

# *Harborview at Cheswicke Homeowners' Association*

C/o Timmons Properties, Inc.  
2200 Hillsboro Road, Suite 200 \* Nashville, TN 37212  
Phone: 615-383-1777 Fax: 615-383-2260  
Email: [pwalker@timmonsprop.com](mailto:pwalker@timmonsprop.com)

---

Harborview Homeowners,

Due to the large number of residents who have contacted the Home Owners Association requesting assistance for tree and or tree limb removal after seasonal storms, your Board of Directors has sought a legal opinion clarifying the HOA's responsibility to act upon such requests.



It is the HOA's position that in the event a dead or dying tree or tree limb, originating from areas referred to as "greenways" and or "common areas", falls onto private property as a result of an act of nature and damages personal property, the HOA is liable for the removal of the tree if they were notified in writing that such a tree or tree limbs may pose a hazard of falling.

If properly notified by a homeowner in advance of such an event the HOA will secure the services of a licensed arborist to inspect the tree(s) in question and provide the Board an informal opinion on the condition of the tree and its potential service needs. The Board will in turn notify the homeowner in writing as to their decision.

If the Board's denial to not remove debris from fallen trees or limbs is challenged and an arborist and or legal counsel conclude in a formal letter to the HOA that the Boards' denial was proper, fees for these professional services will be charged back to the homeowner.

If you have any questions about a particular situation you can send our Association Manager at Timmons an email or letter stating your question or concern and the HOA Board of Directors will review it at the time of their next monthly meeting and respond to you your inquiry within 30 days.

A copy of the HOA's official legal opinion is posted on the Harborview website and can be viewed by going to [www.harborviewneighbors.org](http://www.harborviewneighbors.org)

*\*It should be noted that areas referred to as “greenways” and or “common areas” in which trees and or tree limbs have fallen onto private property are what is being referred to in this notice, not trees that originate on private property.*



LAW OFFICES

ORTALE, KELLEY,

ERBERT & CRAWFORD

WWW.ORTALEKELLEY.COM

THOMAS C. CORTS  
DOUGLAS A. BRACE  
WILLIAM M. BILLIPS  
JOSEPH B. KLOCKENKEMPER II†  
PAUL M. BUCHANAN  
WENDY LYNNE LONGMIRE\*  
GERALD C. WIGGER  
DAVID B. SCOTT

RICHARD W. SEBASTIAN  
W. CARL SPINING  
CYNTHIA D. PLYMIRE  
TODD A. BRICKER  
D. ANDREW SAULTERS  
JULIE BHATTACHARYA PEAK  
J. BRENT MOORE

ANGELA D. SIMMONS  
JEREMY H. CHERRY  
DAVID P. VIAL, II°  
MICHAEL T. SCHMITT  
BRITTON J. ALLAN  
T. WILLIAM A. CALDWELL

OF COUNSEL  
WILLIAM P. ORTALE  
DAVID B. HERBERT  
ELAINE M. YOUNGBLOOD‡  
RETIRED  
WILLIAM H. CRAWFORD, JR.  
JOHN W. KELLEY, JR.  
(1931-1985)

\*CERTIFIED AS A CIVIL  
TRIAL SPECIALIST  
†ADMITTED IN FLORIDA  
‡ADMITTED IN TEXAS  
°ADMITTED IN LOUISIANA

August 11, 2009

Mr. Matthew Dozer  
Timmons Property, Inc.  
2200 Hillsboro Road  
Nashville, TN 37212

RECORDED  
AUG 12 2009

**RE: *Harborview at Cheswicke HOA tree concerns***

Dear Matthew:

Per your request, I am writing to provide my legal opinion regarding clarification on the HOA's obligations to remove trees that fall from common grounds or greenways onto homeowners' properties.

Tennessee law draws a distinction between dead or decaying trees that cause damage to an adjoining lot owner's property and healthy trees that encroach on a lot owner's property causing damage. Dead or decaying trees are analyzed under the general theory of negligence. Thus, liability usually turns on whether the defendant landowner knew or should have known that the tree was dead or decaying and therefore was on notice that the tree might fall. The cornerstone of negligence is "foreseeability." Acts of God are generally deemed to be unforeseeable events and therefore do not cast liability on the landowner should lightning, heavy winds or rains (all generally considered acts of God) cause the tree to damage another's property. The problem occurs when an act of God causes a tree to fall over and it is later determined the tree is dead or decaying. In this circumstance, even though the act of God was the final cause of the tree falling down, Tennessee cases routinely find that the trees weakened state made it susceptible to acts of God and therefore place liability on the landowner. From my experience, any time a tree is deemed dead or decaying, the land owner will be deemed to have known of this and will be held liable.

As for healthy trees that merely encroach on another's property and cause damage, the law appears to place liability on the landowner based upon a nuisance theory. Under a nuisance analysis, a court will focus more on the damage to the plaintiff than the defendant's conduct. Tennessee defines a nuisance as "anything which annoys or disturbs the free use of one's property, or which renders its ordinary use or physical occupation uncomfortable. . . [and] extends to everything that endangers life or health, gives offense to the senses, violates the laws

of decency, or obstructs the reasonable and comfortable use of property.” *Pate v. City of Martin*, 614 S.W.2d 46, 47 (Tenn. 1981). Therefore, should a healthy tree encroach on an adjacent landowner’s property, either via the branches or root system, and the tree causes damage, the owner of the tree will be liable. Although not specifically detailed in Tennessee jurisprudence, should a tree that encroaches on another’s property be felled do to an act of God, I would suspect that the owner of the property on which the tree rests would be liable. This follows the general principal of concentrating on the plaintiff’s damage and not the defendant’s conduct.

In the final scenario, we have a healthy tree that is not encroaching on another’s property but is damaged through an act of God. If that damaged tree then causes damage to another property (imagine flying branches, etc.), then the landowner on which the tree rests would not be liable. These applications of Tennessee law may be altered by the policy of insurance applicable upon the property. Generally though, these policies of insurance can only broaden the protection afforded by Tennessee law, not restrict it. As a recap, should the tree be dead or decaying, liability will more likely than not rest on the landowner on which the tree rests. The same holds true for trees encroaching onto another’s property, even if the tree is healthy. Neither of these scenarios are affected by an act of God. The only time an act of God will shield the landowner for damage done by one of its trees is when the tree is healthy and not encroaching on another’s property.

I hope this opinion clarifies your rights and responsibilities regarding felled trees. Should the tree rest on a greenway owned and operated by the state, the same analysis will apply. Should you require further information or clarification, please let me know. Until then, I am

Very truly yours,

**ORTALE, KELLEY, HERBERT & CRAWFORD**

  
Mickey Schmitt