David P. Richards, Executor of the Estate of Tracy B. Richards v. Rubicon Mill Condominium Association, 011195 OHCA2, C.A. 14666

DAVID P. RICHARDS, Executor of the Estate of Tracy B. Richards, et al., Plaintiffs-Appellants

v.

RUBICON MILL CONDOMINIUM ASSOCIATION, et al., Defendant/Third-Party Plaintiff-Appellee

v.

ANDERSON'S TREE-TECH, Third-Party Defendant/Appellee

No. C.A. 14666.

95-LW-3465 (2nd)

Court of Appeals of Ohio, Second District, Montgomery

January 11, 1995

T.C. CASE NO. 94-0583.

THOMAS D. RICHARDS, Atty. Reg. No. 0012039 and ROBERT H. STRATTON, Atty. Reg. No. 0029931, 3322 Erie Avenue, Suite 101, Cincinnati, Ohio 45208, Attorneys for Plaintiffs-Appellants.

NEIL F. FREUND, Atty. Reg. No. 0012183 and SHAWN M. BLATT, Atty. Reg. No. 0056051, One Dayton Centre, One South Main Street, Suite 1800, Dayton, Ohio 45402-2017, Attorneys for Defendant-Appellee, City of Dayton.

OPINION

WOLFF, J.

David P. Richards, as executor of the estate of Tracy B. Richards and individually, Clara Lee Richards, and Amanda K. Richards (hereinafter collectively referred to as "the Richards") appeal from the judgment of the Montgomery County Court of Common Pleas which dismissed their claim against the City of Dayton (hereinafter, "the City")

The Richards' amended complaint alleged that on May 28, 1993, Tracy Richards was killed when the "top section" of a basswood tree fell and crushed her car as she was driving on South Main Street in Dayton. The trunk of the tree was located on the property of Rubicon Mill Condominium Association. The Richards alleged that the branches of the tree extended beyond Rubicon's property line, through the Dayton Power and Light easement, and "into the air space immediately above South Main Street."

The Richards filed suit against the property owners, Dayton Power and Light, and the City. The owners and Dayton Power and Light filed answers to the complaint, and the City moved to dismiss the claim against it. The City argued, pursuant to Civ.R. 12 (B) (6), that the Richards failed to state a claim against the City upon which relief could be granted. The Richards opposed that motion and filed a motion to file an amended complaint with a copy of the proposed amended complaint attached as an exhibit. Relying on the amended complaint, the trial court granted the City's motion and dismissed the Richards' claim against the City. Because not all of the claims against all of the parties had been determined, the court's judgment entry included a determination that there was no just reason for delay, in accordance with Civ.R. 54(B).

The Richards appealed the dismissal of their claim against the City. The City moved to dismiss the appeal for lack of a final appealable order, and we denied that motion in a decision and entry filed August 31, 1994. The Richards assert one assignment of error.

> WKH#WUIDO#FRXUW#HUUHG#LQ#JUDQWLQJ#GHIHQGDQW/#WKH#FLW\#RI#GD\WRQ*V#PRWIRQ#WR#GLVPLVV# SXUVXDQW#WR#UXOH#45+E,#+9,#RI#WKH#RKIR#JXOHV#RI#FLYLO#SURFHGXUH#IRU#IDLOXUH#WR#VWDWH#D# FODLP#XSRQ#Z KLFK#JHOLHI#PD\#EH#JUDQWHG1

The Supreme Court of Ohio has set forth the standard to be applied in determining whether a complaint has failed to state a claim upon which relief may be granted. The syllabus in *O'Brien v. University Community Tenants Union, Inc.* (1975), 42 Ohio St.2d 242, states:

> Iq#rughu#ir u#dl#frxuw#wr#glvp lvv#dl#frp sodlqw#ir#idlxuh#wr#vwdwh#dl#fodlp #xsrq#z klfk#lhdh#fdq#eh#judqwhg#-#- /#wkp xvw#dsshdu#eh|rqg#grxew#urp #wkh#frp sodlqw#wkdw#wkh#sodlqwii#fdq#suryh#qr#vhw#ri#idfw#hqwlwdqj# klp #wr#uhfryhu|1

Further, in construing the complaint, the court "must presume that all factual allegations of the complaint are true and make all reasonable inferences in favor of the non-moving party.'" *York v. Ohio State Hwy. Patrol* (1991), 60 Ohio St.3d 143, 144, quoting *Mitchell v. Lawson Milk Co.* (1988), 40 Ohio St.3d 190, 192.

The Richards' claim against the City is based upon the City's statutory liability for "injury, death, or loss to persons * * * caused by [the City's] failure to keep public roads, highways, streets, [or] avenues * * * within the [City] open, in repair, and free from nuisance." R.C. 2744.02. The City moved to dismiss the claim because the original complaint failed to allege that any portion of the tree, the alleged nuisance, was within its control. In response, the Richards filed an amended complaint which added an allegation that the branches of the tree extended "into the air space immediately above South Main Street in the City of Dayton." The relevant paragraphs of the Richards' amended complaint follow.

> 441#Rq#Iulgd|/#Pd|#5;/#1<<6/#d#ylvlec|#glvhdvhg#dqg#ghfd|hg#Edvvz rrg#wuhh/#h{lvwhg#rq#wkh#frp p rq#duhd# ri#Uxelfrq#dorqj#wkh#surshuw|#dqh#p p hgldwh|#dgmdfhqw#wr#wkh#qruwkerxqg#kdqhv#ri#Vrxwk#P dq#Vwuhhw# Gd|wrq/#dssur{lp dwho|#496#ihhw#vrxwk#ri#wkh#qwhuvhfwrq#ri#Vrxwk#P dq#Vwuhhw#dqg#Vwrqhp lo#Urdg/#dqg# dssur{lp dwho|#58#ihhw#urp #wkh#hdvwhuqp rvw#Exue#dqh#ri#Vrxwk#P dq#Vwuhhw#-#-#-1#Wkh#Edvvz rrg#Wuhh# kdg#ehhq#lq#d#glvhdvhg#dqg#ghfd|lqj#wdwh#iru#p ruh#wkdq#whq#-43,#|hduv#sulru#wr#Pd|#5;/#1<<61

> 451#Sulru#wr#Iulgd|/#Pd|#5;/#1<<6#wkh#Edvvz rrg#wuhh/#z dv#ehwz hhq#98#dqg#:8#ihhw#lq#khljkw/#z lk#wkh# eudqfkhv#ri#wkh#Edvvz rrg#wuhh#udgldwlqj#rxw#urp #lw#wuxqn#dqg#h{whqglqj#63#wr#73#ihhw#lq#d#z hvwhuq|# glhfwlrq/#eh|rqg#wkh#surshuw|#dqh#ri#Uxelfrq/#wkurxjk#wkh#GS)O#Idvhp hqw#dqg#h{whqglqj#lqwr#wkh#dll#

vsdfh#lp p hgldwhd|#deryh#Vrxwk#P dlq#Vwuhw#q#wkh#Flw|#ri#Gd|wrq1

461#Rq#wkh#hyhqlqj#ri#P d|#5;/#4<<6/#wkh#Edvvz rrg#Wuhh/#gxh#wr#lw#dgydqfhg#glvhdvhg#dqg#ghfd|hg#vwdwh/# lw#vl}h/#dqg#lw#forvh#sur{lp lw|#wr#dk#kljkd|#wudyhdng#xuedq#Wkrurxjkiduh#q#wkh#Flw|#ri#Gd|wrq#Vrxwk#P dlq# Vwuhw,/#frqvwdwkwhg#d#sxedf%#dqg#sulydwh%#qxlvdqfh/#dk#kljkd|#gdqjhurxv#frqglwrq#dqg#srvhg#dq# xquhdvrqdeo#ulvn#ri#kdup #wr#dqglylgxdov#kvlqj#Vrxwk#P dlq#Vwuhw1

* * *

481#Dw#dssur{lp dwhd|#43=83#s1p 1#wkh#nyhqlqj#ri#Eulgd|/#P d|#5;/#4<<6/#Ghfhghqw#z dv#dlz ixoqj#+vlf,# gulylqj#khu#4<;3#Vdde#qruwk#q#wkh#hdvwhuqp rvw#dlqh#ri#Vrxwk#P dlq#Vwuhw#dqg#z dv#lp p hgldwhd|#dgmdfhqw# wr#Uxelfrq/#z khq/#vxgghqo|/#z lwkrxw#z duqlqj#dqg#z lwkrxw#q|#qhjdjhqfh#rq#wkh#sduw#ri#Ghfhghqw# frqwulexwqj#wkhuhwr/#wkh#wrs#vhfwrq#ri#wkh#Edvvz rrg#Wuhh#ho#rqwr#wkh#wrs#ri#Ghfhghqw*v#fdu/# lp p hgldwhd|#fuxvkhg#wkh#urri#ri#wkh#fdu#dqg#dwdo|#qmxuhg#Ghfhghqw/#fdxvlqj#khu#ghdwk1

In its judgment entry, the trial court correctly noted that a municipal corporation's duty to keep roads free from nuisance has long been held to extend to "conditions located not only upon but above the surface of such streets, where such * * * conditions interfere with, or make dangerous, travel thereon." *Yackee v. Napoleon* (1939), 135 Ohio St. 344, paragraph one of the syllabus. In a recent discussion of the duty owed by a political subdivision, the Supreme Court of Ohio held:

Wkh#urdgz d|/#wkh#vsdfh#lp p hgldwhd|#deryh#wkh#urdgz d|/#wkh#vkrxogh/#wkh#ehup /#dqg#wkh#uljkw0ri0z d|# duh#dovr#xqghu#wkh#frqwurd#ri#wkh#srdwfdo#vxeglylvlrq1#Vhh#suhvhqw#U1F1#7844134+XX,+5,1#Wkh#wrz qvkls#kdv#d# gxw|#wr#nhhs#wkh#duhdv#z lwklq#lw#frqwurd#uhh#urp #qxlvdqfh/#*Zh1/#*frqglwrqv#wkdw#glhfwo|#lqmrsdugl}h#wkh# vdihw|#ri#wudiilf#rq#wkh#kljkz d|1#Z khuh#wkh#wrz qvkls#idlv#q#lw#gxw|/#lq#p d|#eh#ddedn#ru#qmxuhv# sur{lp dwhd|#fdxvhg#e|#wkh#qxlvdqfh1#-#-#-#Wkh#uhdvydqw#irfxv#v#rq#wkh#niihfw#ri#wkh#revwuxfwlrq#rq#wkh# kljkz d|*v#vdihw|/#qrw#rq#wkh#qdwxu#ri#wkh#sduwfxodu#revwuxfwlrq1#*P dqxidfwxuhuv#Qdwd#Edqn#/v1#Huh#Fw|1# *Urdg#Frp p 1*#4<<5,/#96#Rklr#Vw16g#64;/#655056#hp skdvlv#*vlf*,1

In its determination that the Richards failed to state a claim upon which relief could be granted, the trial court relied on paragraph 11 of their amended complaint, quoted *supra*. Paragraph 11 describes the location of the trunk of the tree, which was olely on the property of Rubicon Mill Condominiums. If that was the only description of the location of the tree, as it was in the original complaint, then, arguably, the complaint may not have been sufficient to establish that the City had a duty to prevent the tree from falling onto the street. See, *Strunk v. Dayton Power & Light Co.* (1983), 6 Ohio St.3d 429, 431, as modified by *Manufacturer's, supra,* at 322 (placement of light pole adjacent to roadway did not jeopardize ordinary traffic); *Anderson v. CSX Transp. Inc.* (1991), 74 Ohio App.3d 365, 369-70 (city had no duty where alleged nuisance was wholly located on property adjacent to road and did not extend onto road or other area for which city was responsible); *Durham v. Amherst* (1988), 51 Ohio App.3d 106 (municipality had no duty to remove diseased tree located on private property).

However, we need not determine whether the description of the tree in paragraph 11 of the amended complaint viewed in isolation was sufficient to state a claim upon which relief could be granted, because paragraph 12 of the amended complaint expressly alleged that the tree extended "into the air space immediately above South Main Street." As decided in *Yackee, supra* and *Manufacturer's, supra*, the City's duty to keep its streets free from nuisance extends to conditions above the surface of the streets which make the streets unsafe for their ordinary use. See, also, *Strunk, supra*; 1961 Ohio Atty.Gen.Ops. No. 2210 (municipal corporation has duty to remove dead tree on private property where limbs overhang ublic street). Presuming that the allegations in the amended omplaint are true, making

inferences in favor of the Richards, and reading the amended complaint in its totality, we hold that the amended complaint states a claim that the City failed to meet its duty to keep the areas within its control free from nuisance.

The City's arguments against such a holding are not persuasive. Initially, the City argues that "[a]lthough plaintiffs alleged branches of the tree extended westwardly into the air space above South Main Street in the City of Dayton, there was no allegation, nor has there ever been an allegation, that these branches, as they *existed within the air space*, constituted a nuisance or affected the physical condition of the road." (Emphasis sic). This argument interprets the allegations in the amended complaint too narrowly. Under Ohio's system of notice pleading, the complaint need only put the City on notice of the nature of the claim against it. Civ.R. 8(A), (E); *Salamon v. Taft Broadcasting Co.* (1984), 16 Ohio App.3d 336, 338. Further, to succeed on a Civ.R. 12(B) (6) motion to dismiss, it must be beyond doubt that a set of facts could be proved at trial that could support a finding that the City was liable. *O'Brien, supra.* The Richards' amended complaint clearly put the City on notice of the nature of the claim against it, and, making inferences in favor of the Richards, it is certainly possible that the Richards may be able to prove that the diseased state of the tree rendered South Main Street unsafe for ordinary travel and, thus, a nuisance.

The City also argues that "there is *no* allegation in this case hat the tree was overhanging' Main Street. Rather, the only llegation contained in plaintiffs' amended complaint, (*sic*) is that branches Of the tree extended' in a westwardly direction, beyond the property line and into the air space above South Main Street." (Emphasis in original). To the extent that the City appears to be inviting this court to impose a requirement that the word "overhanging" be used in a complaint rather than a phrase with virtually the same meaning, we decline the invitation. Such a requirement would contravene the policy behind notice pleading and would serve no purpose other than allowing the city to avoid its potential liability in this action because of an insignificant semantic distinction.

In conclusion, the Richards' amended complaint gave the City notice of the nature of the claim against it, and the allegations in the complaint were sufficient to state a claim upon which relief may be granted. Thus, the trial court erred in dismissing the Richards' claim against the City pursuant to Civ.R. 12(B) (6). The assignment of error is sustained.

The judgment of the Montgomery County Common Pleas Court will be reversed, and the matter will be remanded for further proceedings.

BROGAN, J. and YOUNG, J., concur.