



If a Tree Falls ...

Always Act Reasonably With Known Dangers

A relatively mundane case from a recent *CAI Law Reporter Newsletter* grabbed my attention as it is relevant to so much of what boards do on a month-to-month and year-to-year basis. The case of *Gibbons v. Horseshow Lake Corporation* involved a homeowners association in Michigan, but the lessons of the case are applicable in any jurisdiction.

In the case, a unit owner sued the association when a tree branch fell through the owner's roof causing both damage to the unit as well as personal injury to the owner. The owner filed suit alleging that the association negligently maintained the common area trees which led to the owner's damages.

To prevail on a negligence claim, a plaintiff must prove that the defendant owed the plaintiff a duty of care, that the defendant breached this duty, that damage resulted from the breach, and that there was a causal relationship between the breach of the duty and the damage sustained. The Supreme Judicial Court of Massachusetts has stated, "Every actor has a duty to exercise reasonable care to avoid physical harm to others."

In the *Gibbons* case, there was an issue over whether the association even owned the land where the tree fell. However, the court stated that since the association specifically undertook the task of identifying and removing diseased trees from the property, including the disputed land, the association "was required to use due care" in the identification and removal process.

In the context of a community association, trees will almost invari-



ably be the association's maintenance responsibility. Thus, the board must act reasonably in its maintenance activities.

In *Gibbons*, the association made the decision to undertake an entire investigation of all trees in the community after numerous residents expressed concern over falling trees. Therefore, once the investigation commenced, the board had a duty to perform the investigation with reasonable care.

Testimony at trial showed that the tree whose branch fell had defects that would have been visible for the prior 10-15 years and would have been vis-

ible from ground level. Thus, a reasonable person would have been able to identify the tree as being in need of removal. By failing to remove the tree, the board may have breached its duty of care to the residents and if so, could be found liable for the resultant damage.

By undertaking the investigation, the board arguably put more of an onus on itself to conduct the investigation in a reasonable manner. Importantly, however, the board was already on notice that many trees had fallen already and that trees were in need of removal. As a result, the board was essentially required to undertake an investigation as it would likely con-

stitute negligence to fail to take any action with regard to a known danger.

The lesson here is not to sit idly by for fear of negligently conducting an investigation, though. If a board does not undertake an investigation of trees or any other common element, liability is lurking as well. A board will be liable for a fallen tree if 1) it knew the tree was diseased or damaged and in need of removal, yet decided to take no action; or 2) a reasonable person would have known or discovered that the tree was in need of removal and the tree is not removed.

In other words, just because a tree or branch falls does not mean the association is automatically liable since the tree is in a

common area. Since the board must have breached a duty in order to be found negligent, an aggrieved unit owner must demonstrate that the board was on notice that a tree needed to be removed or that a reasonable board would have realized the tree needed removal.

The latter form of liability is to ensure that a board does not stick its head in the sand and claim it had no knowledge. If a tree is plainly rotting or diseased, such a condition gives rise to a duty of the board to investigate whether the tree needs removal and then to take the necessary steps to remedy the problem.

The moral of the story—and of the Gibbons case—is one of always

acting reasonably. A known danger triggers the board's duty to investigate whether further action must be taken. If limbs are falling, an investigation of the trees is mandatory. If a roof leaks, the board should investigate whether there is an underlying issue that must be addressed to avoid future leaks that could damage units. Moreover, the board should act reasonably in inspecting the common area on a regular basis in order to determine if there are any defects that must be repaired. ^{CM}

Dean Lennon, Esq., is an associate with the law firm of Marcus, Errico, Emmer & Brooks, P.C.