

## Mike Garvey: Did We Keep that Heritage Tree Too Long?

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[00:00:00] **Tinitia Price:** Welcome to the ISA Conference Rewind Series. I am Tinitia Price, instructional designer at the International Society of Arboriculture. Today ISA is happy to bring you, "Did we keep that heritage tree too long?" by Mike Garvey. This presentation was originally given at the 2020 ISA Virtual Conference. And the views and information expressed are those of the presenter. Now sit back and enjoy the video.

**Mike Garvey:** [00:00:39] Greetings from the big sky state of Montana. And welcome to my presentation. "Did we keep that veteran tree too long?" The ISA Municipal Specialist Certification Study Guide states: deciding whether to remove or retain an old tree involves making decisions about the willingness to accept risk of damage or injury should the tree fail. The city of Billings, Montana decided they were willing to accept the risk of a large mature tree in this picture that was situated in a public park and near proximity to a frequently attended playground. The tree caused significant and severe harm when a large diameter branch fell out of it and hit a person who was sitting on, on the lawn underneath its canopy, subsequently the city was sued for negligence.

The plaintiff's arguing that the city knew, or should've known that the limb was an imminent danger of failing. I was involved in this case for the duration of two and a half years. And as a consultant and an expert witness. The case was resolved last December and is now a public document.

So I really want to talk [00:02:00] about is not so much a case study in analyzing the defects of the structural condition or our loads that may have caused this limb to fail. Although that was very important. But I'd rather, chose to look at the communication breakdowns that was really directly effected this case.

It affected how the case unfolded over time. Sometimes negatively in the city's defense of this, of this case and, and how communication breakdown really caused some trouble and stress for some of the arborist involved as, as the case progressed and actually ended. In our words in our our actions, as arborists sometimes I think we don't think about what we're seeing and what we're doing.

We don't get to practice that very often. So there's a look at communication breakdowns, and I'll start off with setting the table, the background information of this scenario. And then I've broken this down into some of the, the management of this subject tree prior to the tree failure incident. The protocols for managing and protecting the evidence immediately after the tree failure.

This was a, a big part of this case. And then wrap that up with showing some examples how this can be really tough to defend their management decisions and credentials when required to provide sworn testimony. How I came to be involved in this case: about a week after the incident I was retained by the City of Billings Parks Department to write an independent and objective visual tree assessment for this tree.

I was not asked to offer conclusions or opinions on why the subject limb broke. But I was asked to make some recommendations for either retaining or [00:04:00] removing the tree. The plaintiff's attorney used my report to bolster her claim that it proved, my report proved that the City was negligent and they didn't do enough.

As you can see in this newspaper report clipping that the City didn't do enough to ensure the tree was safe, citing a report by an arborist that after the branch fell, recommended removal at the tree. Suffice it to say that the plaintiff's attorney misinterpreted or miss read my report. I did not recommend removal of the tree because this branch fell.

I offered some retention options, but the city decided to remove the tree because at that point they were not willing to accept any consequence of failure.

So the subject tree was a plane cottonwood populous sergenti located in Veteran's Park. It featured a 74 inch stem diameter. It was approximately 30 meters tall. At the bottom of that photograph, the red arrow is pointing to my trusty yellow field bucket, which measured the height at a hundred. It had a a hundred foot ISO diametric crown spread.

There was no history of prior failures with this tree. It was pruned five years before the limb failed. Now there were including me, there were seven arborists who were deposed in this case and were all asked about the age of the tree. And those figures came in anywhere from 75 to even greater than 125 years old.

This was a really important part of the case on the plaintiff's side, because they argued that the City was negligent for having just this really old ancient tree in close proximity within fall distance of a popular [00:06:00] playground. And I'll talk about how the age came into play in a few slides down the road here.

So I should start a month before the limb failed. And this did not directly affect the case, but indirectly it did. The city of billings had hosted an Arbor day event in Veterans Park. And as part of that celebration they use this cottonwood tree to set 10 climbing ropes so that several hundred kids could climb that tree. Now, there were no failures. There was no accident, no one got hurt at this time. But it came out in evidence that the City, there were two City arborist and two private arborist who set this climbing event up that there was not a tree risk assessment done prior to this event.

And the start of the communication breakdowns, the private arborist thought the city arborist had done the tree risk assessment. And the City arborist the private arborist thought they had actually done the assessment. And the it, the, the plaintiff's attorney used this as kind of a starting point that the City is just negligent.

They're, they're missing the standard of duty. No one would have all these kids climb a tree if you weren't really taking care of it and looking at it and make sure that it's stable. Now these photos and all the photos and images, by the way were entered into evidence, shows the event, the yellow arrow and the red arrow that I've inserted shows the approximate direction of where the limb would have fallen a month later.

So the scenario the night of June 2nd, 2017, the day was warm, dry and calm. You show, see a picture of people underneath the shade of [00:08:00] the trees. And I repeat people underneath the shade of the trees. And I repeat that because having people underneath the shade of the trees and a public park actually comes into play in this event. And I'll talk about that a few slides down the trail as well.

But people were waiting for the sun to go down. The City Parks and Rec were offering a free outdoor movie at Veteran's Park. I will note that the month of April produced above average rainfall for Billings. Normally at the beginning of the June, we roughly have six inches, 15 centimeters, of precipitation. Going to the, the night of June 2nd we actually had 8.85 inches of precipitation.

So approximately about 7:30 in the evening, a 50 foot long, 20 inch diameter limps suddenly breaks out of this cottonwood tree, the yellow arrow is pointed where the actual break was. Now, as you can see, as that

limb was falling over, it's actually got caught up in a fork just below it, which took a lot of the force of the of the fall from that limb away. Which was a really good thing for the gentlemen that got hurt. Most people believe that if that limb had just fallen out and hit him directly, that he probably would, would have been killed. Before I go onto the next slide, I just would like to mention this photo right here is a really good example.

For those of you who write tree risk assessments, a level two assessments. And we're asked to come up with that, risk mating, risk rating matrix and all these little cells that are divided by these lines. The consequences of failure from minor significant, severe. There's a lot of gray area between those black lines.

It's really hard to predict what the injury will be. It's hard to predict [00:10:00] the mode of failure. It's really difficult to predict on if a branch falls, what are the consequences?

So rare and devastating images of tree failure. These photos were taken immediately after the tree fell, first responders get there. And I didn't insert these as to sensationalize this this talk of the photos were certainly going to be introduced in evidence in, in, in a court hearing. But it really shows when we talk about risk and, in the definition of risk, as being this combination of a likelihood of an event and the severity of the consequences, and that's really an abstract thought. So what you're looking at here are vivid images of risks realized. So risk instead of being this benign noun and it's now an active verb and you see these young children, I believe they were the children of the gentleman who actually was hurt.

Fireman's doing his best to, to get, you know, just then get them out of the way. These vivid images really counteract the, all the benefits that we talk about, that that trees produce, all these wonderful benefits. And the tree risk assessment manual, ISA's manual, states that some level of risks must be accepted to experience the benefits that tree trees provide.

And I agree with that. And most of my people, I know the clients and customers I have will agree with that. Especially when you sell them all this in the middle here, all these wonderful facts that the trees and public parks and buildings were producing. When you compare that to these images here, people's attitudes toward trees change.

I would not want to be the person defending this action and saying, "oh yeah, well, [00:12:00] this guy got hurt really bad. And his kids are really, really terrified. But look at this, we have 113,000 pounds of carbon dioxide sequestered in Billings". The. The, the advent, the happening of risk changes people's attitudes.

And here's how it did in this case. So as part of a consultant and expert witness on this case, I was given roughly 3000 documents, included a lot of pictures to go over. And this piece of metadata really caught my eye. And what it is, it's a GoFundMe page for this gentleman and you can see that.

Picture of him in the hospital. And he was hurt really bad. His lung was punctured. He broke three of his ribs. He got infections because of it. But I've underlined this, hope he can see it: the evil tree. They're talking about the "evil tree". So at this, this was really a beloved tree, a community tree in Billings, probably the largest tree in our public parks.

Within 48 hours this tree is now referred to as the "evil tree". In my thought being is that if that's the evil tree, what do they think of the people who are actually taking care of that tree. Now on the complete other end of it, I cut this article out of the newspaper. I'm an old, old school guy and I actually liked holding and reading newspapers, but a little over a month after the incident, I cut this out and this was before I was retained in this case. This article was not introduced into evidence, but I really caught my eye. A guy by the name of George, and some of the things that he said, but just astounded me.

He states "I'm offended that the city cut down the tree in Veteran's Park just because a branch fell on some guy walking under it, or so he says. [00:14:00] He was probably hanging on it and it broke. I see no reason why a a hundred year old tree should be killed just because a branch fell on some guy."

This is the arena that we're really dealing with. As, as tree managers. Two polar opposites. Perspective, on when trees fail and hurt people. And they're both irrational One: you're now blaming the tree. The other, now you're blaming the victim. Where this can really come in to play in a court case, if you have some people who have these feelings, get seated on a jury. That's basically going to decide the verdict. So sometimes it doesn't matter. You can have the law behind you. You can have all the facts behind you.

If the jury sees something or feels something will really, really negatively one way about a tree that can really alter the verdict.

Okay. So I talked about the first part of that. I want to just go over some errors, some mistakes, Very honest errors and mistakes, in terms of communication. That process of conveying information between and among people. Before the tree fell, before the tree limb fell. So in Billings parks, City of Billings has no tree, man, it had no tree management plan. Still does not have a tree management plan.

Big mistake. The plaintiff's attorney really pounded the City on that. But they did compile a complete park tree inventory in 2011. And all of those 8,335 trees were pruned within a five-year cycle. Now the City of Billings aimed for a seven year cycle and they actually finished it in five years, which you would think is a good thing.

The plaintiff's attorney argued that [00:16:00] well, you've just rushed through your job. You really weren't doing a good job. And because of that, my client got hurt. You can't make this stuff up. However, in Billings, we have roughly 115,000 people in the city. 2 million people annually enjoy our parks. We've got a lot of really nice public parks.

People like our parks and buildings. And there was no evidence at all of any injury caused by a tree failure reported in a city park. So the city did operationalize the tree inventory and they prioritized some of the largest trees and those trees that were in really close proximity to frequently used areas in the park.

And they sent out a scope of services, request, for what essentially was crown cleaning. However, the person who wrote this slipped in this word, "hazard tree pruning" and "hazardous trees". And during deposition, this person really got grilled on this. And the line of questioning like this way. So what's a hazard? What's a tree hazard? Well, tree hazard is a, a likely source of harm. Oh, really? Well, I'm looking here and you have. 87 hazardous trees going up to 63 inch diameter. In fact, it was 74 inches. If you include the subject tree that I'm talking about and how did you let them get hazardous? Were all the hazards pruned out of this tree? The reply was that, well, it was crown clean.

Most of the hazards, dead dying branches, broken branches, maybe disease branches. Hanging branches were removed. But we don't know. So the question was, you know, did you ask this was all sublet it, you know, [00:18:00] to a private tree company. Was in your, scope of services. Did you ever mention that if this company is up in history and if they see something that they should report back to you and, and, and it wasn't.

So note this that the, the last person in the tree is probably going to be the first person is going to be asked questions about what happened if, if something bad happens to this tree. And the question that the plaintiff's attorney posed was, is there a duty for arborists to report concerns they may have that are not directly related to the work they are to perform?

Now these two photos were taken by the City Forester at the time they were pruned in August of 2012, which was a good deal. I'd advise anyone in arboriculture to take as many photos of the work that you can. It's very useful. It's easy to do anymore. Like can really come back and save you in a pinch.

So in the left photo, the arrow is showing they had a climber going all the way to the top of that tree. They also had a person in the bucket and they had two grounds people. And they were called into deposition. The foreman was actually called in to provide deposition. And he was asked about these hazards.

Is that so you're pruning hazard trees. Did you remove all the hazards? Well, we removed what, you know, we were told to remove. And in this photo, on the left, on the right, that where the yellow arrow is pointing. Oh, that's an old lightning strike an old injury, which would be a hazard. And the question was, well, if that's a hazard, is that's a likely source of harm. How come you didn't remove that?

So in hindsight, it might be for municipalities, a good idea to consider having some sort of language [00:20:00] in a document. In the specifications that says, if you see something you're up there looking down, we can't see this from the ground. Just let us know.

On the flip side of that. If you're a private arborist that puts a lot of heat on you that, nah, now am I responsible now? I wasn't responsible for doing, you know, taking care of the, for instance, this lightning strike. It seemed to be healed up and it was fine.

So this is a really sticky matter. And I don't know how that's going to get resolved, but I really think that in the future that for people who are writing specs, should think about how that could unfold.

So I talked about negligence and duty and just to clear up a few definitions of duty in the standard of care. The duty is our obligation and responsibility. In this case, it's the care of trees. Negligence, and a breach of duty are very similar. It's a failure to use reasonable care or failure to act in a reasonable way.

The standards are the documents that operationalize or you know, form this recipe on how the work is to be done. The standard of care, this concept came up a lot through, through this case. And it's it's, it's a, it's an idea that I don't think a lot of people, a lot of arbors think about daily. And it's really important to know. The standard of care is that degree of care, which a reasonably, prudent person should exercise in the same or similar circumstances.

Now, the plaintiff's attorney had argued all along that Billings in particular, their tree risk assessment, or lack of tree risk assessment, for all the trees that were included in the inventory had failed the standard of care. Of note though, a universal [00:22:00] standard of care has yet to be defined for a tree risk assessment.

Okay. Words and actions before the tree fell. And this is a classic example of just a failure of communication. And I should start by saying that the person who wrote this, it was a former, arborist and City Forester for Billings. And this person did more than anyone in Billings to promote arboriculture safety among trees, urban forestry, getting kids interested into trees.

He made a classic mistake of communication, not to, you know, take away from all his credentials. I still wish he was, is actually back in Billings. But roughly, about a month after the pruning was done, he posted a picture of that, of that pruning on a website and the park city parks website on a page that he had "Tree of the Month" article.

And at the very bottom of my underlined this last statement, he says, come and join the shade in Veterans Park. So it goes back to that picture that I mentioned that people are underneath the shade of trees and

public parks. Plaintiff's attorney argued that the people in the public parks are now considered guests because they were invited to enjoy the shade in Veterans Park.

What provides shade, and shade in parks, are trees. And so now not only are you negligent, you don't take care of your trees. You're actually inviting people into a dangerous zone. So you're like doubling negligent. That's not a legal term, so don't, don't quote me on that. But he got in hot water on that. More importantly, he makes a few statements about [00:24:00] cottonwood trees and he says they can live well over a hundred years, but often begin to fall apart and die out really fast.

And this one statement here really caused a lot of, a lot of heartburn actually on the defense side. And he says that cottonwood trees are beautiful trees that provide tons of shade, but do not make for the best trees around houses and playgrounds. And I'll talk about how he was crushing on that later on in my presentation, but I can guarantee you that plaintiff's attorney jumped all over this as evidence that this is just negligence. Why would you, you're saying right now that these, this, this species of tree is not good to have around a playground, and yet you have a really big one that's in really close proximity.

Okay. A few items after the tree fell. In terms of breakdowns of communication. Spoliation in the collection of evidence. So spoliation is a legal term and refers to the intentional reckless negligent hiding, withholding, altering, or destruction of evidence that would be reasonably anticipated to be used as evidence in a legal proceeding.

Now you'll recall that, the as the limb fell out, it actually didn't fall all the way to the ground. He got hung up in that fork beneath it. So very early, the next morning, the city arborist and his crew were directed to get the, the limb out of that, out of that fork, lower to the ground. And then they were directed to actually get rid of it.

So it was cut up into rounds. It was chipped. It was hauled the dump. At no point was there any [00:26:00] evidence that anyone in, in the parks department had contacted the city attorney's office and said, Hey, someone got really, really hurt here last night. We had this large limb on the ground. What do we do with it?

It's a breakdown in communication. Now the city arborist; however, took some pictures of. This is the best picture of, of approximately where that that limb snapped off. And you can see on the lower part of, of that limb that there is a, there's a fairly decent pocket of a decay there. And that would have been on the top side.

On the tension side, on that limb, you can see that it was a live branch. It was alive limb and live branches and twigs all over. The, there are penalties for spoliation, some severe penalties for spoliation. In this case, the plaintiff's attorney, petitioned the court for a summary judgment before the trial even began because she was denied the, the evidence that she needed to, you know, represent her client in in the fullest way that she could.

And I'd have to agree with her on that. I would have actually liked to seen this piece of information right here because you know, it could help explain what happened. It could also help defend the City in some ways. Again, if this was on the top side of this brand, you can't really see it. You've got all this live foliage around.

But you can't get rid of this evidence. And so we did take to the, City arborist did take some pictures on this, and again, he was fulfilling, you know, the standard of care. It was his duty there. Cause he was asked at deposition, why did you take these pictures? And he said, well, we're getting rid of this.

I was told to get rid of this. And I thought they might come in handy. Do not get whether you're a [00:28:00] City arborist or a private arborist. When a limb falls and causes severe damage in particular to a human being, do not get rid of this evidence until you seek some legal counsel. So process of documentation what's in, you know, your management plan for tree failures.

As I mentioned, the City of Billings did not have a tree management plan. So. The, although the plaintiffs were denied the lion's share of the evidence. It was agreed that the plaintiffs could have any portion of the tree, of that limb, that they wanted to. And so it was cut down. Now the yellow arrow in this left photo was actually pointing to an old pruning cut.

And this is really important to the case because. It's actually on the top side of, of that limb. Is very hard and this is about 30, 35 feet, 10 meters in height. And on that top side, it was really hard to look at and actually spot this from the ground. Now, the plaintiff's attorney had argued all along that this in fact was the point this defect here was the the reason why this limb broke. And so they got it down to the ground. And the red arrow in this photo on the right is pointing again to that old pruning site. Now what's really interesting was the the attorney and she's actually in this photo. She's a second to the right in this photo.

Had complained that the evidence was destroyed. But all she wanted was this top part where, where that section was cut and the city had no interest in keeping the part below it. [00:30:00] And again, this is a breakdown in communication. There is no evidence that the city attorney's office was asked, what should we do with the rest of this area?

So they made the cut and at the point that they made that cut at that point, in my view, this whole piece of evidence, it actually should have been weighed. For one thing, the the plaintiffs are arguing that the limb was just too heavy to support itself. It should have been measured and it should have been photographed on all sides before it was actually moved from the site.

Here's the reason why. So the photo on the left is the photo that the arborist took a aerial photo before he actually cut it. And what you see there is not a cavity. Now, the plaintiff's attorney all along kept referring to it as that old cavity. And in fact, she had several of the arborists who were deposed to refer to it as that old cavity.

And they didn't correct her. You know, what, as an arborist, that's not an old cavity. That's an old pruning cut that is surrounded by and I measured this another four inches of highly lignified supporting wood. So as it was cut down, the middle photo shows that it probably, and I wasn't onsite at that point.

When they, when they lower this to the ground, probably swaying a little bit, you know, hit, hit part of the other tree, hit the ground hard a little bit. So some bark got bounced off of that. But now you look at that that old pruning site and you can see the remnants of the original lateral branch there.

And yeah, you can see some space that in circles that lateral branch. Photo on the right shows it. As it was finally transported to a secure storage space and whatever happened to that that that small [00:32:00] branch that was in there no one knows the evidence was just gone and you can now see that that is an old cavity. But it wasn't an old cavity that anyone who was managing this tree before that branch broke.

And so it's really important, when in the cases, when you have to preserve your evidence, is really not thinking so much like an arborist, but think like a detective, investigative journalists and, and, and just document everything, photograph everything that you can. And here's what happened. So, as it was put in, as this piece was put into the storage center, it was actually the bottom part, the cut part was left.

It was standing up. And so these photos were taken roughly a year after the that it was actually put into the storage unit. Now, as we turn that over to look at the backside of it and the plaintiff's expert witness, really wasn't interested in seeing that too much. And they were afraid, the plaintiff's side was afraid that if we turn that piece over, it was just going to disintegrate and, and fall into dust.

But we tipped it over and it was fine. It was solid. The plaintiff's expert witness literally did not touch this piece. He looked at it and proclaimed, that is 60% rotten. This case is over. Now, I brought it with it, pounded with my fist on that, got a pocket knife poke for some, some you know, punky wood, which I found the yellow circle there, shows an area roughly about 11 square inch.

Of some punky wood and that aligned up with this red arrow that is right below that'll pruning cut, which is now an old cavity. Now, when you, when you look at this, this looks really bad. [00:34:00] And I was prepared to explain to a jury that this was just superficial mildew that, that piece of wood had a lot of water in it.

And when wood with a lot of water is, is set on concrete, concrete has that ability to actually wick that water away. That it was just mildew. But if there were some pictures taken as that piece was cut, this really could have just settled the question right then and now. So I was prepared to tell a jury all about, you know, like my ethics formula for off-center eccentric cavities and decay, T overarm being greater than or equal to 0.3, zero.

In the back of my mind, if you have someone on that jury that thinks that this is an evil tree, they might be thinking, look at this, this, this foreboding miasma of wood, this is what evil trees look like. This could really a boad not well for the defense. So in the pressure, cookie, cooker testimony at deposition.

And this part in particular, for those of you that are watching this, for arborists, urban foresters, who have never been deposed before, or those of you who have been arborists for a while and are thinking about getting into consultation and being an expert witness I hope this is some good information for you to consider.

So testimony at deposition, just a few things. What not to do. Don't argue with the attorney. You'll never win that argument. Don't be flippant or arrogant. And in this case one of the arborists was being deposed by the plaintiff's attorney and she asked a really good, tough question. And he didn't really answer that at all, danced around [00:36:00] it.

And she asked that question again. He didn't answer it again either. And then she rephrased it, but ask the question third time, still did not answer in any direct way. So she makes the statement to him when she says we're going to be here all afternoon Sir, if you want to play this game, he replies, that's fine. I've got all day.

You know, that doesn't help you, doesn't help anyone. I really believe that lawyers really like when in this case, arborists, who are really not that schooled in how to, how to testify at a deposition. I think they'd got you right now. And you really harmed your case.

What to do, tell the truth. It's as simple as that, tell the truth. If you tell the truth, you can stand your ground. Be prepared to know the facts. When you're testifying everyone has a right to an opinion, but that opinion must be based on facts. And there's a really big difference. So no, the facts of the case, be prepared and then be prepared for the actual, the, the scenario of sitting in a deposition.



And by that, I mean is for the most part we arborists, urban foresters, we can talk all day and very confidently about trees to our coworkers, our colleagues our customers, our clients. But when you're in this scenario of a deposition, there's this really weird dynamic because all of your words are being recorded.

And oftentimes there's actually a video. And that we're really take you out of your game, because at some point, all of a sudden you start listening to your own words and you're kind of a spectator on the outside looking in. That's a bad place to be because you're now the center of attention here. So you have to be really, really careful about going into a [00:38:00] deposition.

And here's the reason why. Depositions are known for in the process known as discovery. All the evidence on both sides is being brought in and opposing sides, the attorneys, will use the deposition as to probe to see weaknesses and strengths of the other side's case, but it really is an attack on your credibility and professionalism.

Not, I had more than one lawyer tell me that, Mike, what this opposing attorney wants to do to you is make you look like you're the stupidest person in this room. Make you look like you're inept. You're probably the most unethical arborist that's out there. This is what they really do. So I pulled a few examples.

Again, in terms of how we communicate, how we can defend ourselves in a really tense situation. So this example, and this is a to cue this up. This is the plaintiff's attorney questioning one of the arborist who was going to testify for the City.

Is there anything else you can do to test for decay other than a probe and a mallet? Well, there are various devices you can use such as a resisto graph. What is a restisto graph? It's a very thin, long drill that connects to a graph that gets printed out. Does the City of Billings have one? Yes. How often do you use something like that? I haven't. Would you be able to pick one up and use it tomorrow if I gave it to you? I don't think so.

Now I know this arborist, this is a highly qualified arborist, lot of certifications, qualifications. A great climber, a great bucket guy, is one of the most ethical arborists that I know, hardworking arborist. He was kind of taken out of this game here. But he was telling the truth.

He never had that opportunity to actually use the resistor graph that the City bought. So [00:40:00] really the attorney is not re is using him in a way as a pawn to get to back to the larger point of the City is that you're negligent. You screwed up your, your duty that a reasonable person, this standard of care, a reasonable arborist, or some w arborist who was overseeing other arborists reasonably, if you had this early expensive piece of equipment, you would use that you would train someone to actually use, that and it didn't happen. And now the pressure is on this arborist, you know, to defend himself.

Okay. Getting back to the "Tree of the Month" article. So here are here's how, some of the questions that the person who wrote this had to answer. This is the plaintiff plaintiff's attorney asking these questions. Now there's one thing I read where you state the cottonwoods don't make for the best trees around houses and playgrounds. Do you see that part? Yes. Do you see what's immediately to the right of that tree in that picture? Yes. And what is that? That would be a playground.

There is no way to defend that this, this is tough. This is one of the main points that really caused a lot of concern for the defense.

She further asked, cause he was stating that these trees fall apart. By the time they hit a hundred years old and the plaintiffs are arguing, but the tree was already too old. In your experience, how often do cottonwoods, you know, fall apart and die out before reaching a hundred? The good, tough question. She asked me that very question.

I didn't agree with that. So that was my opinion. She said, well, show me the evidence. So when I was deposed, I said, okay, good, let's, let's get out of this stuffy room. Let's get in a car [00:42:00] and I'll drive you around town and the county. And I can show you 40 of these things. Really old Cottonwood trees that are actually in pretty good shape.

Here's another really good, tough question that she asked too. Would a significant branch failure constitute a tree falling apart, in your opinion. That's a tough question to answer. Yeah. We can look at that and parse it over. Yeah. I can answer that. You have some time if you're going over and having a couple of beers with your buddies and so forth, but in the heat of a deposition in the really strange atmosphere of the deposition, this is a tough question to answer.

And all those words that are recorded will probably be used in open court, where you'll actually have to answer it all. So the plaintiff's expert witness had contradicted himself at times during some of the reports that he had submitted that were entered into evidence and also at deposition. And this one here caught my eye.

And so I, this is just a screenshot of the actual printout and I underlined a couple of these. Of these sentences. So this is the, the defense attorney is questioning the the plaintiff's expert witness. And you also stated that the trunk was generally, or is generally sound, how did you come to that opinion?

Why I felt that it was generally sound and that it was supporting the weight of the tree, had no visible fungi, and that it had no major cracks in the trunk itself. And then a few sentences later. I was reticent to bore of the tree and get the age. I did not want to introduce a wound point into a tree that that was far gone. In my opinion, it was that unsound.

Needless to say this arborist here got really grilled on that contradiction. You're saying it was unsound. And now [00:44:00] you're saying it was sound, what is it? This is a really tough spot for this arborist to be in.

To the larger point, in terms of figuring the age of the tree. And again, where we have to take off, our arborist hat and put on our detective hat. In terms of figuring out the age of trees. We don't really need drilling instruments all the time to figure that out. And it's an old concept using the social sciences.

I'm an old sociologist before I got into arboriculture. It's called unobtrusive measurements. And it's a really useful tool for arborists to put in your toolbox because it doesn't take up any space. It doesn't cost anything. Here's how I determine the age of the tree. Again, thinking of this as like you're an a detective or an investigative journalists clues are really close to the scene of the crime.

So this photo on the left, is black and whites, and aerial photo showing what was then called the Billings Polytech Institute. They owned all that land that you see there. And at the time it was an agricultural college. It's, the college is still there. It's called Rocky Mountain College.

Over time they parceled out a lot of that land. What you're looking at now, or a lot of homes that were actually built in the, the late forties, early fifties. And at the top left of that photo actually is what we call the Rim Rocks. It's this Mesa like plateau, that's around 300 feet above, above the valley, Yellowstone river valley. And the airport is on top of that.

So I hope you can see that there's an inverted yellow triangle in this photo. That is the approximate citing of where that cottonwood tree was. So this photo was taken in the 1920s. The incident happened [00:46:00] in 2017. There was absolutely no way that this tree is 125 years or older.

Now I augmented that with just taking a few steps away from where the tree was growing, the Cottonwood tree was growing, to a really nice memorial that dedicated Veterans Park. And if anyone had had bothered to read that, you'd also get some really good information. It's actually a sad story. So at the end of 1945, December of 1945, World War II had just ended.

And 21 army veterans are flying back from Europe and they're on their way to Seattle Washington to be discharged and start their lives again, as civilians. And in a blinding snow storm, the plane actually crashed, came really close to the airports on top of the Rims there, and they all got killed. And the, the plaque says that they were killed in an area very near here.

That's in 1945. So there's no tree. Now a tree could have been planted after the 1920 that cottonwood could have been planted after the 1920s, but the City really didn't take hold of that property until the late forties, early fifties. There'd be no reason for the college to plant a tree there because this is an open field.

They're trying to grow crops there for experimental crops. Right? So based on that, This, I felt that the tree could have been as young a seventy-five years old, at the most 105, but more likely than not, this was a younger tree than what the plaintiffs were actually arguing. So as an arborist when you get into, when you're asked to look into forensics and investigative arboriculture, don't forget unobtrusive measurements.

Start to wrap this up. Few slides ago, I mentioned that it's not a good idea to get snippy [00:48:00] and arrogant and flippant with a, an attorney in particular opposing attorney in deposition. And this is the question that the plaintiff's attorney was asking this arborist and he didn't want to answer it. He just couldn't quite answer it.

And here's her question. What I asked was this green crown, that's not necessarily determinative of health, of a cottonwood tree. Would you agree or disagree with that statement? Now I'm asking you anyone, who's actually watching this video to display that right now, you're in a room of a deposition room.

What would be your answer right now? What's your answer right now? She asked me that very same question. And I began with a lengthy reply, but I began with a two word sentence. It depends.

So how does it all end? I spent two and a half years of time from the incident that included over 3000 documents. 48 hours before the trial was to begin. This is what happened. And 72 hours before I was to testify. This is what happened: the City and the plaintiffs settled out of court for \$370,000.

The City did not have to admit they were negligent. Was this worth keeping this tree? So I'll go back to talking about that, you know, we have to accept some level of risk to enjoy all these benefits that the tree gives us. So if you agree with that and I do. Here's another question then, did the total aesthetic environmental and ecological and social benefits over time match or surpass the monetary social, physical, and psychological cost of causing severe harm to a person? [00:50:00] Could our improved communication as arborist and urban foresters have maybe made the situation better or at least help the defense? Not as part of the defense, win this case outright? We'll never know.

Thanks for tuning in. I hope at some point in the future that some of this information might come to your mind and maybe help you manage your trees in a more safe way. Thank you very much.