's trunk (c. 58%) was on Ms. Thayer's side of the fence. Even a conservative interpretation of these estimates would leave an observer expecting to find 29-32 feet of the mulberry tree remaining on Ms. Thayer's property after the departure of the Cooper crew. In fact, however, the remaining stump was only about 6.5 feet in heigh and approximately 21inchs in diameter.[38] By this approximation, the tree crew had cut off about 45 feet of the length of the tree – or more than twice what they should have even under generous factual and legal conditions. Or, put another way, they trespassed that much onto and against Ms. Thayer's property committing substantial,

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is what the tree cutter determined would be the best course of action" (Tape 2A)(Thayer); (Tape 3A)(Thayer)(quoting Mrs. DeWolf as staying that "I didn't intend for it to be cut that way"). Notably, however, Mr. Cooper testified that before he even began the job, "I told her where I was going to cut it." (Tape 3B)(Cooper). Whether authorized *vel non*, as discussed more fully below, this was ***still*** a trespass on the Thayer property, with resulting damages – all at the direction of a stranger with no legal right to do so. *See* Pl. Post-Tr. II at 8-9.

[37] One of Ms. Thayer's long-time neighbors estimated at trial that, at its literal height, 40-45% of the tree remained on the Thayer side of the fence (which would constitute 21-24 feet of the trunk on that side). (Tape 5A)(Woodward); *see also* Pl. Post-Tr. II at 4 ¶ 21.

[38] The approximate height of the stump was agreed upon during the testimony of Mrs. DeWolf. (Tape 4B)(DeWolf); *see also* Pl. Post-Tr. I at 3 and Def. Post-Tr. at 5-6 ¶¶ 21-22). Actual measurement showed it to be 19-22 inches in diameter. (Tape 1B)(Pitchford) & Def. Post-Tr. at 2 ¶ 2); *see also* PX 5 (work description form, Item 4, dated 08/01/01), which gives the diameter of this mulberry as 19 inches.

impermissible, and irreversible damage in the process.

Arriving home after sunset that day,[39] Ms. Thayer discovered that the mulberry tree in her back yard was gone.[40] When Ms. DeWolf came over that evening to inform her of what she had caused to be done to Ms. Thayer's tree, the sight, she testified, left her "agape."[41] After a period of reflection, if not decompression, during which no progress was made in resolving this dispute, Ms. Thayer filed this suit against the DeWolfs on or about June 20, 2003. In due course, the DeWolfs filed an Answer and Counterclaim in which they not only denied any legal liability for their actions, but also asserted that (a) they now have the right to recover their own costs against Ms. Thayer for having had the tree cut down and (b) Ms. Thayer's tree had actually damaged the fence and retaining wall on their side of the two properties,[42] also resulting in water damage to their basement, for which they initially sought monetary recompense, as well.[43]

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[39] Consultation of any standard local almanac or any Internet weather site reveals that the sun sets in the jurisdiction at or about 5:15 p.m. on December 7th of any given year.

[40] (Tape 2A)(Thayer).

[41] (Tape 3A)(Thayer); see also Pl. Post-Tr. I at 3)("extremely upset"). It was only after the fact that Mrs. DeWolf, according to her own testimony, came over to inform Ms. Thayer of the reason for her actions. (Tape 4A)(DeWolf)("Hi. I'm your new neighbor. I just wanted to let you know we had to cut the tree down because the branches were hanging over our house.").

[42] *See* DX 3 (photo of tree grown against retaining wall) and DX F (estimate for masonry repairs).

[43] The Defendants attempt to advance on the procedural fact that the Plaintiffs never filed a formal Answer to their Counterclaim. Def. Post-Tr. at 6 ¶ 25 & at 8 ¶ K. Although Small Claims Rule 5 does require the filing of such an Answer, Civil Rule 15(b) plainly states that "[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." The parties joined this issue with the pre-trial Motion for

D. Damages

After the Defendants' Motion for Summary Judgment on the issue of trespass was denied by the Court on July 15, 2003,[44] the case was eventually called for trial on September 9, 2003. As Plaintiff, Ms. Thayer called as her expert witness Keith C. Pitchford, a Certified Arborist and a member of the International Society of Arboriculturalists (ISA) since 1979.[45] Using one commonly-accepted process, the "appraisal method," Mr. Pitchford valued the missing tree at $5,800.[46] By another method, the "square foot value,"[47] Mr. Lew Bloch, a registered

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Summary Judgment and the Defendants did not file any other pre-trial motions on this point. *See* Pl. Post-Tr. II at 4¶ 25& at 14-15. Instead, both parties went to trial on all issues raised in both the original claim and in the counterclaim. The Court, therefore, cannot allow a technical judgment to be entered on the Counterclaim, which it has found to be meritless after having heard all the evidence.

[44] *See* n.63, *post.*

[45] (Tape 1A)(Pitchford); PX 4 (current certification). All expert witness qualifications and *voir dire* thereon was implicitly waived, without objection, at the Court's suggestion that the parties' respective experts be called at the beginning of the trial and out of turn so as to allow them to depart and thus to minimize further expense to the litigants. (Tape 2A); *cf.* Fed.R.Evid. 702-03 & Small Cl. Rule 12(b).

[46] PX 12 (reported dated 09/05/03). To the *noncognoscenti,* this approach rivals the complexity inherent in the long-dreaded legal doctrines intricacies of the Rule Against Perpetuities, the Rule in Shelley's Case, or the Infield Fly Rule. Mr. Pitchford utilized the three main factors of this method, "location, contribution, and condition" to yield a "per square inch value," giving the tree a valuation of 45-60 points on that scale. (Tape 1B & 2A)(Pitchford); *see also* Pl. Post-Tr. I at 6-7. Though, as pointed out on cross-examination, Mr. Pitchford did not view the scene or the remaining stump until 20 months after the tree had been felled, he does recite in this report that he interpolated the bases for his opinion of value of the absent tree by taking into consideration discussions with Ms. Thayer herself, the written statement of previous experts who had viewed and evaluated the tree in its prime (*see, e.g.*, DX 5), and viewing another white mulberry tree nearby on the Thayer property which, though smaller, was "in similar condition." PX 12.

[47] This method, apparently, is also known as the "trunk method." *See* Lakewood Homes, Inc. v. BP Oil, Inc., 1999 Ohio App. LEXIS 3924 *18 (August 26, 1999).

consulting arborist and landscape architect, had previously found it to have been worth $6,700.[48]

The Defendants' position on this point was that, even if a trespass had occurred, the white mulberry was intrinsically worthless.[49] Their expert witness, Mr. David Hall, an ISA member since 1991, an arborist since 1977, and now the chief groundskeeper at the 200-acre Chevy Chase Country Club in Bethesda, Maryland, testified that the tree had "a very low valuation." He virtually sneered

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[48] PX 9 (report dated 10/21/02). Note that Mr. Bloch's report was only considered in evidence for this estimate, not necessarily for its other evaluative contents, other than the fact that the Plaintiff's testifying expert also relied on it as a basis of his opinion. *See* Fed.R.Evid. 703; (Tape 1B)(Pitchford). Of course estimates are a "stock-in-trade" of the Small Claims Branch. *See, e.g.*, Hemminger v. Scott, 111 A.2d 619, 620 (D.C. 1955)("[T]here is no practical difference between an itemized receipted bill being offered as proof of payment and … an itemized … estimate coupled with oral testimony as to payment of same. Either method supported by testimony … is sufficient *prima facie* evidence of the amount of damage."); Solomon v. Easterly, 160 A.2d 621, 623 (D.C. 1960)("A *prima facie* showing of damages is made by an itemized bill or estimate, or a witness who has seen and who can testify to the extent of the damages."); and Brewer v. Drain, 192 A.2d 532, 533 (D.C. 1963)("Either an itemized receipted bill, or an itemized estimate coupled with testimony as to payment, plus, in either case, testimony that the repairs were necessitated … is sufficient evidence to constitute a *prima facie* showing, provided there is no evidence of a suspicious nature surrounding the transaction ….");
see also Sm. Cl. R. 12(b). Here, either of the Plaintiff's valuations (averaging $6,250), of course, exceeds the $5,000 jurisdictional limit for initial claims in the Small Claims Branch of the Superior Court, *see* D.C. Code § 11-1321, thus "capping" Ms. Thayer's claim at that amount – not counting expenses for "stump removal," expert witness, legal fees, and court costs occasioned by this unfortunate incident.

[49] Defendants introduced relevant portions of a "learned treatise" (*cf.* Fed.R.Evid. 803(18)) to this effect as DX 1 (Michael A. Dirr, *Manual of Woody Landscape Plants: Their Identification, Ornamental Characteristics, Culture, Propagation and Uses* (Champaign, Ill.: Stipes Publ. Co., 1990), pp. 557-58); *see also* Def. Post-Tr. at 5 ¶ 19). This "evaluation," however, is aesthetic, not fiscal. Under the category "Landscape Value," Dr. Dirr opines that the white mulberry has "none," describing the species as "a witch's broom … [with] a messy, unkempt appearance; definitely one of the original garbage-can trees." The Court states in *dictum* here that it agrees with the competing testimony of Mr. Pitchford who flatly asserted on cross-examination,"All trees have value." (Tape 2A)(Pitchford). Other factors, of course, are at issue in the instant case, which is one of trespass *quare clausum fregit*.

at the species itself, branding it "a piece of junk that should never have come over here" to America in the first place.[50] In the context of this case, his low valuation was, he said, due to the facts that, among other things, its "location was not very good" and it leaned over at "a tremendous angle,"thereby casting most of the shade on the neighboring property.[51]

Any right of self-help to the contrary notwithstanding, Ms. Thayer presented evidence that it was not necessary to, in effect, leave the tree moribund by cutting away over 87% of it. She testified that, in fact, only the previous August she had brought out another arborist to inspect the mulberry tree in her back yard and one of his recommendations was to "prune to clean [the] crown of dead branches larger than 1 inch diameter over [the] roof and patio." [52] As seen above, Mr.

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[50] (Tape 2A)(Hall); *see also* Pl. Post-Tr. I at 7. This view was not shared historically, particularly by entrepreneur merchant-farmer-manufacturers of the first half of the 19th century, who sought these trees in great numbers to pursue and perfect the silk industry in this country. *See generally*, Giovanni Fredrico, *An Economic History of the Silk Industry, 1830-1930* (Cambridge, 1954). The resultant spinning of litigation was inevitable. *See, e.g.*, Maupay v. Holley, 3 Ala. 103 (Ala. 1841), LEXIS 242 (June 1841)(contract to but 20,000 *morus multicaulis* mulberry trees); Barr v. Myers, 1842 Pa. LEXIS 38 (May 1842)(contract for sale of 2,000 *morus multicaulis* mulberry trees); Smith v. Griffith, LEXIS 213 (July 1842)(action for destruction of 5,000 Alpine mulberry tree seedlings); Barton v. McKelway, 1948 N.J. LEXIS (July, 1849)(suit over 13,848 *multicaulis* mulberry trees); Vanhorn v. Scott, 28 Pa. 316 (1857)(suit over 5,000 *multicaulis* mulberry trees); and Attorney Gen. v. State Board of Judges, 38 Cal. 291 (1869)(involving suit over orchard of 5,000 mulberry trees).

[51] The process of a tree's "seeking the sun" and growing in its direction, thus casting shade behind and beneath, is called "phototropism," Mr. Pitchford informed the Court. This phenomenon accounts for the mulberry's steep angle at this location, he concluded. (Tape 2A)(Pitchford); *see also* DX C & D (showing directional sunlight) and Def. Post-Tr. at 4-5 ¶ 17).

[52] *See* n.15, *ante*. (Tape 3A)(Thayer); PX 5 (work description form, Item 4, dated 08/01/01). The estimate for this particular task was $265. Moreover, she testified, once the neighboring house was put on the market, she had even cooperated with the real estate agent regarding the bordering foliage to help them prepare the property for more ready sale. (Tape 3A)(Thayer).

Pitchford also testified that the tree could easily have been merely "pruned" instead of cut down altogether[53] – an approach with which the DeWolfs' own Home Inspector had agreed.[54]

Cutting the tree down, however, left Ms. Thayer with only a useless sprouting of what Mr. Pitchford explained were "adventitious" branches, commonly known as "sucker sprouts." [55] He found the condition of the remnant tree stump to be "very, very poor – almost dead" and pronounced that "the tree will never come back, will never be viable again." [56]

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[53] (Tape 1B)(Pitchford).

[54] *See* n.21, *ante*.

[55] (Tape 1B)(Pitchford). The dictionary defintion of an "adventitious branch" is one that is "added or appears accidentally or unexpectedly" and "develops into an abnormal position, as a root that grows from a stem." *Id.*; *see also* Pl. Post-Tr. I at 3 and Def. Post-Tr. at 5 ¶ 20)("epicormic shoots"). Such sprouts are, therefore, anything but "advantageous." Examples are depicted in the photographs received in evidence at trial as PX 6-8 & 20-21, showing a concatenation of random, gnarled branches that are thoroughly unattractive – even if they were not protruding from a moribund, flat-topped, six-foot high stump.

[56] (Tape 1A & 1B)(Pitchford); *see also* Pl. Post-Tr. I at 3. The Court, as factfinder, feels constrained to state that it gives no credence to Mr. Hall's correlative testimony that the remains of this tree left it "quite alive" and not "moribund." (Tape 2A)(Hall); *see also* Def. Post-Tr. at 2 ¶ 3 & at 14-15 ("The tree is alive and growing suckers."). This would be something akin to Charles-Henri Sanson, the Chief Executioner during the French Revolution, holding up the head of the unfortunate King Louis XVI, fresh from the guillotine, and, based upon its still blinking eyes, concluding that the decapitated monarch was "still alive." Anyone who has had experience with a tree stump of this size knows that it will not regenerate in any appreciable way – at least not during the current Cenozoic Era of geologic time. *See also* Thayer Aff. at ¶¶ 6-7 and Def. Post-Tr. at ¶ 3. *Cf.* Levine v. Black, 44 N.E.2d 774, 776 (Mass. 1942)(Court finding that after neighbor had hacked owner's tree down to a "trunk and two limbs," despite a plea for injunction, "[t]here is nothing to show that the lapse of any reasonable period of time will restore it to attractiveness or value."). Even Mr. Hall conceded that "eventually, it has got to go," concluding that "the whole thing [*i.e.*, stump] needs to come out." (Tape 2A)(Hall). As seen, the concept long antedates the Sterling decision (1950). *See* State v . Blair, 2 S.E. 333, 334 (W. Va. 1887)("If the trunk is destroyed the whole tree must fall. But the

Ms. Thayer therefore had little choice but to either endure the eyesore – a perpetual reminder of the DeWolfs' depredation on her property – or to remove it. Her evidence showed that the cost for this task would run between $565 and $1,400.[57] Her actual damages, however, limited as they are by the jurisdiction of this Branch of the Court, are for the loss of the tree itself.[58] That reduces the case to one of simply applying the governing law on the subjects at issue (self-help vs. trespass).[59]

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removal of a limb does not affect the foundation of the execution ….")(metaphor used in a criminal contempt case).

[57] PX 14 (dated 12/11/02) from Joseph Christopher, Certified Arborist, gives a comparatively low estimate of $565, while PX 26, from Joseph Payne of th Bethesda Chevy Chase Tree Experts. Co. (dated 09/15/03) gives a total estimate of $1,400.

[58] (Tape 2B)(Thayer)("My claim is for the value of the tree" in trespass.). Litigation over the value of a species that in this suit was been called a "junk tree," has been as long and convoluted as the branches of the mulberry tree itself. *See, e.g.*, Smith & Delamater v. Richardson, 3 Cai. R. 219 (N.Y. 1805)(suit for damage to mulberry trees delivered for transportation); Smethurst v. Woolston, Pa. LEXIS 246 (Dec. 1842)(issue of the value of *multicaulis* mulberry trees at the time of breach of contract); Moran v. Green, 21 N.J.L. 562 (N.J. 1845)(contract for sale of mulberry trees); Davenport v. Holland, 56 Mass. 1 (1848)(contract for delivery of mulberry trees); Bryant v. Crosby, 40 Me. 9 (1855)(suit over agreement for sale of mulberry trees); Davis v. Christian, 56 Va. 11 (1859)(dispute over growing and selling mulberry trees); Owens v. Lewis, 46 Ind. 488 (1874)(*multicaulis* mulberry tree nursery suit); Anderson v. Northrup, 30 Fla. 612 (1892)(suit over stock of mulberry tree nursery); Acme Food Co. v. Older, 61 S.E. 235 (W.Va. 1908)(dispute over contract purchase price of mulberry trees); and Cogliano v. Commonwealth, 135 N.E.2d 648 (Mass. 1956)(agreement for sale of mulberry trees). (Of course, having done this research, the Court is fully aware of the difference in "value" between the *multicaulis* mulberry trees in these cases and the *morus alba* tree in the instant case; *see* n.6, *ante*.)

[59] Incidentally, there is an aspect of potential damage that no one has mentioned – *i.e.*, the value and disposition of the Thayer mulberry tree, once cut down. Although it does not appear in the record, apparently Cooper and company simply carted it away. The remaining "logs," whatever their value or use, presumably belonged to Ms. Thayer. She might have had some use for them, if nothing other than firewood. *See* Beals v. Griswold, 468 So.2d 641, 643-44 (La. App. 1985)(successful suit for trespass and conversion after neighbor's crew entered plaintiff's property and cut down and removed

III. LEGAL TRUNK

The most oft-cited case in this area of the law is Michaelson v. Nutting, 175 N.E. 490 (Mass. 1931), resulting in what is referred to as the "Massachusetts Rule." [60] This was a case wherein a ***landowner*** complained over the roots of his neighbor's poplar tree intruding into his sewer line. The Massachusetts Supreme Judicial Court ruled that, although any property owner is free to plant any non-dangerous tress or foliage on his own land, that right does not leave

> [t]he neighbor ... without remedy. His right to cut off the intruding boughs and roots is well recognized .... His remedy is in his own hands. The common sense of the common law has recognized that it is wiser to leave to the individual to protect himself, if harm results to him from this exercise of another's right to use ***his*** property in a reasonable way, than to subject that other to the annoyance, and the public to the burden, of actions at law, which would be very likely to be innumerable and, in many instances, purely vexatious.

Id. 490-91 (citations omitted).[61] Thus, the Massachusetts Rule is designed, in

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130-year-old oak tree) and Scarborough v. Woodill, 93 P. 383, 384 (Cal. App. 1907)(successful action against adjoining landowner for cutting cypress trees on neighboring property for firewood). There has been litigation over the value of mulberry trees, for example, as to their value as timber only, whether of the *morus multicaulis* or the *morus alba* species. *See, e.g.*, Taylor v. Downs, 14 S.E.2d 487 (Ga. App. 1941)(affirming holding that mulberry trees qualified as "sawmill timber"); *see also* Lakewood Homes, Inc. v. BP Oil, Inc., *ante*, at *14 (defining "timber" in such a context).

[60] At this point in this Memorandum Opinion, the Court pauses to call attention to the emphasis added in the following quotations to words that show an ownership or possessory interest in the parties who took the affirmative steps against encroaching branches, roots, or foliage on the property which they ***actually owned at that time***, rather than continue to emphasis those terms throughout all ensuing quotations hereinafter cited. It is the ***absence*** of possessory ownership in the DeWolfs ***at the time*** that they hired workers to do this cutting of Ms. Thayer's tree, before they themselves actually owned the land upon which it encroached, that this Court sees as a major distinction (or exception, if it ever arises again) to the prevailing "Massachusetts Rule" discussed herein.

[61] As the Kansas Court of Appeals summarized, "The philosophy of the law is simply that whenever neighbors cannot agree, the law will protect each property owner's

substantial part, to ***obviate*** litigation between property ***owners*** residing on increasingly-congested urban lots with closely-aligned separating foliage, by ascribing as the "default remedy" that of reasonable self-help.

In this regard, our own Court of Appeals ruled favorably that,

> The simplicity and certainty of the Massachusetts rule appeals to us. It leaves no doubts as to the rights and obligations of the parties. While it places the burden on the ***owner*** of land to protect himself by cutting the invading branches and roots, generally that burden is not great. It is of some significance that .... generally these questions between adjoining ***owners*** may be adjusted without the aid of courts and that the self-help rule is sufficient.

Sterling v. Weinstein, 75 A.2d at 147-48 (emphasis added).[62] The Court therefore "conclude[d] that one ***whose land*** is invaded by branches and roots of trees or plants not poisonous or inherently injurious ***has no cause of action*** against the owner of such trees or plants, but may protect himself therefrom by cutting them off to the extent that they invade ***his*** property." *Id.* 148 (emphasis added).[63] Other

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rights insofar as that is possible. Any other result would cause landowners to seek self-help or to litigate each time a piece of vegetation starts to overhang their property for fear of losing the use or partial use of their property as the vegetation grows." Pierce v. Casady, 711 P.2d 766, 768 (Kan. App. 1985); see also Pl. Post-Tr. II at 11-12.

[62] This theory bears some vindication in light of the fact that Sterling, *ante*, is the only D.C. case in this area of the law and that our neighboring contiguous jurisdictions cite only a total of three cases, one in Virginia and two in Maryland. In light of the vast forest cases discovered and cited in this Memorandum Opinion nationwide, however, this Court has its doubts about whether more trees or more cases have been cut down.

[63] The foregoing footnote notwithstanding, the Court feels honor-bound to state publicly that it misapprehended the case law in initial concerns expressed during argument on the Summary Judgment Motion regarding what it at that time considered to be the "overreaching" interpretation of the rule in this case relied upon by the Defendants' Counsel. In short, he was entirely correct on the fundamental principle of that case. Nevertheless, the Court's denial of the Defendants' Motion for Summary Judgment was a correct ruling – though on different grounds – in view of its findings of fact and conclusions of law herein, because of the holding herein that the DeWolfs technically had no standing to invoke the rule in Sterling. For the same reasons, the

authority cited by the Plaintiff supports this well-settled rule. *See* 1 Am. Jur.2d, *Adjoining Landowners* § 22 ("Where the roots and branches of trees … extend over into the adjoining land, the ***owner*** of the adjoining land may cut off the intruding growth.")(emphasis added).[64]

As discussed toward the end of trial in this matter, however, the DeWolfs did not go to closing on this property until January 2002, and therefore they had no legal possessory rights in the property from which they acted to cut the Thayer tree, until ***after*** that formal event.[65] This evidence transpired fully for the first time during the trial toward the end of the last day of testimony, on cross-examination of Mrs. DeWolf by Ms. Crumpton, as follows:

> MS. CRUMPTON: When did you actually buy this house?
> MRS. DeWOLF: We settled either at the end of January or the beginning of February [, 2002].
> MS. CRUMPTON: So at the time you cut down this tree, you

Defendant's post-trial submission, considered as a renewed Motion for Judgment as a Matter of Law (Def. Post-Tr. at 1) is also denied.

[64] *See* Pl. Post-Tr. I at 9. This is also the "general rule." *See* n.107, *post*. Note that the right to "self-help" does not mean that any type of "title" passes to the person over whose land the branches stretch. It is only the right to cut them off. Indeed, at least one case stands for the proposition that if said branches bear any fruit, the neighboring landowner may not keep it for his own because "[t]he title to the … [fruit] depends upon the title to the tree." *See* Skinner v. Wilder, 38 Vt. 115, 116 (1865)(disallowing the adjoining landowner from taking the apples on overhanging branches growing from a tree located wholly on the neighbor's property); *see also* Jurgens v. Wiese, 38 N.W.2d 261, 263 (Neb. 1949)(same principle, expressly holding that a hedge rooted on A's property but extending over to B's, and used as a "boundary marker," did not provide any title to same in B so as to allow him to effectively destroy it).

[65] Def. Post-Tr. at 6 ¶ 23. Discussion at this point at trial between the Court and Counsel yielded a closing date of January 10, 2002. The filings at the Office of the D.C. Recorder of Deeds, however, show that the DeWolfs did not go to closing and receive any title to this property (Lot 821, Square 1818, commonly known as 3304 Idaho Ave., N.W.) until January 11, 2002, with the deed filed and recorded on February 4, 2002. (Document No. 2002-026998). This was 35 days after the DeWolfs had already cut down Ms. Thayer's tree.

didn't own the house?

MRS. DeWOLF: No, we had pre-settlement renovations [to do].

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THE COURT: Yes, but there are some facts that eyebrows start arching at. *** The tree was cut on December 7th [, 2001] …. Now, when did you go to settlement on the house?

MRS. DeWOLF: January [, 2002].

THE COURT: Next question.[66]

MS. CRUMPTON: So, you were so concerned about the danger of the tree to a house that you didn't live in, you didn't own?

MRS. DeWOLF: Because … we had pre-settlement rights in order to mitigate -- we were taking it "as is" and we had to move in straightaway in order to – upon settlement, and … everything that needed to be done, anything that we had to in that time … before then.[67]

From a strictly legal standpoint, while the property may have been "under contract" to the DeWolfs, it was clearly an "executory contract" [68] and conveyed no palpable rights *in rem* to these buyers to undertake such material changes to

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[66] This was the first time during the trial that it became clear to the Court that the DeWolfs had taken this action without having any legal title to the property allegedly offended. While Counsel for the Plaintiff had argued in opening statement that the Defendants had so acted "before they even moved in" (Tape 1A), the Court took this to mean simply that they had already purchased the house, but had not yet occupied it before they cut down the Thayer tree. *See* Pl. Post-Tr. I at 1, 4 & 10.

[67] During this part of her testimony (represented by the foregoing ellipses), the witness kept referring to e-mails to and from her mother-in-law and real estate agent, Doda DeWolf (Def. Post-Tr. at 2 ¶¶ 7-9), that putatively accounted for this prerogative, but they were not offered into evidence in the face of objection. (Tape 4B)(DeWolf). No effort was made on redirect to provide any additional evidence on this point.

Mrs. DeWolf's husband and co-defendant herein, Francis DeWolf, also testified at the trial. Virtually all of his testimony, however had to do with measurements and the DeWolfs' concern of the reach of the mulberry's branches over the roof of their house. (Tapes 4B & 5A)(Mr. DeWolf). Again, this would only be relevant if the DeWolfs had had standing to take the actions that they did through Mrs. DeWolf's agency and the aegis of Mr. Cooper.

[68] *See* Sloan v. Sloan, 66 A.2d 799, 801 (D.C. 1949)(once full performance under a contract has been rendered it becomes and ***executed*** contract; until then it remains an ***executory*** contract, *i.e.*, one on which whole, substantial, or partial performance has yet to be made).

the property – particularly as they might involve the property interests of another – until the formalities attending the legal conveyance of the realty were finalized at closing. This reflects the prevailing practice in this country that

> one who contracts to buy real property does not at that time "acquire" the property. Title to realty passes only upon full performance of the terms of the escrow agreement .... [B]efore ... [those formalities], only an equitable right to compel transfer of title on the date set in the contract [exists] .... [This] equitable right (sometimes called equitable "title") merge[s] into the full legal title ... at closing.

Miller v. Miller, 184 Cal. Rptr. 408, 410 (Cal. App. 1982); *see also* Reconstruction Finance Corp. v. Beaver Co., 328 U.S. 204, 210 (1945)("Concepts of real property are deeply rooted in state traditions, customs, habits and laws.")(Black, J.); and Iroquois Gas Corp. v. Jurek, 290 N.Y.S.2d 140, 144 (App. Div., 4th Dep't 1968)("Bear[] ... in mind that we are dealing with real property, around which the law has always placed formal safeguards ....").[69]

Beyond that, contrary to their post-trial assertions,[70] if the DeWolfs had any contractual, agency, or other permission from the owner of the owner from whom they later purchased this property to act in this manner, it was ***not*** presented at

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[69] The operative word in this case, after all, is "***proper***ty." It is not untypical in cases affecting real property ("*in rem*" actions) that serious complications and consequences develop before formal closing occurs. Because of their legal complexity, real estate cases are usually handled by judges alone "sitting in equity," rather than in jury trials "at law." This is one reason, for example, that the jurisdictional statute for Small Claims Court specifically provides that, "An action which affects an interest in real property may not be brought in the [Small Claims] Branch." D.C. Code § 11-1321. While, technically, this is not such a case, inasmuch as it deals with damage only to the tree itself, it illustrates the point.

[70] "Plaintiff's criticism of the Defendants not being the owners of the property ... on December 7, 2001, was addressed by the evidence adduced at trial ...." Def. Post-Tr. at 13; *contra* Pl. Post-Tr. II at 6-7.

trial.[71] Even the assertions along this line that they do present post-trial fall short of any evidence that would permitted their transgression onto Mrs. Thayer's property. Defendants miss the point entirely when they confine (as may, or may not, have been the case) the scope of their putative authority to a theory of what may be termed "sub-agency."[72] Arguing that the real estate firm, Long & Foster, was the "agent" of the property owner and that the DeWolfs' authority flowed from that agency, they contend that they "obtained pre-settlement authority from Long & Foster to make ***repairs*** and ***improvements to*** 3304 Idaho Avenue, NW, prior to settlement so as to make the property ***inhabitable*** for themselves and their … children." [73] Just so. Even if accepted at face value now (since it was not in evidence in any way at trial), nothing in this concept (a) speaks to the issue of cutting down trees, much less (b) on the neighbor's property. Confined to the purchase property, the act of cutting down healthy growing trees – especially prior to settlement – cannot be put in either the category of "repairs" or that of "improvements."[74] This tree, having grown there without any incident whatsoever for nearly two decades, did not make this property "***un***inhabitable" – in fact the shade that the tree had been providing had been deemed an ***asset*** by

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[71] Pl. Post-Tr. I at 9-10 (The Defendants "also failed to produce any evidence whatsoever at trial that they had been authorized by the actual owner of the property to cut the mulberry tree down to a stump."); *see also* Pl. Post-Tr. II at 1 ¶ 9 (As to putative agency, "[t]hese proposed facts are not established in the trial record.") & at 7.

[72] *See* Pl. Post-Tr. II at 7-8.

[73] Def. Post-Tr. at 2-3 ¶ 9 (emphasis added); *see also id.* 7 ¶ D ("The Defendants had the authority to make ***repairs*** to ***the property*** … prior to settlement ….")(emphasis added).

[74] *See* Pl. Post-Tr. I at 7-8 (arguing that any "scope of authorization," if it existed, was limited to one to "maintain the property" – not depredate it).

the prior owner. Beyond that, this "authority," if it existed, was confined "to" the property and nothing in such a grant of authority empowers one to cut down the trees growing ***next door***. Even assuming broadly that neither the then-current owner or his real estate agency didn't care a fig, so to speak, as to whether they cut down one or all the trees on ***that*** property prior to formal closing (an implied premise that the Court doubts), no one could successfully argue that the current owner (much less his agent) could grant anyone the authority to take actions which could affect the rights of the neighbors or embroil him in future legal actions.[75] As a matter of legal fact, even if the absent owner had reversed his decade-plus course of continuing cooperation with Mrs. Thayer in sustaining and nurturing this tree, not even he himself could have taken this step in this manner. Finally, as the Court has repeatedly pointed out, all of this could have waited until after closing.

Further as to the "dangerousness" factor, given as a reason for taking this "pre-emptive" action to protect the DeWolfs prospective hearth, home, and children, that, too is both unjustified and illusory. Two points: (1) Despite its proximity to the dwelling, there is no persuasive evidence that this mulberry tree was any greater a threat to the house that the DeWolfs were purchasing than any of the many other trees on the property that Mrs. DeWolf herself testified had been a major factor in their decision to purchase the house in the first place.[76] The mulberry tree had been there, the record shows, for two decades – throughout

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[75] Indeed, had this issue been broached at trial, it might have been the subject of a Rule 19(a) motion by Ms. Thayer to name or implead one or more additional "necessary parties," including the original owner and/or his real estate agent – and its agent, Doda DeWolf, who is the mother and mother-in-law of Mr. and Mrs. DeWolf, respectively.

[76] (Tape 4B)(DeWolf).

which it had been nurtured as a healthy growth by both neighbors – and no damage had ever occurred to the neighboring house from it. *See* Dudley v. Meadowbrook, Inc., 166 A.2d 743, 744 (D.C. 1961)("A healthy tree does not ordinarily fall of its own weight without some exterior force being directed against it.").[77] (2) As to its "risk" in the face of a storm, the fact is that in any storm, ***any*** tree is susceptible to being blown down – it is a matter of pure chance. The mulberry is a strong, steadfast, surviving species. Its roots go deep and the tree endures as a species.[78] This may be one reason why one of the most revealing facts in the "litigatory history" of the mulberry tree in this country is the frequency with which it appears in the appellate record as a "landmark" or "boundary mark" in property and estates cases.[79]

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[77] That one person, Mr. Mstowski, (who was not even a "tree expert" but a home inspector") gives one vague and generalized opinion that "it is only a matter of time" before the tree falls (either in a storm or otherwise) (Tape 3A)(Mstowski), is both a truism and, technically, irrelevant. *See* Fed.R.Evid. 401 (defining "relevant evidence" as "evidence having any tendency to make the existence of any fact … of consequence to the … action more probable or less probable that it would be without the evidence"). Mr. Mstowski's platitudinous pronouncement about "time" does not meet that requirement. Taken literally, ***everything*** is a matter of time. Without doubt, in time, this tree, like all mortal things, will wither, die, rot, fall down and decompose. The issue is whether it is "reasonable" to think that it will happen anytime ***soon***. Yet, this tree was in its prime and of a hearty species. Truth be told (outside the world of microbiology), the oldest living things on this planet are trees, ranging from the Giant Redwoods of California to the Bristlecone Pine of the White-Inyo Mountain Range in that State (a single tree in the latter locale is estimated to be over 4,767 years old). *See* <www.sonic.net/bristlecone>. Nothing about the Thayer mulberry tree on this record required that time was of any essence at all in this matter.

[78] In fact, the mulberry tree is (in)famous for its steadfastness. As noted above in n.6, even St. Luke's analogy to the Sycamine's obduracy and stubbornness is "rooted," figuratively and literally, in its unyielding nature.

[79] *See, e.g.*, Selden v. King, 6 Va. 72 (1799)(devise of land using mulberry tree as marker); Cardwell v. Strother, 32 Ky. 439 (1834)(survey using mulberry tree as landmark); Guion v. Burton, 19 Tenn. 565 (1838)(mulberry tree used as landmark for property measurement); Pierce v. Southbury, 29 Conn. 490 (1861)(measurement of

That a healthy tree, without any history of damage, disease, or rot, ***might*** fall is insufficient reason to take action.[80] A mature, prospering mulberry tree such as the one in this case is not likely just to "fall over," storm or no storm.[81]

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property using mulberry tree as landmark); Lippett v. Kelley, 46 Vt. 516 (1874)(mulberry trees used as reference point to measure metes and bounds on property); Buckingham v. Elliott, 62 Miss. 296 (1884)(mulberry trees used as lot boundary markers); Burrows v. Guest, 12 P. 847 (Utah 1886)(mulberry trees used as landmark on property); Daughtrey v. McCoy, 135 S.W. 1060 (Tex. App. 1911)(mulberry trees used as landmark in property measurement); White v. White, 77 S.E. 911 (W.Va. 1911)(mulberry tree used as reference point for house extension property); Strother v. Hamilton, 268 S.W.2d 529 (Tex. App. 1925)(mulberry tree used as corner marker in property boundary); Holcombe v. Dinsmore, 137 S.E. 924 (Ga. 1927)(mulberry tree used as property boundary mark); Rader v. Howell, 54 S.E.2d 914 (Ky. App. 1932)(mulberry trees used as corner landmarks for land parcel); Sanders v. Rose, 176 S.W.2d 119 (Ky. App. 1943)(mulberry tree referred to as landmark in deed); Vrana v. Stuart, 99 N.W.2d 770 (Neb.1959)(mulberry tree used as property landmark); Gardner v. Howard, 342 S.W.2d 541 (Ky. App. 1960)(mulberry tree used as landmark in deed description); Cox v. White, 160 So.2d 418 (La. App. 1964)(two mulberry trees used as plat landmarks); Paasch v. Brown, 208 N.W.2d 695 (Neb. 1973)(mulberry tree used as property landmark); Broadhead v. Terpening, 611 So.2d 949 (Miss. 1992)(mulberry tree used as road marker); and Snider v. Beasley, LEXIS 221 (May 3, 1995)(unpublished opinion)(adverse possession case with mulberry tree as landmark).

[80] *See* Bonde v. Bishop, 245 P.2d 617, 621(Cal. Ct. App., 1st Dist., Div. One 1952)(That "land was used for agricultural purposes … and plaintiff complained that the overhanging limbs *might* interfere with his growing fruit trees" left the court "unable to see how it can be said that land is injuriously affected, or that its owner's personal enjoyment is lessened ….")(*citing* Grandona v. Lovdal, 121 P. 366 (S.Ct. Cal., Dept. One, 1886))(italics in original).

[81] In point of legal fact, a Lexis search of the entire history of "mulberry tree litigation" in the United States (1798-1995), which spans virtually the full political history of the country itself, reveals that there are only two recorded appellate cases (both in Ohio) predicated on a mulberry tree's falling on anyone or anything – and both trees were already seriously "rotted." *See* Jackson v. Ervin, 1995 Ohio App. LEXIS 5099 *7-*8 (Nov. 16, 1995)(mulberry tree that was long since "decayed, defective, or unsound," in fact, all but "dead," and already leaning "heavily" on the garage that was destroyed by the tree's fall during a storm) and Pullins v. Murphy, 1993 Ohio App. LEXIS 3545 (July 12, 1993)(outwardly healthy tree later found to be literally "rotten at the core" falling on electrical wires, causing fire). In contrast, as the evidence in the instant case shows, the Thayer tree was not only healthy, but PX 4 (photo of the stump) also shows that tree, cared for as it was over 20 years' time, was healthy through-and-through before it was

As Plaintiff points out post-trial, the record shows that "[n]o one followed the industry-standard practice of completing a Hazardous Tree Evaluation form, and the tree had been trimmed and maintained less than five months before by certified arborists ...."[82] Moreover, arguably, a tree that is ***already*** growing at an angle ***lower*** to the ground has, as a matter of logic and physics, actually a ***lesser*** distance to fall, a lesser velocity associated with it, and consequently, will do less damage, depending on its weight and mass, than any nearby trees of similar size standing more erectly with greater distance and velocity to fall. This concept is dramatically illustrated by splicing together PX 24 & 25 (photographs taken from the same vantage point) to show a composite view of the left front (driveway) side of what is now the DeWolf house. They clearly show a towering "V-trunk" tree (possibly an elm), that is approximately twice the height of the house itself, located easily within 10-12 feet of the house and presenting arguably a much greater danger to both the occupants of the house and the car in the driveway.

In any event, on these facts, the Court finds no compelling reason to have justified the DeWolf's taking this action so prematurely.[83] The Court therefore

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cut. Put more aptly to the facts of the instant case, there is not a single recorded appellate case stemming from the falling of a healthy, growing mulberry tree.

[82] Pl. Post-Tr. I at 4 and Pl. Post-Tr. II at 3-4 ¶ 20; *see also* PX 16 (uncompleted form). Clearly this was not anything like the "old, doty, faulty and unsafe trees" that lay at the root of other parallel claims. *See, e.g.*, Niemi v. Stanley Smith Lumber Co., 149 P. 1033 (Ore. 1915).

[83] Bear in mind that the Defendants' own evidence, via Mr. Mstowski, shows that he suggested only that the ***branches*** overhanging what became the DeWolf house be cut back . *See* n.19, *ante*. Their "tree expert," Mr. Hall testified only as to his opinion as to the ***value*** of the tree, once destroyed; although he had a low opinion of the species, he gave no opinion as to ***whether*** this particular tree should have been destroyed. In fact, the record is quite clear on this point: The only person who suggested that the tree be cut down entirely was Mr. Cooper, who had a fee to make there and other jobs to do elsewhere that fateful morning. Regrettably, Mrs. DeWolf took that advice. *Cf.* Segraves

finds that the cutting of this tree – without any impending danger or immediate need to plant grass in mid-winter – does not fall into the category, to use Mrs. DeWolf's own terms, of "pre-settlement renovation" or "repairs" or "improvements."[84]

Thus, as seen above, the right to "self-help," without resorting to courts, is not only a right endemic to actual property ***owners***, but it is also (like the statute of limitations) a rule that is ostensibly designed to assist courts themselves by (presumably) forestalling needless litigation over such an ancient, and well-settled property-holder's common law remedy.[85] The same concept applies,

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v. Consolidated Elec. Coop., 891 S.W.2d 168, 170 (Mo. App. 1995)("'The Mulberry and the Cherry trees probably needed to be trimmed; but there is no evidence convincing to the Court that the Mulberry needed to be cut to a stump ….'")(quoting and affirming trial court); *see also* Pl. Post-Tr. I at 13 ("Defendants went far beyond the permissible cutting of branches and cut the tree down to a stump.").

[84] *See, e.g.*, Musch v. Burkhardt, 48 N.W. 1025 (Iowa. 1891)(liability affixed to defendant who cutting down several neighbor's 40-60' trees on lot line because cast shade therefrom onto a strip of land 4-5 rods (66-82') wide had thereby "been rendered unproductive"); *see also* Granberry v. Jones, 216 S.W.2d 721, 722 (Tenn. 1949)("Every owner of land has dominion of the soil, and above and below to any extent he may choose to occupy it with some exceptions ….[and] the owner of a lot may plant shade trees upon it, or cover it with a thick forest, and the injury done to them by the mere shade of the trees is *damnum absque injuria*.")(harm without injury) and Bliss v. Ball, 99 Mass. 197 (1868)(same).

[85] Compare this situation to that in the case of Ackerman v. Ellis, 79 A. 883 (N.J. Super. 1911). There, a landowner sued a tenant on the adjoining property for allowing and maintaining a row of coniferous trees near the boundary line, which had existed long before the tenancy in question, in derogation of the former's habitation, tillage, and pasturage rights, he claimed. The Court sustained the defendant's demurrer on the contention that, in effect, a tenant on the property, in contradistinction to its actual owner, had no obligation even to respond to, much less stand liable for, damages claimed by the neighboring landowner under these circumstances. Citing an O.E.C., the New Jersey Court held that, "'A tenant for years is not responsible in damages to a third person for maintaining and keeping in repair upon the demised premises a … [condition] thereon [originated] by his landlord, prior to the commencement of his term, which operates to the nuisance of such third person.'" *Id.* 884-85. One can only conclude that,

though, as to the current formalities involved in the actual conveyance of title to the real property. As the Plaintiff points out, "This is the only sensible rule."[86]

IV. CONCLUDING CANOPY

A. Property Ownership

Of course, not a single case nationwide citing the Massachusetts Rule comprehends a cause of action (or even a defense) by a non-owner of any property affected.[87] Indeed, why should any? Legally, a person who does not own or

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conversely, the tenants would also have had no "standing," in their own right, to either agree to the removal of the trees or to seek any affirmative relief on behalf of their landlord, such as "self-help." A similar result obtained in Conklin v. Newman, 115 N.E. 849, 852 (Ill. 1917), though under a statutory provision. Thus, even had the DeWolfs in the instant case been in a legal property relationship (an actual "tenancy for years") much stronger than the one existing as to them at the time of their trespass on, and cutting of, the Thayer tree, they would ***still*** have been without any legal right to so proceed. Such are the formalized technicalities of the law of real property, now memorialized after nearly a century of "boundary tree" litigation in this country alone.

[86] Pl. Post-Tr. I at 9.

[87] When Michaelson v. Nutting is "Shepardized" for other cases in all jurisdictions that have cited it, the following relevant cases are revealed, each one, in turn, being a dispute between ***current*** landowners: Smith v. Holt, 5 S.E.2d 492, 492-93 (Va. 1939)(roots, branches, and shoots from neighbor's 8' high hedge growing onto plaintiff's land); Levine v. Black, 44 N.E.2d 774, 775 (Mass. 1942)(commercial property dispute between two owners over tree bisecting boundary line); Jurgens v. Wiese, 38 N.W.2d at 262 (suit by property owner to enjoin destruction of half of a hedge near mutual boundary line); Granberry v. Jones, 216 S.W.2d at 721-22 (branches and foliage from neighbor's evergreen hedge growing over boundary line and extending up against plaintiff's house); Higdon v. Henderson, 304 P.2d 1001, 1002 (Okla. 1956)(property owner's unsuccessful claim that defendant's construction killed valuable shade tree on mutual boundary); Lemon v. Curington, 306 P.2d 1091 (Idaho 1957)(plaintiff awarded injunction to remove a 50-year-old poplar trees on boundary line); Merriam v. McConnell, 175 N.E.2d 293, 294 (Ill. App. 1961)(property owner's unsuccessful motion for an injunction to stop for damages stemming from box elders and bugs seasonally accompanying same on defendant's adjoining property); Kurtigian v. Worcester, 203 N.E.2d 692, 693 (Mass. 1965)(plaintiff struck by falling tree limb from neighbor's tree while working in his own yard); Keiper v. Yenser, 42 Pa. D. & C.2d 1, LEXIS 31, *2 (1967)(roots of willow tree extending onto plaintiff's property and penetrating his sewer line); Rosa v. Oliveira, 342 A.2d 601, 603 (R.I. 1975)(adjoining landowners' dispute over

otherwise have a possessory interest in the property affected has no "standing" to bring a complaint in court respecting it. Interestingly enough, both parties herein virtually ignored this pivotal fact throughout all pre-trial submissions and until the closing minutes of the trial itself. The Defendants' Motion for Summary

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branches of lilac trees extending over plaintiff's roof); Norwood v. New York, 406 N.Y.S.2d 256, 257 (1978)(city held liable for damage to property owner's sewer line 25 years after it had planted oak tree over same); Turner v. Coppola, 424 N.Y.S.2d 864, 865 (1980)(claim for damage from debris and branches falling from defendant's trees and cluttering plaintiff's property); Whitesell v. Houlton, 632 P.2d 1077, 1078 (Haw. App. 1981)(damages awarded to property owner for costs in cutting back branches of neighbor's 12-foot diameter banyan tree extending onto his property); Ponte v. DaSilva, 446 N.E.2d 77 (Mass. 1983)(dispute between neighboring landowners regarding overhanging branches); Richmond v. General Engineering Enterprises Co., 454 So.2d 16, 17 (Fla. App. 1984)(claim for damages from ficus tree branches overhanging plaintiff's property); Abbinett v. Fox, 703 P.2d 177, 179 (N.M. App. 1985)(roots from neighbor's cottonwood trees extending onto plaintiff's property causing damage to wall, patio, and swimming pool); Schwalback v. Forest Lawn Memorial Park, 687 S.W.2d 551 (Ky. App. 1985)(dropping of leaves and debris on from cemetery trees onto plaintiff's property); Cannon v. Dunn, 700 P.2d 502 (Ariz. App. 1985)(roots of Eucalyptus tree from adjoining property interfering with plaintiff's land); Hasapopoulos v. Murphy, 689 S.W.2d 118, 119 (Mo. App. 1985)(Chinese elm branches and roots from neighbor's property overhanging and damaging driveway on plaintiff's property); Bandy v. Bosie, 477 N.E.2d 840 (Ill. App. 1985)(claim for damages caused by maple and Chinese elm trees dropping sap and leaves onto plaintiff's property from adjoining lot); D'Andrea v. Guglietta, 504 A.2d 1196, 1996-97 (N.J. Super. Ct. 1986)(suit by property owner to abate damage caused to boundary fence by roots of neighbor's maple trees); Gallo v. Heller, 512 So.2d 215, 216 (Fla. App. 1987)(neighboring property owners in dispute over roots and branches of trees growing on defendant's property); Melnick v. C.S.X. Corp., 540 A.2d 1133, 1134 (Md. 1988) and 510 A.2d 592, 593 (Md. App. 1986)(same case)(tree leaves and vines from defendant's commercial property encroaching over common boundary onto plaintiff's residential property); Garcia v. Sanchez, 772 P.2d 1311, 1313 (N.M. App. 1989)(dispute between adjoining property owners over roots and branches of 10 elm trees along mutual boundary); Jones v. Wagner, 624 A.2d 166, 167 (Pa. Super. 1993) and Pa. D. &C.4th 410, 412 (1992)(same case)(adjoining landowners' dispute *re* overhanging branches of 26 hemlock trees on defendant's property line); Macero v. Busconi Corp., LEXIS 563 *2-*3 (Mass. Super. Ct. 2000)(defendant hired tree service to cut branches from plaintiff's tree overhanging his property); and Lane v. W.J. Curry & Sons, 92 S.W.3d 355, 357 (Tenn. 2002)(dispute between adjacent property owners over large oak trees protruding over plaintiff's house, including a large branch falling through attic).

Judgment[88] repeatedly assumes *a priori* that at all times relevant the DeWolfs were the owners of the property onto which the Thayer mulberry tree was intruding.[89] While the Plaintiff did not formally challenge these groundless assertions, the legal facts remain -- facts which clearly show that this was not the case. If the situation were one in which the DeWolfs faced some ***liability*** as to third parties on the property, it is highly probable that they would have taken an entirely different approach to this matter. For example, if at any time between their declared intent to purchase this property and the formal closing on it, this tree had fallen over on a visitor, or any other misfortune had occurred thereon prior to the DeWolfs' acquisition of formal ownership, they would doubtless leap behind the shield of that well-established formality, protesting that they had no technically legal liability for anything that occurred on the property ***until*** they took formal possession of the mesne via actual (not prospective) transfer of title. If the law protects them as against liabilities on that basis, it must, perforce, hold them liable for any action that they themselves take in traducement of that right. Put another way, if one does not yet actually own the property, what right does one have to cut down trees on it in derogation of the rights of the neighbor who

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[88] Filed on or about July 15, 2003.

[89] This submission refers to the DeWolfs and Ms. Thayer, *passim*, as "adjoining landowners," refers to the tree as leaning "almost entirely on to the[ir] … property," (p. 1), asserts that they "were … completely within their rights to cut the invading tree to [their] property line" and, in the process, assumes that "they have a cause of action against … [Ms. Thayer] for the costs" in doing so, asserting further that "[s]elf-help … is all the[y] … have done." (p. 2), and concludes with the pronouncement that "[a]ll the Court needs to know is that all but the trunk of the tree was trespassing on the … [DeWolf]s' property and that the[y] …used self-help rather than attempt to maintain an action to abate …." (p. 5). As the foregoing discussion clearly shows, however, the DeWolfs were ***not*** the legal owners of the property during the time that they took this action.

does own her property?

To the prospective argument that this is a distinction without any practicable difference – that the DeWolfs did, in fact, go to closing, that they did, in fact, purchase the property, and that they now, in fact, take both the responsibility for their actions, *nunc pro tunc*, and assert their rights as they ***currently*** exist, the response must be that a Court of law is governed by ***legal*** reasons, not necessarily practical ones. The law does not play fortune teller so as to prognosticate or divine what will, would, or could happen at a particular point – however immediate or seemingly certain – into the future. There is, in reality, no such thing as the "foreseeable future";[90] there is only the "anticipated future." Similarly – at least outside that great murky, Sargasso Sea known as "future interests," a topic which is mercifully not applicable here – there is no elastic or futuristic application of the rights of landowners. For the purpose *sub judice*, one either is possessed of such a right or one is not. Thousands of lawsuits are generated, both in law and equity, stemming from "certain" contractual sales of land and homes that did not, for whatever reason, go to closing. Before that legally-decisive point (which is why such a "formality" or "fuss" is made over it), prospective buyers are seised of no possessory or other dispositive rights on or about the property.

Simply put, one must have a ***current*** legal right – not merely a prospective right, or a convenient right, or a practical right – to do a thing, especially when the act affects someone else's property or interests. To allow any such rights affecting

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[90] And, in fact, Lexis a search of the entire corpus of case law from our Court of Appeals since 1925, shows that our Highest Governing Authority has only used that phrase once and then, arguably, only in quoting the findings of fact of the trial court. *See* In re C.O.W., 519 A.2d 711, 713 (D.C. 1987).

real property to be exercised prior to formal passage of title is to invite disaster in a litigious society. It is not enough that said right be "after-acquired," following the *actus reus* itself. In short, the right thing must be done in the right way. *See* People v. Cappolla, 310 N.Y.S.2d 539, 539-40 (N.Y. App., 1st Dep't, 1970)("It is better not only that the right be done, but that it be manifestly done in the right way.") and Appeal of Samuel Huston, 18 A.2d 419, 422 (Pa. 1889)("the law ... in general requires not only the right thing to be done, but also in the regular way"). Thus, "[i]t is the doing of the thing, not the mode of doing it, which contravenes the law, if it be contravened at all." Vestal v. Vestal, 209 S.W. 273, 276 (Ark. 1919). Put another way, "there is no right way of doing a wrong thing. An act essentially wrong does not become right by the manner of doing it." City of Denver v. Coulehan, 39 P. 425, 429 (Col. 1894). Consequently, "where one does the right thing in the wrong way, and causes injury to another, he may become answerable to the aggrieved party." Gondolfi v. Palisade Holding Co., Inc., 273 N.Y.S. 60, 61 (Mun. Ct. of Manhattan, 2d Dist. 1934).[91]

B. Trespass

1. In Fact

Thus, with no immediate legal rights of their own to vindicate at the time that they acted against Ms. Thayer's property, the DeWolfs (and their agents) fall squarely into the realm of "trespassers."[92] Even assuming that the DeWolfs'

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[91] Similarly, people can get into trouble if "they did not say the right thing in the right way." McCrary-El v. State, 703 S.W.2d 29 (Mo. App. 1985). Thus, while a man might get somewhere by telling a lady that, "Your face could make time stand still," he will get nowhere by telling her that, "You have a face that would stop a clock."

[92] Thus the only "agency" established here is Cooper's acting as the agent for his interloping principals. *See* Butler v. Zeiss, 218 P. 54, 55 (Cal. App. 1923)(landowner awarded damages for actions of defendant's agents in cutting down trees on landowner's

workers ***intended*** to perform all their tasks while remaining on the property that the DeWolfs were planning to purchase a month hence,[93] the DeWolfs' actions ***still*** could not have avoided constituting a trespass.[94] Given the girth of the tree and the angle of the cut, the workers' saw blade(s), if nothing else, would have transgressed the Thayer property.[95] The photographic evidence presented at trial (including that from the Defendants themselves) makes this clear. Plaintiff's photograph (shot from her property)[96] of the remaining stump (estimated to be approximately 6.5 feet high), shows an almost horizontal cut straight across the trunk of the tree. Similarly, the Defendants' own photograph (taken from their side of the property line) of the same scene,[97] shows the tree (with a previously protruding segment of a "dual trunk" already having been cut off at an earlier date). The Court, as a factfinder, estimates that, even assuming *arguendo* that the

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property, the court finding that such an action was therefore done "willfully and maliciously").

[93] Something that the credible eyewitness testimony of Ms. Kate Woodward (Tape 4B)(Woodward), discussed *post*, belied.

[94] This would be true, if for no other reason than that, as a matter of law, a tree rooted on real property is also considered to be "realty" upon which a trespass may be perpetrated. *See* Dryer v. Liberty Mut. Ins. Co., 248 A.2d 504 (D.C. 1968)("Growing trees are obviously realty and not personalty."); *see also* Key v. Loder, 180 A.2d 60, 61 (D.C. 1962)(reiterating the well-known distinction between *fructus naturales* and *fructus industriales*).

[95] The Court openly discussed this issue with the parties and their counsel without any satisfactory explanation forthcoming from the Defendants. (Tape 4B). Cf. Luke v. Scott, 187 N.E. 63, 64 (Ind. App. 1933)("In order for appellants to have cut them [two 'ornamental trees'), they must, of necessity, have gone upon the land of appellee. There was testimony that no permission was given by appellee to cut said trees, or to go upon her land.").

[96] PX 4.

[97] DX 3.

DeWolfs had any legal standing to cut the tree at all, they should have cut it at a corresponding vertical angle to that of the previously-cut extension as shown in DX 3, not the virtually horizontal cut that they did cause to be made. As a result, the stump would likely have been at least twice as tall – although the tree (estimated at 52 feet in length) would have been effectively "truncated" and terminated, anyway.[98] The Court concludes that, as Ms. Thayer asserted in her pre-trial submission, the DeWolfs "cut down the tree on Ms. Thayer's side of the

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[98] The Court sets forth the following methodology for arriving at this conclusion. During trial the Court copied the photographs at issue (PX 4 & DX 3) and made "angle markings" on them with the use of a dime-store protractor to measure the approximate degrees of those angles. DX 3 shows (with a dark blue line) the approximate "inside angle" of the trunk leaning over onto the prospective DeWolf property. Measured from as "true" a 180° base as possible (intersecting blue line), the Court fixes this interior angle at 96° (∠ A-B). Using a smaller pencil line at the base of the previous tree cut and drawing a line that bifurcates that cut at an angle, the Court fixed the angle of that cut at 77° (∠ C-D). Further bifurcating angles A-B and C-D, a broken line shows an approximate equidistant angle of 86° (∠ E-F). (Another angle, that of the slope of the previously-cut segment of the trunk extending from the Thayer property was measured at 116°, but is not relevant here.) By drawing parallel lines along the two corner edges of the stone wall separating the properties, a "base line" is give to which on the "DeWolf property" angles C-D and E-F can be easily extended downward. Coincidentally, they both land precisely at the "inner" top corner on what was to become the DeWolf property (points C & E). All of this leads the Court, as factfinder, to conclude that in order for the workman to have remained on the DeWolf Property and made the proper cut, the angle of said cut should have been anywhere from 86-96° (*i.e.*, the "halfway point" between ∠ A-B and ∠ E-F). (*See* Tape 4B).

This conclusion is confirmed by viewing this same stump from the opposite side (as shown in PX 4). In so doing, one can "run" a brace of "guidelines" on that photograph along both the top and bottom of the fence (lines 1 & 2). Reversing the view so that the angles can be seen from the Thayer side of the property, but measured from the DeWolf side, the "outside" (or back) of the stump can been measured at approximately 80° (∠ G-H) and the "proper cut" of approximately 86° (∠ I-J) can be show "clipping off" the inside (DeWolf side) of the tree stump. By extending these two lines upward until they meet (at points H-J), one can easily see that this would have left a taller (albeit angled and pointed) stump of approximately twice the height as the one actually remaining. The conclusion is inescapable, therefore, that either the DeWolf workers or their saw blades, if nothing else, trespassed onto the Thayer property in leaving behind the only evidence left to tell the tale – the forlorn, moribund, and useless white mulberry stump, depicted in PX 4.

property line so that portions of the tree located on her property were also removed."[99]

Evidence of the trespass onto the Thayer property by the DeWolf workers is not confined to the foregoing exercise in "deductive plane geometry." During his expert testimony on behalf of Ms. Thayer, Mr. Pitchford had concluded that, as a professional arborist, he was "very familiar with how these trees get trimmed" and was of the opinions that (a) the tree could have been pruned back, rather than cut down altogether, and (b) in the case of a tree of this size, length, and girth at the point where it was cut down, there was "no way to trim it or cut it without trespassing on the [Thayer] property." [100] Corroborating this opinion, PX 4 shows large amounts of sawdust residue on the Thayer property (down along her side of the tree and on the covering over her woodpile), "trace evidence" also proving that trespass had occurred.

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[99] Pl. Mem. at 2; Thayer Aff. at ¶3. The "bifurcation" of the trunk discussed in the previous note does not, under at least one legal definition, disturb the premise that the "trunk" was rooted in ground owned by Ms. Thayer. In the early 20th century, the Supreme Court of Vermont defined 'tree trunk"as "'the body of the tree above the surface of the soil,' and this means the body of the tree ***at*** the surface of the soil.'" Cobb v. Western Union Telegraph Co., 98 A. 758, 759 (Vt. 1916)(emphasis added). Consequently, "[a]fter the base of a tree standing on one … [person]'s land divides, each division, without respect to its size, is a branch, and no matter what is it is called or what its size, if a branch extends over the land of another, the latter may cut it off at the division line." *Id.*; *see also* Wolfinger v. Moats, 1990 Pa. D. & C. LEXIS 246 ** 6 (Jan. 30, 1990)('The law … is determined by the exact location of the trunk of the tree at the point it emerges from the ground.'"); Wideman v. Faivre, 163 P. 619, 621 (Kan. 1917)("[T]he ownership of a tree under such circumstances is in him in whose land the tree stands."); and Loggia v. Grobe, 491 N.Y.S. 2d 973, 974 (Dist. Ct., 6th Dist., Suffolk Co., 1985)(same). As seen in this case, for whatever reason not made clear on the record herein, this step had previously been taken on the "lower trunk" of the Thayer tree as it had previously extended into the yard next door. *See* PX 4.

[100] The usual approach to such a situation, he testified, was to secure the contractual agreement or permission of the neighbor involved – or at least attempt to do so – before actually doing the cutting. (Tape 1B)(Pitchford).

Moreover, as discussed above, the testimony of both Ms. Thayer and Mr. Cooper himself, showed that this arrangement to cut the tree in December was hastily made, hard on the heels of the cancellation of another job. Mrs. DeWolf had told him, he related, that she would contact the neighbor prior to the time for the cutting. Upon arrival, he remembered, Mrs. DeWolf was present and walked over and knocked on Ms. Thayer's door, but didn't get an answer (we now know that she was at work at that hour). Thus, his protestations at trial notwithstanding, that he would never cut a tree on another person's property unless he was sure that permission had been granted to do so, the facts show that Mr. Cooper, as well, knew or had every reason to know, that no such permission had been forthcoming from Ms. Thayer. Mrs. DeWolf, of course, knew this absolutely.[101]

Next, although Mr. Cooper expressly denied that he had ever gone over onto the Thayer property in the course of his work for the DeWolfs,[102] the Court finds this self-serving assertion to be completely improbable. With regard to the actual cutting of the tree, Cooper himself recounted that he had "checked it, cut it off in sections [using a chain saw], and roped it out," so that those sections could be safely "lowered to the ground" onto the property next door to Ms. Thayer's.[103] The

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[101] (Tape 3B)(Cooper). Much later on, when these three principals met at the stump to discuss reconciliation over this matter, Mr. Cooper, according to Ms. Thayer's testimony, protested to Mrs. DeWolf as to "why she hadn't notified him of Ms. Thayer's lack of authorization." (Tape 2A)(Thayer). In view of these plain facts, the Court is highly skeptical of Mr. Cooper's "public display" ignorance on this occasion. There is little doubt in the Court's mind as to who the "real culprit" is in all this – or that the DeWolfs are yet not without a remedy.

[102] (Tape 3B)(Cooper); *see also* Def. Post-Tr. at 5-6 ¶ 21.

[103] (Tape 3B)(Cooper).

Court finds that this could not have been done, by definition, without also destroying the branches on the Thayer side of the tree and property and the Court further finds it unlikely that a busy "tree man"[104] would have taken the trouble to "swing" cut sections around the trunk of the tree so that they would not be lowered on the Thayer property.

Finally – and most convincingly – with respect to the issue of trespass, Ms. Thayer also called one of her neighbors, Ms. Kate Woodward, to testify that she had been an actual eyewitness to the presence of several tree workers on the Thayer property on the occasion of the cutting of the mulberry tree.[105] Thus, this is not just a existential question of the cutting plane of a chainsaw blade's interloping onto the space of the Thayer property. Both parties' cases in this matter clearly show that this was done without Ms. Thayer's knowledge or

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[104] Remember that, according to Cooper himself, he and his crew were so "booked up" that they were only there on December 7, 2001, because a previous job scheduled for that date had unexpectedly been cancelled and he wanted to take advantage of the opening. *See* text associated with nn.28-29, *ante; see also* Def. Post-Tr. at 3-4 ¶¶ 13-14).

[105] Ms. Woodward lives at the corner of Macomb St. and Idaho Ave., N.W. The view from her front drive (as she was starting to walk her dogs that day, she recalled) is directly along the properly line in question (shown in DX B & H). She plainly saw the Cooper workers at various times on the Thayer property, she testified, including walking down the driveway and climbing up in the tree on Ms. Thayer's side of the lot line (something that would have been more convenient for the tree cutters when one also remembers that a six-foot fence separated them from the incipient Thayer property and the trunk of the Thayer tree). (Tape 5B)(Woodward); *see also* PX 4 and DX 3and Pl. Post-R. I at 1, 2-3 & 23 and Pl. Post-Tr. II at 3 ¶ 16, at 4 ¶ 2 & at 11. Based on Ms. Woodward's demeanor, certitude, controlled responses on cross-examination, together with her sense of percipience and recall, the Court credits her testimony entirely. As seen above, due to his conversation with Mrs. DeWolf that very morning, Mr. Cooper knew, in fact, that he did not have permission either to be on the Thayer property or to cut her tree down.

consent.[106]

2. In Principle

Alternatively, even if the DeWolfs ***had*** been the actual property owners or somehow had acquired the legal right to take such unilateral action at the time, the Court would ***still*** find them liable for the trespass damages. Sterling holds that a landowner may only "cut away ***to his property line*** branches and roots from trees of the adjoining owners." 75 A.2d at 147 (emphasis added) and 148 ("by cutting them off to the extent that they invade his property"). This is the long-standing "general rule" stemming from an 1886 case by the California Supreme Court:

> Trees whose branches tend over the land of another are not nuisances, except to the extent to which the branches overhang the adjoining land. To that extent they *are* nuisances, and the person over whose land they extend may cut them off of have his action for damages, and an abatement of the nuisance against the owner or occupant of the land on which they grow, but ***he may not cut down the tree, neither can he cut the branches thereof beyond the extent to which they overhang his soil***.

Grandona v. Lovdal, 11 P. 623, 624 (S.Ct. Cal., Dept. One 1886)(emphasis added). It is also the "general rule,"[107] one which long antedates the staid Massachusetts

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[106] *cf.* Beals v. Griswold, 468 So.2d at 643 ("Although it is undisputed that the defendant's workers walked in plaintiff's front yard and climbed the tree from her property, the crucial issue is whether plaintiff consented to their entry.").

[107] *See, e.g.*, Law v. Lee, 1988 Del. Super. LEXIS 210 * 9 (June 21, 1988)("As for encroachment of the trees on the defendant's property, the defendants have an absolute common law right to remove encroaching branches and roots as long as they do not go beyond their boundary line."); Pierce v. Casady, 711 P.2d at 767 ("A landowner has a right to trim branches that overhang the landowner's property even though the trunk of the tree is on a neighbor's land. The landowner may not, however, go on the neighbor's land and remove the tree or any part thereof [on the tree owner's land,] absent the neighbor's permission."); Ferrara v. Metz, 267 N.Y.S.2d 823, 824 (S.Ct. Suffolk Co. 1966)("It has been established that a property owner may resort to self-help in the first instance, to remove roots and trees adversely affecting his own land."); Schneck v.

Rule,[108] with only rare exceptions,[109] and does not depend on advance notice.[110]

Podrasky, 1960 Pa. D. & C. LEXIS 109, **5 (July 28, 1960)("No landowner has a cause of action from the mere fact that the branches of an innoxious tree belonging to an adjoining landowner overhang his premises. His right to cut off the offending branches in considered a sufficient remedy ….)(citations omitted); Bonde v. Bishop, 245 P.2d at 620 ("The weight of authority is that to the extent that limbs or roots extend upon an adjoining landowner's property, the latter may remove them, but only to the boundary line."); Fick v. Nilson, 220 P.2d 752, 753 (Cal. App. 4th Dist. 1950)("It is well established that an adjoining landowner who is injured by limbs and roots of trees on another's property may cut off the offending parts, or may sue for damages and to abate the nuisance, but may not enter the other's land and cut down the trees …. It would seem to follow that where such a landowner, without pursuing either of these remedies, commits a trespass and destroys the other's property he is liable for any resulting damage."); Granberry v. Jones, 216 S.W.2d at 722-23 ("There can be no question but that … appellee had the legal right to cut any branches or foliage which to any extent hung over his soil from the hedge growing upon the adjoining land."); Crance v. Hems, 62 P.2d 395, 396 (Cal. App. 4th Dist. 1936)(*quoting* Grandona, *supra*); and Luke v. Scott, 187 N.E. at 63-64 ("[A]n adjoining landowner has no right to cut or destroy the trunk of a tree which is entirely upon the land of another although it causes him personal inconvenience, discomfort, or injury; and, if he cuts or destroys such a tree, he is liable in damages to the owner thereof."). *See generally*, 2 C.J.S. *Adjoining Landowners* § 62 (2003); Glenn A. Guarino, "Removal by Self-Help," 1 Am. Jur.2d, *Adjoining Landowners* § 22 (2003); Robert Roy, *Encroachment of Trees, Shrubbery, or Other Vegetation by Adjoining Landowner*, 65 A.L.R.4th 603 (1988); and F. S. Tinio, *Rights and Liabilities of Adjoining Landowners as to Trees, Shrubbery, or Similar Plants Growing on Boundary Line*, 26 A.L.R.3d 1372 (1969).

[108] *See, e.g.*, Stevens v. Moon, 202 P. 961, 962 (Cal. App., 2nd Dist, Div. One 1921)(*quoting* the Grandona Court); Gostina v. Ryland, 199 P. 298, 232 (Wash. 1921)(same); Cobb v. Western Union Telegraph Co., 98 A. at 759 ("[T]he right of an owner of land to free it from the obstruction of overhanging tress exists without notice so long as he operates on his own land in clearing away obstructions vertically above it … [and] the owner of land is entitled to cut away all encroachments over his land from trees of another so long as he does not trespass upon the land of that other."); Harndon v. Stultz, 100 N.W. 329, 330 (Iowa 1904)(If the limbs of … trees overhang the land of a neighbor, he may cut them off at the line, and, if the roots penetrate the neighbor's soil, he may dig them out, but that is the extent to which he may carry his objection."); Toledo, St. Louis & Kansas City RR Co. v. Loop, 39 N.E. 306, 307 (Ind. 1894)("As for trees that grow so close to the line that their branches extend over the adjoining premises, there is no doubt that if injury is shown the adjoining property owner may have his action in damages; or he may cut off the overhanging branches so far as they extend above his soil. He may not, though, cross his neighbor's line and cut down the trees."); Tanner v. Wallbrunn, 1989 Mo. App. 523 ** 4 (Dec. 5, 1898)("While it is true that my neighbor has no technical right to overhang my soil with the branches of his trees, yet if he do so I have no right to

cut his tree down and destroy it entirely. I may, however, clip off the overhanging branches, but only to the extent of such overhanging."); Hickey v. The Michigan Central RR Co., 55 N.W 989, 991(Mich. 1893)(*quoting* Grandona); Buckingham v. Elliott, 62 Miss. at 296 ("'The overhanging branches of a tree not poisonous or noxious in its nature are not a nuisance *per se* in such a sense as to sustain an action for damages.' ... [T]o constitute an action for a nuisance, 'there must be not merely a nominal but such a sensible and real damage as a sensible person, if subjected to it, would find injurious' ...")(mulberry trees case); and Skinner v. Wilder, 38 Vt. at 116 ("[T]he defendant had the right to cut the roots and branches of the tree to the division line so far as they penetrated or overhung his land, upon the ground that they were unlawfully encumbering his premises ....").

[109] The only significant departure is the "Hawaii Rule" as set forth in Whitesell v. Houlton, 632 P.2d 1077 (Haw. App. 1981). There, the Hawaii Intermediate Court of Appeals expressly considered and rejected the Massachusetts Rule, though, apparently, largely in favor localize botanical conditions and the type of tree involved. When the foliage of a neighboring landowner's tree, which was either an Indian banyan tree (*ficus benghalensis began*) or Malayan or Chinese banyan tree (*ficus retusa*), began overhanging the plaintiff's property, the latter hired a tree trimmer to cut off some of the branches and successfully sued the tree's owner to recover his expenses. Affirming the judgment, the appellate court held that this situation had created a legal "nuisance" and that "if the owner knows or should now that his tree constitutes a danger, he is liable if it causes personal injury or property damage on or off his property .... Such being the case, ... he is duty bound to take action to remove the danger before damage of further damage occurs." Failing to do so, he is liable for the expense involved in self-help. *Id.* 1078-79. Although asserting that the Massachusetts Rule "is especially unrealistic and unfair when applied to banyan trees in the tropics," *id.* 1079 n.8, the Hawaii Court did not bother to explain why. One reason might be that, as they grow outward, the banyan tree's branches actually "drop down" what may be termed "auxiliary trunks," so that one tree, which may grow to approximately 100 feet in height, can replicate itself through a network of "trunk branches," spreading laterally indefinitely, and thus result in an entire grove of banyans that would literally take root on neighboring soil. *See Encyclopedia Britannica Online* at <www.britannica.com> ("banyan").

[110] Note that most of these "self-help" cases either expressly provide that such actions may be undertaken "without notice" to the tree owner, or they completely ignore the concept, implying that notice is not necessary. The only case that this Court has found that turned on the issue of notice is Stevens v. State of New York, 197 N.Y.S.2d 111, 112 & 114 (1959), in which the appellate court expressly held that when the State Department of Public Works cut down a landowner's tree impinging on a state right-of-way "without notice to the claimants," it would nevertheless be held liable for their damages. Arguably, that case – before the New York State Court of Claims – can be distinguished because the defendant was a state agency and the "taking property" clause of the Fourteenth Amendment was involved. *See also* Simpson v. City of Gibson, 1911

Of course, as point ed out above, simple courtesy and reasonable notice would probably have obviated this entire case.[111] Nevertheless, as one leading legal treatise puts it *in nuce*,

> Adjoining landowners do not have an absolute right to sever tree roots, and must act reasonably with regard to the rights of the owners. The landowner ***may not go beyond the line and cut or destroy the whole or parts of the tree or plant entirely on the other's land***, even though it may cause personal inconvenience, discomfort, or injury, unless he or she has permission to do so from the owner.

2 C.J.S. *Adjoining Landowners* § 62 (2003)(emphasis added).[112] All the more so

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Ill. App. LEXIS 275, ** 3 (Oct. 20, 1911)(same result under State Constitution). No such right, of course, is protected as between private landowners. Notice was also an issue in Rautsaw v. Clark, 488 N.E.2d 243, 245 (Ind. App. 12th Dist. 1985)(small claims case), but only because an Ohio statute expressly required same; likewise in Meyer v. Perkins, 130 N.W. 986, 986-87 (Neb. 1911); *see also* Wegener v. Sugarman, 138 A. 699, 700 (N.J. Super. 1927)(notice issue ruled immaterial).

[111] And spared the world one more Memorandum Opinion. The main reason for emphasizing the concept of notice in the instant case is simply to show how much difficulty might have been avoided had the DeWolfs talked this matter over with Ms. Thayer in advance of resorting to arbitrary and unilateral self-help, even if they had had that right in the first place. Safe to say that this kind of thing is not what our Court of Appeals had in mind in adopting the Massachusetts Rule in Sterling so as to "reduce litigation." *See* Pl.Post-Tr. II at 12; *cf.* Schneck v. Podrasky, 1960 Pa. D. & C. LEXIS 109 at **4 ("It is indeed unfortunate that the parties to this action have been unable in an amicable and neighborly way to settle the almost insignificant differences that have interfered with the otherwise peaceful possession of their land …. We doubt our decision will allay the tensions and discontent, or satisfy these parties unless they, in the spirit of neighborliness and good will, reasonably discuss methods of eliminating the sources of friction.").

[112] Although the evidence shows that the DeWolfs' crew did not actually destroy the roots of the mulberry tree at issue, it also shows that they effectively destroyed the tree – a distinction without any practical difference, in this Court's view, especially since they encroached upon the Thayer property itself in order to reduce her thriving tree to a nullity, or worse. *Cf.* Keller v. Oliver, 1982 Del. Super. LEXIS 837 (May 17, 1982)(where landowner's tree limbs overhung neighbor's property, the fact that neighbor cut them back to the trunk of the tree, rather than only to the elevated property line, held that "[a]ny trespass committed by the defendant to cut these limbs at the trunk rather than

when the action is done at the behest of strangers with no standing.[113]

Plaintiff also makes an arguable point that the great body of case law stemming from the principle inherent in the Massachusetts Rule speaks only to cutting back "branches and roots" and does not comprehend destroying the entire tree.[114] The Court is also sympathetic to this argument but, for reasons set forth

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at the property line is *deminimis*.").

[113] *See* Pl. Post-Tr. I at 11. Arguably, this action by the DeWolfs could technically have been deemed a criminal offense in violation of one or all of three existing code sections. *See* D.C. Code § 22-3310 ("It shall be unlawful for any person willfully to top, cut down, remove, girdle, break, wound, destroy, or in any manner injure any vine, bush, shrub or tree ***not owned by that person*** …, under a penalty not to exceed for … vines, bushes, shrubs and smaller trees [less than 55 inches in circumference] $5,000 or imprisonment for not more than 30 days, or both.") (emphasis added); *id.* 22-3308 (criminally penalty for "[c]utting down or destroying things growing on or attached to the land o another"); and/or *id*. § 22-3309 ("Whoever maliciously cuts down , destroys, or removes any boundary tree, stone, or other mark or monument …, either of his own lands ***or of the lands of any other person whatsoever***, even though such boundary or bounded trees should stand within the person's own land so cutting down and destroying the same, shall be fined not more than $1,000 and imprisoned not exceeding 180 days.")(emphasis added). Indeed, in a metaphor that is not without irony here, one appellate court in an estate case painted a written picture based on the image "though, the legislative ax has lopped off some of the prominent branches, it has not cut down the tree; the mutilated trunk still stands." Comm'rs of the Rouse Estate v. Dirs. of the Poor of McKean Co., 32 A. 541, 544 (Pa. 1895)(disgorgement case). *Cf.* Fick v. Nilson, 220 P.2d at 753 ("While we sympathize with appellant's general viewpoint, he was not justified in taking the law into his own hands [and trespassing to cut down a nuisance tree] even to accomplish what the respondents should have done.").

[114] Pl. Post-Tr. I at 13. On review of the case law, the Court finds that in the Michaelson v. Nutting derivations, *ante*, n.87, only four of the 27 cases cited involved the trunks of trees. *See* Levine v. Black, 44 N.E.2d at 775 (commercial property dispute between two owners over tree bisecting boundary line); Higdon v. Henderson, 304 P.2d at 1002(property owner's claim that defendant's construction killed valuable shade tree on mutual boundary); Lemon v. Curington, 306 P.2d at 1091(plaintiff awarded injunction to remove a 50-year-old poplar trees on boundary line); and Norwood v. New York, 406 N.Y.S.2d at 257 (city held liable for damage to property owner's sewer line 25 years after it had planted oak tree over same). Plaintiff's reliance on Higdon in particular (Pl. Post-Tr. II at 9), is misplaced in that, although the appellate court in that matter, found the damage done by the neighbor to the owner's boundary-line tree to have been "incidental," the fact remains that it ***did*** result in the destruction of tree altogether and the perpetrator

below, does not need to predicate a ruling on it.

Thus, whatever the white mulberry's intrinsic fiscal value, as to Ms. Thayer's claim, three irreducible facts remain: (a) it was her tree; [115] (b) she "lost a mature tree that provided privacy and shade to her home," [116] and (c) she "will have to

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was ***not*** found liable, on the grounds that "the defendant was excavating on his own lot to build a residence and nothing more, which was not an unreasonable use of defendant's property. Under such circumstances, the resulting incidental injury to the tree did not create a right to recover damages." *Id.* 1002. To be sure, though, the "tree killer" in that case was at least the property-owner of record at the time of his "arbolicide." Other cases, however, grant relief on this distinction. *See, e.g.*, Turner v. Coppola, 424 N.Y.S.2d at 867 ("[O]rdinary trimming and clipping of overhanging branches does not extend to the main support systems of the tree."); Schneck v. Podrasky, 1960 Pa. D. & C. LEXIS 109 at **5 ("This self-help applies only to branches, and one may not trespass on his neighbor's property and cut down the tree."); Wegener v. Sugarman, 138 A. at 700 ("But the present case is not one of lopping branches to the line; on the contrary, it is one of total destruction of the hedge, the bulk of which was on the plaintiff's land; something that was quire beyond the legal rights of defendant, notice or no notice ...")(trespass case); and Butler v. Zeiss, 218 P. at 55 (Even though the trees were leaning over onto his property, "defendant would not necessarily have had the right to cut the trees down.").

[115] *See* nn. 8, *ante* and 121, *post*.

[116] (Tape 3A)(Thayer). Mr. Pitchford had likewise testified that the mulberry's shade also served to "provide energy savings" in cooling during the hot months. (Tape 2A)(Pitchford). Ms. Thayer believed that, over the years, these extra costs and the value of the loss of this aspect of her privacy, pushed her consequential damages into the range of "tens of thousands of dollars." (Tape 3A)(Thayer). Her initial expense in this regard, the record shows, was the purchase of a new air conditioning unit in the absence of the mulberry tree's shade the following Summer. (Tape 3A)(Thayer); *see also* Pl. Post-Tr. II at 6 ¶ 10. The loss of shade alone, has been found to the "actionable" under these circumstances. *See, e.g.,* Stevens v. State of New York, 197 N.Y.S. 2d at 112 (successful suit against State Dept. of Public Works for cutting down shade tree on right of way without notice to property owner); Higdon v. Henderson, 304 P.2d at 1002 (unsuccessful suit for "destruction of a shade tree located on the lot line between the adjoining properties"); Wiesel v. Hobbs, 294 N.W. 448, 450 (Neb. 1940)(landowner's successful appeal to enjoin neighbor from cutting down a borderline tree that provided "the only shade that he has from the west sun"); Luke v. Scott, 187 N.E. at 63 (successful suit against neighbor for cutting down two shade trees); Cobb v. Western Union Telegraph Co., 98 A. at 759)(unsuccessful action for cutting trees on landowner's property depriving him, in part, of their shade); *cf.* Smith v. Holt, S.E. at 495 (recognizing a cause of action for damage done by shade) and Musch v. Burkhardt, 48 N.W. at 1025 (cause of action

incur expenses for the removal of the unsightly stump [that] Defendants left behind." [117] All this transpired without her consent and at the hands of interlopers who had no legal right to do so.

C. The "Joint Ownership" Theory

The foregoing findings of fact and conclusions of law are predicated on the premises that (a) the tree at issue was located entirely on Ms. Thayer's property (b) the DeWolfs had no legal ownership interest in ***either*** property and (c) therefore they had no authority – whether express, implied, actual, or vicarious – to take any action on even their "own" property, much less that of Ms. Thayer, and (d) having done so, they committed a trespass for which they are liable in actual damages.[118]

The major premise of the foregoing rationale, however, depends on Ms. Thayer's ownership *in toto* of the mulberry tree or on some other theory that vested an absolute protective right in her so as to preclude even an entitled co-owner of the tree from destroying it without her consent.

Throughout these proceedings, though, both parties have repeatedly used the cryptic term "jointly-owned tree," as though the mulberry had been bisecting the property line and that both parties had some type of ownership interest in it.[119] The Court is of the primary view that this is plainly ***not*** the case on the

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because of the shade rendering portion of land "unproductive").

[117] *Id.* and (Tape 5A)(Thayer)(rebuttal case).

[118] *See* Pl. Post-Tr. I at 13-14 ("Self-help does not excuse trespass."); see also Pl. Post-Tr. II at 10-11.

[119] *See* Def.'s Opp. to Summary Judgment at pp. 3-4; (Tapes 1A & 4B)(Plaintiff's argument to the same effect); Pl. Post-Tr. I at 1 ¶ 10, & at 2, 10-11 & 15; and Pl. Post-Tr. II at 9-10.

record here because there was never any question of "joint" or even "adverse" ownership of this tree, either by the DeWolfs or their predecessor in interest.[120] This tree was growing from (*i.e.*, rooted in) the Thayer property and leaning over onto what became the DeWolf property. It was not "jointly owned." It was owned by Ms. Thayer. As she herself testified, "It is my tree." [121] To be sure, it was intruding onto the neighboring property and the *antedewolfian* owner of the latter had the right to "cut it back." But, as seen above, he did not do so, and in fact, countenanced its presence for well over a decade.[122]

Moreover, as also seen above, at no time relevant did the DeWolfs legally own ***anything*** regarding this case. To the extent any such theory is sustainable on any grounds, the DeWolfs would have to stand in the shoes of the then-current owner of the property that they were planning to buy. As noted above, however, no such evidence was provided at trial. True enough, they were ***planning*** to step into his shoes so as to have "standing," as it were, but that act was wholly anticipatory at all times relevant herein. One either has standing or one does not; it is not a prospective thing (absent a "future interest" of the kind ordinarily

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[120] *Cf.* Ifft v. Trimble, *et ux*, 120 D.W.LR. 873 (D.C. Super. Ct., July 27, 1992)(Dixon J.)(adverse possession of tree on lot border).

[121] (Tape 2B)(Thayer). Thus, the actual evidence flies in the face of the contentions of both counsel, whether before, during, or after trial. *See* Pl. Pos-Tr. I at 1 ("the fact that the trunk is located on both properties is uncontested"); *id.* 10 ("the trunk is situated on the boundary line"); Def. Post-Tr. at 2 ¶ 2 ("located on the property line) and *id.* 6 ¶ A & at 7 ¶ G (located "partly on the line of two coterminous owners"). The Court has already set forth is reasons for finding otherwise, despite the agree of the lawyers, at any rate. *See* n.8, *ante*.

[122] If the Court has to make a finding on this issue, it is that the property line is coincident with, and along the plane of the cut, of the "lower branch" of the mulberry tree that had been "lopped off" over the dividing stone wall between the properties, as depicted in PX 4 – thus leaving the "base" of the trunk decidedly and entirely on the Thayer property, and, *ipso facto*, making it her tree. *See* n.8, *ante*.

understood in the law of real property, which is decidedly not the case here). In short, in order to have a ***remedy*** (self-help), one must have a ***right*** (real property ownership) in the first place. The DeWolfs had neither. This is the *sine qua non* of this aspect of the case and, indeed, of the entire case itself.

Nevertheless, these legal contentions and the proof supporting this proposition – even, though, as seen above, Ms. Thayer herself repudiates them in her own testimony -- cannot simply be ignored by the Trial Court, lest it risk making reversible error. If this Court's legal conclusion on the foregoing "sole ownership" theory is repudiated by Higher Judicial Authority, it will go on to hold in the alternative that even if the DeWolfs ***did*** have such a right they exercised it impermissibly. It discusses this concept below, concluding that, even on this theory, the DeWolfs would still be liable.

The issue of "joint ownership" of what is termed a "boundary line tree," it turns out, is not well-settled, and contrary to the postulations of both parties herein, this issue is not as simple as either purports it to be. Authority exists to support the contention of each party, which is doubtless why the issue has been raised. The Court's research on this issue reveals that there are at least four discernible schools of thought on how a boundary tree may be, or become, jointly-owned and, if so, what rights inhere in said co-owners.

1. One view holds that trees standing on the boundary line of two adjoining owners are automatically their property as tenants in common and neither may take any action inimical to the health of their tree without the consent of the other, without thus being liable for damages. This rationale was best set forth by the Tennessee Court of Appeals in 1950, as follows:

> "A tree standing on the division line between adjoining proprietors, so that the line passes through the trunk or body of the tree above the

> surface of the soil, is the common property of both proprietors as tenants in common …. To hold in such case that each is the absolute owner of that part of the tree standing on or over his land would lead to a mode of division of the tree when cut that would be impracticable and would give the right to one to hew down his part of tree to the line, and thereby destroy the part belonging to the other. The rule is therefore settled that in such case, the parties are tenants in common.'"

Moreover,

> "'A landowner who cuts or destroys a tree growing on the boundary line without the consent of the adjoining owner is liable in trespass to the latter for such injury for although, ordinarily, trespass will not lie … [when] one tenant in common destroys the subject of the tenancy, … trespass will lie at the suit of the injured party."

Cathcart v. Malone, 229 S.W.2d 157, 158 (Tenn. App. Mid. Sect. 1950)(both quotations from *American Jurisprudence*); *see also* Fowler v. Saks, 18 D.C. 570 (1890)("[O]ne of two coterminous owners has no right to pull down a party-wall; if he does so, he commits a trespass and he is liable … and the natural measure of damages would be what it would cost to restore the property of his neighbor to the condition in which it was before he entered upon that undertaking.").

This view has the clear weight of widespread authority in case law nationwide and the added value of provenance dating in principle back to Roman antiquity.[123] Under this theory, the DeWolfs would still be liable.

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[123] Justice Asahel Peck (1803-1879) of the *antebellum* Supreme Court of Vermont informs us that this concept goes back to the Roman Byzantine Emperor Justinian (527-565 A.D.), whose codified "Institutes" ruled "that if the tree of a neighbor borders so closely upon the ground of Titius as to take root in it, and be wholly nourished there, we may affirm that such tree is become the property of Titius; for reason doth not permit that a tree should be deemed the property of any other than of him in whose ground it hath rooted; therefore, if a tree planted near the bounds of one person, shall also extend its roots in the land of another it will become common to both." Instit. 1, 2, 31. *Quoted and cited in* Skinner v. Wilder, 38 Vt. at 120; *see generally, Project Gutenberg* on the Worldwide Web at <http://www.gutenberg.net/etext/5983>.

2. Another view does not assume commonality, but holds that the adjoining parties must have agreed, either in fact, implicitly, or by past course of conduct, to be so entitled.[124] The DeWolfs would also still be held liable under this approach.

3. Melding both the foregoing, a third school of thought holds that while boundary line trees are commonly owned, it requires more than location to place such a tree in that legal category.[125] Inasmuch as no authority has been found for this proposition that is not derivative from a statute, and since the Legislative Branch has not enacted such a statute for the District of Columbia, any reliance on this theory by the DeWolfs would prove unavailing.

4. A fourth line of cases holds that each party has title to only that part of the tree on his side of the boundary line, but each has the right to prevent his

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[124] *See* Garcia v. Sanchez, 772 P.2d 1311, 1314-15 (N.M. App. 1989)("The mere fact that trees have encroached upon the line between two properties does not automatically mean that the trees are owned as tenants in common by adjoining property owners. *** '[A] test is whether they were planted jointly, or jointly cared for, or were treated as a partition between adjoining properties.'")(*citing and quoting* Rhodig v. Keck, 421 P.2d 729, 731 (Colo. 1966)) and Weisel v. Hobbs, 294 N.W. 448, 452 (Neb. 1940)("[W]here the trunk of the tree impinges upon the lot line, and when the respective owners have for years jointly cared for the tree, and divided the expenses of protecting it from the ravages of time and the elements, then each has an interest in the tree sufficient to demand that the owner of the other portion shall not destroy the tree.").

[125] *See* Holmberg v. Bergin, 172 N.W.2d 739, 742 (Minn. 1969)(Holding that while "[o]wners of boundary-line trees are considered as tenants in common, neither tenant possessing the right to destroy the commonly held property without the consent of the other," nevertheless, "something more than mere presence of a portion of a tree trunk on a boundary line is necessary to make the tree itself a 'boundary line tree' so as to bring it within the legal rule that it is owned by the adjoining landowners as tenants in common.'")(Minn. statute to this effect) and Higdon v. Henderson, 304 P.2d at 1002 ("[S]ince the tree standing on the boundary line is the common property of both abutting owners … neither had … the right to damage or destroy the tree without the consent of the other. Generally, as a proposition of law, this is true, but the rule is qualified by the right of an abutting owner to use his property in a reasonable way and conversely, not in an unreasonable way.")(Okla. statute to this effect).

neighbor from dealing which his part of the tree so as unreasonably to injure or destroy the whole. This approach springs from the comparatively ancient Connecticut Rule set forth in 1895:

> If the tree stand so nearly upon the dividing line between the lands that portions of its body extend into each, the same is the property, in common, of the land owners. And neither of them is at liberty to cut the tree without the consent of the other, nor to cut away the part which extends into his land, if he thereby injures the common property in the tree …. The tenancy in common in a 'line tree' upon whose land any part of a trunk of a tree stands has an interest in that tree, a property in it, equal, in the first instance, to, or perhaps, rather identical with, the part which is upon his land; and in the next place, embracing the right to demand that the owner of the other portion shall so use his part as not unreasonably to injure or destroy the whole.

Scarborough v. Woodill, 93 P. 383, 384 Cal. App. 1907)(*quoting* Robinson v. Clapp, 35 A. at 942).[126] Likewise, the DeWolfs would lose with this theory because most the mulberry trunk is growing on and from the Thayer property and because of the difficulty in measuring and parsing out proportionate "ownership" of the small segment that is on what is now their property.

As seen from this discussion, the essential result of this Court's holding

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[126] This same language recurs throughout "tree law" on the issue of "boundary trees." *See also* Doran v. Rugg, 164 A.2d 859, 861 (Conn. Super. 1960)(quoting Robinson, *supra*); Anderson v. Welland, 55 P.2d 1241, 1242 (Cal. App. 4th Dist., 1936)(same); Luke v. Scott, 187 N.E. at 64 ("Even if one of these trees was partly upon the land of appellants, this would not give them the right to cut them off at the ground, or destroy them. Under the rule, in such case, if the trunk of a tree is wholly or in part upon the line dividing the land of an adjoining owner, it is the common property of both; and it has been held that the property interest of each owner is identical as to the extent the portion of the tree is upon his land, and that where a tree is thus owned in common neither party has the right to cut or injure the same without the consent of the other, and if he does, he will be liable for damages therefor."); and Scarborough v. Woodill, 93 P. at 384 (*quoting* Robinson)); *but see* Loggia v. Grobe, 491 N.Y.S. 2d at 974 ("On this issue, the Court finds that the trunk of the tree is located predominately, if not entirely, on defendant's land and defendant must be held to be the owner.").

would not change, whether the Court found (a) that the DeWolfs did or did not have any "ownership standing" to take this action against the mulberry tree at issue or (b) the tree was solely owned by Thayer or jointly owned by both parties. Since there is utterly no statutory law on this point, if the Court is required to make a "selection," it would – given the stated preference of our Court of Appeals for a rule with "simplicity and certainty," Sterling, *ante*, at 147-48 – it will rely on first approach discussed above.[127] Indeed, on three out of four of the foregoing legal theories, the result is exactly the same – and on the fourth, substantially the same – and Ms. Thayer would still prevail on her trespass/damages claim.

V. JUDGMENT STUMP

A. Plaintiff's Claim

The measure of damages for trespass is well-known. Our Court of Appeals has held "unequivocally that … recovery under that theory is based on force and resultant damage ***regardless of the intent to injure***." Cleveland Park Club v.

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[127] These approaches on this topic are rooted in the ancient common law. As a matter of history and law, when there is no statute for the District of Columbia, the Courts must rely on the common law. *See* D.C. Code § 45-401(a)("The common law, all British statutes in force in Maryland on February 27, 1801, [and] the principles of equity … shall remain in force except insofar as the same are inconsistent with, or are replaced by, some provision of the … [District of Columbia] code."). As seem above, the Maryland Court of Special Appeals expressly eschewed the Hawaii Rule, holding that "we … choose instead to adopt the 'simplicity and certainty' of the Massachusetts Rule," and specifically cited the ruling of the D.C. Court of Appeals in Sterling. "To hold otherwise, the Maryland Court stated, "would be an open invitation to countless disputes between neighbors [especially in urban areas] concerning encroaching vegetation, which could be remedied more efficiently through 'self-help' rather that through costly and burdensome litigation." Melnick v. C.S.X. Corp., 510 A.2d 592, 598 (Md. App. 1986). That holding was affirmed by the Maryland Court of Appeals two years later in Melnick v. C.S.X. Corp., 540 A.2d 1133, 1135 (Md. 1988), the State's highest court adding that "[w]ith regard to self-help, the landowner is generally limited to cutting back growth to the property line; he may not enter the adjoining landowner's property to chop down a tree or cut back growth without his neighbor's consent." Neighboring Virginia's rule is the same, as set forth in Smith v. Holt, 5S.E.2d at 494-95.

Perry, 165 A.2d 485, 488 (D.C. 1960)(emphasis added). Consequently, "[i]n case of ***actual*** injury to realty resulting from trespass, the measure of damages is the difference between the value of the realty before the injury and its value after the injury." Decker v. Dreisen-Freedman, Inc., 144 A.2d 108, 1110 (D.C. 1958)(emphasis added).[128] Put another way, it is the value of the thing(s) damaged or destroyed on the property which, in turn, has reduced its value.[129] *See* Cathcart v. Malone, 229 S.W.2d at 159 ("'The measure of damages in an action of this kind is the difference in the market value of the realty immediately before and

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[128] Not only does civil trespass not require any intent to injure, but also in the criminal analogy which the Defendants themselves have raised (Def. Post-Tr. at 14, *citing* D.C. Code § 22-3208), it would be what is termed a "general intent" offense. That is to say, all that is required is the intent to do the act which results in trespass; it is not required that any specific criminal intent be proven to injure or do any damages. *See* Charles v. United States, 371 A.2d 404, 411 n.12 (D.C. 1977)(ruling that a violation of such statutes required a "particularized form of the intent labeled 'malice'") The best (though concededly not a precise) analogy is the District's "Unlawful Entry" statute, set forth at D.C. Code § 22-3102 (punishable by six months' imprisonment and/or a $100 fine). *See* Artiss v. United States, 554 A.2d 327, 300 (D.C. 1989)("The only state of mind that the government must prove is the ... general intent to be on the premises contrary to the will of the lawful owner."); *see also* D.C. Criminal Jury Instruction 4.36 (setting for a "knew or should have known" standard).

[129] *See generally*, 9-64A, **Powell on Real Property**, § 64A.05, *Damages and Equitable Relief Are Available in Trespass Cases* (Matthew Bender, 2004) and J. H. Cooper, *Measure of Damages for Destruction of or Injury to Trees and Shrubbery*, 69 A.L.R.2d 1135 (1960). There is no explicit requirement that a plaintiff go through the basically "roundabout" methodology of proving the value of the realty itself; rather, an elastic interpretation has been placed on this approach. *See* Jones v. Johnson, 2003 Tenn. App. LEXIS 423 (June 4, 2003) *3 (liberal proof allowed along these lines for award of damages against a neighbor who trespassed onto landowner's property and made several deep cuts with a chainsaw into the trunk of a tree, "effectively killing it"); Coldsnow v. Hartshorne, 2003 Ohio App. LEXIS 1163 **8 (Mar. 10, 2003)(discussing proper measure of damages for cutting trees on another's property); and Moss v. People's California Hydro-Elec. Corp., 293 P. 606, 608-10 (Ore. 1930)(discussing the various methods of proving awarded damages for the wrongful mutilation of branches and foliage of trees). *Cf.* Mease v. Bingaman, 1930 Pa. Super LEXIS 240 (Apr. 18, 1930)(where the cause of action is breach of contract, not trespass, the proper measure of damages is the value of the trees *qua* trees).

immediately after the destruction of the tree.'") Here, the Plaintiff amply presented evidence of her damages by two estimates as to the value of the destroyed white mulberry tree.[130] As seen above,[131] taking the average of the two yields a reasonable valuation of $6,200. That figure alone exceeds the statutory maximum of $5,000 for the award of damages on an initial claim in the Small Claims Branch. This is the *sine qua non* of this aspect of the case.[132]

B. Defendants' Counterclaim

Only five brief statements need be made as to the Defendants' counterclaim.

(1) Of course, having been adjudicated to have had no contemporary right at any time relevant to take the steps that they did, the Defendants also have no standing to seek any damages in this matter, whether under a theory of "self-help," or otherwise.

(2) Notwithstanding the boldness of their "pre-emptory strike" counterclaim actually to be compensated for this depredation of the Thayer property,[133] it, of course, cannot be seriously entertained under the circumstances. With regard to

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[130] PX 12 ($5,800) and PX 9 ($6,700); (Tape 2B)(Thayer)("My claim is for the value of the tree" in trespass.). *See* Hancock v. Fitzpatrick, 170 S.W. 408, 409 (Mo. App. 1914)("This is a suit in trespass ... and not a suit for damages for removing the [fully-grown Osage tree hedge] fence without notice.").

[131] *See* n. 48, *ante*.

[132] Under the well-settled "American Rule," however, despite the fact that she is the prevailing party, Plaintiff may not recover either her attorney's fees or expenses for trial preparation, as requested. *See* American Bldg. Maint. Co. v. L'Enfant Plaza Properties, Inc., 655 A.2d 858, 862 (D.C. 1995)("absent express statutory authorization or a contractual provision, each party is responsible for its own attorney' s fees" and costs); *see also* Bonde v. Bishop, 245 P.2d at 619 ("In the absence of statute, attorney's fees are not a proper element of damages in actions for injuries suffered as a result of a nuisance.'")(overhanging branches case).

[133] Def. Post-Tr. at 11-12.

these two aspects of the counterclaim, the rule in Sterling v. Weinstein, *ante*, is that "one whose land is invaded by branches … of trees … has no cause of action against the owner of such trees or plants." 45 A.2d at 148.[134] As seen above, the DeWolfs exercised their sole remedy – and then some. Moreover, even if they had standing to do so as "tenants in common" as to the tree, they are still precluded from seeking additional damages under these circumstances.

(3) Even if the Defendants could recover absent this theory, as to the second aspect of their counterclaim – alleged damage to the retaining wall between the properties – they likewise have no more standing to seek damages against Ms. Thayer for events occurring ***prior*** to the vesting of their possessory interest than they have to seek same against the ***original*** property owner of decades ago.[135]

(4) Insufficient evidence was presented, in the Court's view, to warrant awarding any damages on their remaining claim – for water damage to their

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[134] Pl. Post-Tr. I at 15.

[135] Moreover, after examining the relevant photographs of this fence at the time (show in PX 4 & DX 3), showing that the fence was built with its "face" to what became the DeWolf property, the Court finds that (a) the fence was built by the property owner who sold to the DeWolfs and (b) the Court credits the testimony of Ms. Thayer (Tape 2B)(Thayer) – supported by the opinion of Mr. Pitchford (Tape 2A)(Pitchford) – that the fence was built ***around*** the angling mulberry tree in order to actually ***accommodate*** its growth onto that property of the previous owner. *See also* Def. Mem. at p. 3 and Pl. Post-Tr. I at 5. Finally, though it was not raised here, it could readily be found that, to use the term in equity, the Defendants had voluntarily and knowingly "come to the nuisance," rather than having had it unexpectedly inflicted upon them. *See* D'Andrea v. Guglietta, 504 A.2d at 1199; *see also* Hasapopoulos v. Murphy, 689 S.W.2d at 121 (Neighbors complaining of shedding Chinese elm trees growing near boundary line held not able to recover because "[t]he trees and their proximity to plaintiffs' land existed when plaintiffs purchased their residence. They must be charged with awareness of the potential effects of growing trees."). Therefore, no liability for any damage thereby could be laid at the feet of Ms. Thayer by the new owners of the property next door.

basement, even if they ***now*** have standing to bring it.[136]

(5) Finally, as Ms. DeWolf herself repeatedly declared during her testimony, she and her husband had purchased this property on an "as is" basis,[137] knowing full well, she admitted, that the basement and other areas were "a mess" and "had not been looked after for over six years."[138] In no wise could Ms. Thayer and the innate mulberry tree be responsible for anything in this regard.

Consequently, the DeWolfs take nothing on their counterclaim.

VI. DECIDUOUS DAMAGES [139]

Judgment will therefore enter in favor of the Plaintiff against the Defendants, jointly and severally, for **$5,000** (five thousand dollars) plus interest on the principal at the judgment rate, together with all allowable court costs.

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[136] In this regard, the Court need say little more than that it credits the expert testimony of Mr. Pitchford, on behalf of Ms. Thayer, that nothing causal about the tree at issue could have resulted in flooding on what is now the DeWolfs' property. (Tape 1B)(Pitchford)("I don't see any way how it could. The roots are not large enough.") DX A (newspaper account of heavy rains in November 2001). Moreover, nothing in the testimony or other evidence offered by their Home Inspector spoke to the issue of any problems or potential problems with the Defendant's fence, wall, foundation, or basement. Pl. Post-Tr. I at 5. Thus, both the Defendant's claim on this point and PX 22 & 23 (composite of exterior of house) all become unpersuasive. Indeed, arguably, during her testimony, Mrs. DeWolf abandoned this claim. *See* Pl. Post-Tr. I at 8.

[137] *See* n.67, *ante*.

[138] Pl. Post-Tr. I at 6, 8 & 15. Indeed, the Defendants' own Proposed Findings of Fact deem the property to have been "in a significant state of disrepair at the time that … the property was shown to the[m]." (Def. Post-Tr. at 2 ¶ 9). And, not too incidentally, the records showed, that Mrs. DeWolf and her husband purchased the property against the advice of her mother-in-law, who had some expertise in the real estate area. Once again, Mother was right – the property would only lead to more trouble than it was worth. (Tape 4A)(DeWolf).

[139] A civil judgment, like a tree shedding leaves, casts off interest annually.

SO ORDERED, ADJUDGED, AND DECREED this _____ day of August 2004; and this judgment is **final.**[140]

RONALD A. GOODBREAD
MAGISTRATE JUDGE
(Signed in Chambers)

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[140] Both parties are informed of their right to seek both review of this judgment before an Associate Judge of the D.C. Superior Court and then to appeal from that ruling to the D.C. Court of Appeals – steps that must be taken in that order. The review process must be commenced by a filing of a Petition for Review in the Office of the Clerk of the Small Claims Branch within ***ten days*** of the entry of this Order on the docket. Note that ***no appeal can be made directly*** from the final judgment of a Magistrate Judge to the District of Columbia Court of Appeals. *See* Civil Rule 73(b), (c)(1) & (7); D.C. Code § 11-1732(k)(From the final order of a Magistrate Judge, an "appeal to the District of Columbia Court of Appeals may be made only after a judge of the Superior Court has reviewed the order or judgment."); Bratcher v. United States, 604 A.2d 858, 859 (D.C. 1992)(noting five previous opinions to this effect); Artl v. United States, 562 A.2d at 635-36; Dorm v. United States, 559 A.2d 1317, 1318 (D.C. 1989); and Speight v. United States, 558 A.2d at 360. (Note with regard to all these citations that the term "Hearing Commissioner" therein has since been replaced by the title "Magistrate Judge," pursuant to P.L. 107-114 (2002), codified at D.C. Code § 11-1732.) *See generally*, American Service Center v. Helton, 131 D.W.L.R. 677, 679-80 (D.C. Super Ct., April 8-9, 2003)(Goodbread, M.J.)(setting forth this process in detail).