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DIVISION II

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COURT OF APPEALS
DIVISION II
STATE OF WASHINGTON

LYNN S. VANCE,

Appellant,

v.

XXXL DEVELOPMENT, LLC,

Respondent.

APPELLANT'S OPENING BRIEF

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I. Introduction

Under Washington's nuisance statute, a plaintiff is entitled to recover damages for past injuries caused by a nuisance that has been abated.¹ Moreover, no Washington appellate court has ever required a nuisance plaintiff to own the subject property at the time of trial to recover damages. Yet that is what the trial court required below. While awaiting trial, Appellant Lynn Vance sold her nuisance-ridden home and—in doing so—suffered at least \$100,000 in damages. But because she had sold her home, the trial court dismissed Ms. Vance's nuisance claim. The issue presented to this Court is: Did Ms. Vance forfeit her right to damages by selling her home prior to trial?

II. Assignment of Error

Ms. Vance assigns error to the trial court's legal ruling dismissing her nuisance claim on the grounds that—by selling

¹ RCW 7.48.180 ("The abatement of a nuisance does not prejudice the right of any person to recover damages for its past existence.")

her home—she lost "standing" to pursue her claim for past damages caused by the nuisance.

The issue pertaining to Ms. Vance's assignment of error is the trial court's conclusion that "Plaintiff no longer has standing to bring any claims based on nuisance because the Plaintiff no longer owns the property at issue."²

III. Statement of the Case

In 1988, Ms. Vance paid \$205,000 for a modest, one-story home in Longview, Washington.³ Ms. Vance decorated the house, landscaped the yard, planted a garden, and settled in to enjoy her retirement.⁴

Eight years later, in the summer of 2006, XXXL Development, LLC, was seeking approval for a residential

² Order Dismissing Private and Per Se Nuisance Causes of Action ("Order"), Clerk's Papers ("CP") 48: 22-23.

³ Plaintiff's Opposition to Defendant's Motion to Dismiss Nuisance Claims ("Opposition"), CP 34: 18-19.

⁴ Opposition, CP 34: 19-20.

subdivision just to the north of Ms. Vance's property.⁵ But before it could obtain final approval, XXXL had to deal with the development's stormwater runoff.⁶ XXXL's solution was to lay two enormous tanks on the ground, pile a huge mound of dirt on top of the tanks, and then build a retaining wall to hold in the dirt.⁷ The resulting retaining wall is massive, towering more than 25 feet high and reaching more than 100 feet in length.⁸ XXXL placed the retaining wall just two feet from Ms. Vance's property line and roughly 20 feet from the back of her house.⁹

The following photograph shows the wall in relation to Ms. Vance's house.

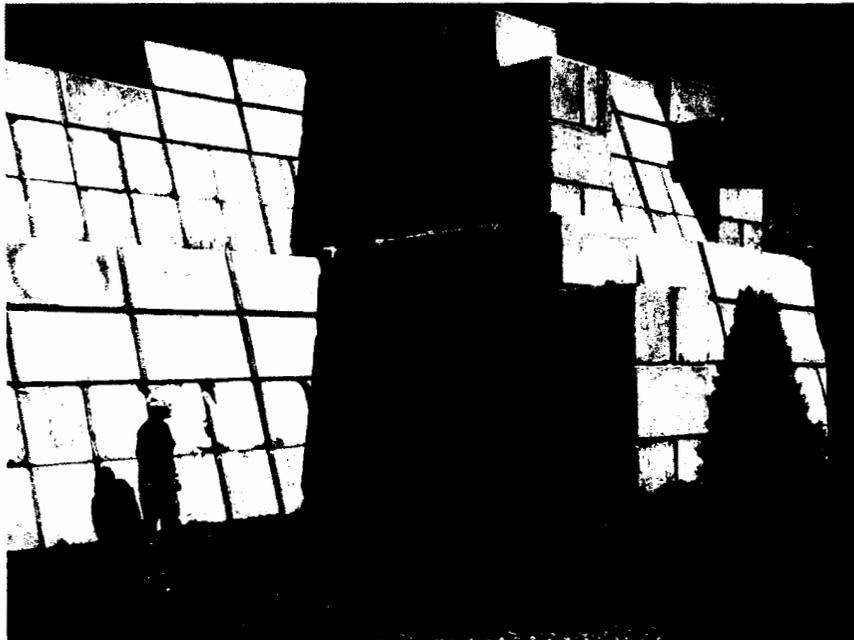
⁵ Opposition, CP 34: 20-24; XXXL Development, L.L.C.'s Answer to Complaint ("Answer"), CP 18: 1-3.

⁶ Answer, CP 18: 1-3; Opposition, 34: 22-24.

⁷ Answer, CP 18: 1-3; Opposition, 34: 24-26.

⁸ Complaint, CP 5: 4-6.

⁹ Complaint, CP 5: 5-7.



Four months later, in December 2006, Ms. Vance sued XXXL on several claims, including private nuisance.¹⁰ The case was initially set for trial in December 2007, but the trial date was continued to February 2008.¹¹ In the meantime, unable to bear living next to the wall any longer, Ms. Vance sold her home in December 2007.¹² Even though the home was

¹⁰ See Complaint, CP 3-15.

¹¹ Plaintiff's Motion for Reconsideration of Order Dismissing Nuisance Claims ("Motion for Reconsideration"), CP 51: 19-20.

¹² Motion to Dismiss Plaintiff's Nuisance's Claims ("Motion to Dismiss"), CP 28: 1-3.

worth at least \$285,000 before the wall was constructed, Ms. Vance sold her home for only \$185,000.¹³ Thus, Ms. Vance realized a loss of more than \$100,000 as a result of the retaining wall.

Four weeks before trial, XXXL asked the trial court to dismiss Ms. Vance's nuisance claims.¹⁴ XXXL's motion was in the nature of a motion for judgment on the pleadings, supplemented with the uncontested fact that Ms. Vance had sold her home.¹⁵ Roughly one week before trial, the trial court dismissed Ms. Vance's nuisance claim on the grounds that she had lost her "standing" by selling her home: "The Court concludes that Plaintiff no longer has standing to bring any claims based on nuisance because the Plaintiff no longer owns the property at issue."¹⁶

¹³ Motion for Reconsideration, CP 51: 11-16.

¹⁴ Motion to Dismiss, CP 27-32.

¹⁵ Id.

¹⁶ Order, CP 48: 21-23..

Rather than proceed to trial without her main damage claim, Ms. Vance asked the trial court to strike the trial date. Ms. Vance then requested the trial court to reconsider its decision, but it declined to do so. The trial court did, however, grant Ms. Vance's motion to certify the issue for discretionary review under RAP 2.3(b)(4).¹⁷

On May 14, 2008, the appellate court granted Ms. Vance's motion for discretionary review, finding that, "[n]either Washington statutory nor case law specifies that a property owner must currently own the property subject to an alleged nuisance to recover damages for the nuisance."¹⁸

IV. Standard of Review

Because this appeal presents solely a legal issue, the trial court ruling is not entitled to any heightened deference and the proper standard of review is *de novo*. Moreover, because the defendant's motion was in the nature of a motion for judgment

¹⁷ Order Granting Certification for Discretionary Review, CP 67-69.

¹⁸ Ruling Granting Review, pg. 4.

on the pleadings, all facts well pleaded by Ms. Vance must be taken as true, and all reasonable inferences from those facts must be drawn in favor of Ms. Vance on this appeal.

V. Argument

1. Diminution in Market Value is a Proper Measure of Damages for a Permanent Nuisance.

Nuisance is a well-defined tort in Washington. It has both statutory and common law roots. The statutory source is RCW 7.48.010: "[W]hatever is injurious to health or indecent or offensive to the senses, or an obstruction to the free use of property, so as to essentially interfere with the comfortable enjoyment of the life and property, is a nuisance and the subject of an action for damages and other and further relief." Case law provides the following, similar definition: a nuisance is any "substantial and unreasonable interference with the use and enjoyment of land."¹⁹ At the heart of both definitions is an

¹⁹ *Grundy v. Thurston County*, 155 Wn.2d 1, 6, 117 P.3d 1089 (2005).

unreasonable interference with a landowner's use and enjoyment of her property.

Washington courts have recognized that the diminution of market value is one proper measure of damages for a permanent nuisance, such as this retaining wall. "The measure of damages for a permanent trespass, like a nuisance, is depreciation of market value."²⁰ Here, Ms. Vance suffered at least a \$100,000 diminution in the market value of her home as a result of XXXL's construction of the retaining wall.²¹

2. The Trial Court's Ruling is Based on a Strained, Illogical, and Inequitable Interpretation of Washington's Nuisance Statutes.

XXXL argued to the trial court that the nuisance statute bars Ms. Vance's claims because the statute is written in the present tense. In other words, because the statute defines a nuisance using the present tense, a plaintiff must still be

²⁰ *Bradley v. American Smelting*, 104 Wn.2d 677, 688 (1985).

²¹ Motion for Reconsideration, CP 51: 11-16.

suffering from the nuisance when the case comes to trial. But if this reasoning is correct, the moment a nuisance ceases any previously valid claims would no longer exist. Fortunately, this is not the law in Washington, or anywhere else.

For example, RCW 7.48.180 clearly states that damages caused by a past nuisance are recoverable. "The abatement of a nuisance does not prejudice the right of any person to recover damages for its past existence." This statute ensures that a landowner responsible for creating a nuisance is not freed from liability for past damages even if the nuisance is abated.

An abatement of a nuisance is analytically similar to a landowner moving away from the nuisance. In both cases, the fact that the plaintiff is no longer actively experiencing the nuisance should not (and in the case of abatement, expressly does not) eliminate the cause of action the plaintiff had for damages that have already been suffered.

XXXL argued that "there is no authority which supports recovery for a 'past nuisance.'"²² This, taken with the present tense of the nuisance statute, is XXXL's entire authority for its argument. It has not cited a single case, Washington or otherwise, in support of its proposition. Further, the closest statutory authority—the provision on abatement—specifically supports recovery for "past nuisance." Nevertheless, the trial court granted XXXL's motion and dismissed Ms. Vance's nuisance claim simply because she had moved away from the nuisance.

The trial court's ruling is also illogical. Under the trial court's reasoning, if Ms. Vance had waited to sell her home until the day after trial, she could have recovered fully for her nuisance damages. But if she sells her home one day prior to the verdict, she cannot recover at all. Thus, her right to recover hinges on a few days difference in when the sale of her house closes, which could make the difference between a complete

²² XXXL's Response to Plaintiff's Motion for Discretionary Review, p. 6.

recovery or no recovery at all. This is not a sensible or an equitable result.

Further, under the trial court's interpretation, all individuals suffering from a nuisance would be forced to live on their properties throughout the entire litigation, or forfeit their right to recover any damages that they suffered while living with the nuisance. Under the trial court's reasoning, the plaintiff loses the right to recover at the moment ownership passes. Moreover, this forfeiture would seem to occur regardless of the stage of litigation, so long as the damages have not yet been paid.

Other effects of the trial court's decision are equally unpalatable. Owners are presented with an unpleasant choice: continue to tolerate the nuisance until the collection of damages or forfeit the right to recover any damages. This ruling would also give the nuisance tortfeasor a strong incentive to both extend the litigation and to make the nuisance more noxious—

for if the plaintiff can no longer stand the nuisance, and must move, the tortfeasor is released from any liability for the past damages.

No authority or precedent in Washington requires such an inequitable result. And reference to other types of torts is helpful. Notably, a person who suffers property damage is not required to retain ownership of the property through trial to collect for property damage actually suffered. A personal injury victim need not be suffering at the trial from all his injuries to recover compensation for the injuries caused by the tortfeasor. Similarly, a trespass plaintiff need not own the property throughout the litigation to have standing to pursue damages suffered in the past. The victim of a nuisance is no different and should not be treated any differently by the law.

3. Ms. Vance Cannot be Made Whole Without Her Claim.

As our Supreme Court has repeatedly and recently stated, "[e]quity will not suffer a wrong to be without a remedy."²³ Unless there is statute or case law to the contrary, the courts should provide relief for legal wrongs. This Court need not invent a new cause of action to provide a remedy for the wrong suffered by Ms. Vance: a nuisance claim is already well established. All this Court need do is reverse the trial court for creating a new, unprecedented, and unsupported rule that strips Ms. Vance of any remedy for the wrong that she has suffered.

Without her nuisance claim, Ms. Vance will not be able to recover for the damages she realized when she sold her home. No other cause of action will allow her to obtain damages for her home's market value reduction—damages that were "locked in" irrevocably when she sold her home.

²³ *Crafts v. Pitts*, 161 Wn.2d 16, 23, 162 P.3d 382 (2007) (quoting *Manning v. Potomac Elec. Power Co.*, 230 Md. 415, 422, 187 A.2d 468, 472 (1963)).

Ms. Vance suffered a \$100,000 loss as a direct result of XXXL's nuisance.²⁴ Nuisance is a recognized cause of action—both by statute and common law—intended to provide recourse to individuals such as Ms. Vance. Yet if the trial court's ruling is allowed to stand, Ms. Vance will have forfeited her right to recovery simply because she sold her house shortly before trial instead of shortly after trial. She will have forfeited her damages due to the trial court's creation of a new rule wholly unsupported by precedent.

4. Other Jurisdictions Allow Nuisance Actions After Plaintiffs Have Sold the Nuisance-Ridden Property.

No published Washington opinion has addressed the precise issue here: whether a property owner who suffered a financial loss from a permanent nuisance forfeits recovery of damages for that loss if she sells the property before trial. But, at least peripherally, other jurisdictions have addressed it.²⁵

²⁴ Motion for Reconsideration, CP 51: 11-16.

²⁵ See Appendix for out-of-state cases cited in this section.

These cases show that the property owner did not forfeit the right to recovery by selling the nuisance-burdened home during the course of litigation.

For example, the Kentucky Court of Appeals, in *Radcliff Homes, Inc. v. Jackson*,²⁶ awarded damages to a property owner for a nuisance even though the property owner had sold the land to move away from the nuisance. There, the nuisance involved a malfunctioning septic system on adjoining property. The nuisance arose in May 1983. Unable to bear the ongoing problem, the plaintiffs moved out of their home in August 1984, and the house was eventually sold before the suit was even filed. Nevertheless, the trial court awarded past damages because the nuisance "had an injurious effect" on the plaintiffs' "use of their property while in residence and upon their ability to sell it."²⁷ The Court of Appeals affirmed.

²⁶ 766 S.W.2d 63 (Ky. App. 1989).

²⁷ *Id* at 66.

A similar case, out of Connecticut, is that of *Kinsale v. Tombari*.²⁸ Again, damages for nuisance were awarded after the plaintiff had sold the property. The nuisance arose in April 2004 and the plaintiff sold the property five months later, in September 2004. Thereafter, the plaintiff sued for nuisance and asked the trial court to enter a pre-judgment writ of attachment for the damages suffered in the sale of the property. The trial court issued the writ, which was affirmed on appeal, based on testimony that the nuisance had decreased the sale price of the property by \$100,000.

The appellate court supported its decision by noting that if a nuisance causes a property to be sold for less than its fair market value, the former property owner can sue for the decrease in value. "[I]f a nuisance, albeit one that could be removed, causes a reduction in the sales price of a property

²⁸ 897 A.2d 646 (2006).

burdened by the nuisance, the damages realized by the seller may be viewed as permanent."²⁹

California has also implicitly recognized that property owners can continue to pursue claims for nuisance damages after sale of the subject property. In *Griffin v. Northridge*, the plaintiffs purchased their property in 1940.³⁰ After the purchase, the nuisance arose and eventually the plaintiffs initiated litigation. Prior to the trial, however, the plaintiffs sold their home. Upon the sale, they dropped their claim for injunctive relief, but they continued to seek damages for the nuisance they suffered while they lived in the home. The trial court awarded monetary damages, even though the plaintiffs clearly did not own their home by the time the case was tried.

Thus, while a nationwide search has not revealed any jurisdiction that forces a plaintiff to forfeit nuisance damages upon sale of the nuisance-ridden property, it has revealed

²⁹ *Id.* at n.4 (citation omitted).

³⁰ 153 P.2d 800 (Cal. App. 1944).

several states that do not require such forfeiture. If this Court were to adopt the rule expounded by the trial court, it seems it would be the only state in the Union to require such forfeiture.

Here, XXXL's wall is a permanent nuisance. It is an enduring structure that XXXL will not remove. Because of the wall's presence, Ms. Vance lost substantial amounts of money when she sold her home.³¹ She is not seeking an injunction or damages for interference with her ongoing use of the property. She is only seeking damages for the harm she has already suffered—harms that are substantial, definite, and irreversible.

VI. Conclusion

There is no Washington case or statute that holds a property owner who has suffered permanent loss from a nuisance cannot sell the nuisance-ridden property prior to the litigation's end. In spite of this, the trial court dismissed Ms. Vance's nuisance claims days before trial, holding that she

³¹ Motion for Reconsideration, CP 51: 11-16.

did not have standing to pursue nuisance claims against XXXL.
But she has suffered permanent loss from XXXL's act and
should be made whole. Ms. Vance respectfully respects that
this Court reverse the trial court's ruling , and allow Ms. Vance
to have her day in court against XXXL.

Dated this 18th day of August, 2008.



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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing Appellant's Opening Brief on:

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DATED this 18th day of August, 2008.



Steven E. Turner