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COURT OF APPEALS
DIVISION II

No. 37503-6

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COURT OF APPEALS
DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON
BY cm
DEPUTY

LYNN S. VANCE,

Appellant,

v.

XXXL DEVELOPMENT, LLC,

Respondent.

BRIEF OF RESPONDENT XXXL DEVELOPMENT, LLC

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ORIGINAL

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II. INTRODUCTION

Washington's nuisance statutes provide for a cause of action for conditions which are "injurious to health or indecent or offensive to the senses, or an obstruction to the free use of property, so to essentially interfere with the comfortable enjoyment of the life and property." The nuisance statutes allow a claim for nuisance to be brought "by any person whose property is...injuriously affected." The plain language of Washington's nuisance statutes indicate only an intent for present owners of property to seek damages for alleged nuisances.

Appellant Lynn Vance no longer owns the property which she argues was impacted by a structure which Respondent XXXL Development built on its land. The trial court's correct interpretation of Washington nuisance statutes and case law should be upheld so that this matter can proceed to trial on Ms. Vance's remaining claims.

III. STATEMENT OF THE CASE

Ms. Vance filed a Complaint on December 29, 2006, alleging nuisance, nuisance *per se*, negligence, trespass, and strict liability for surface water. (Appendix A:5-6.) Ms. Vance's Complaint is based on the presence of a retaining wall built by XXXL on its property opposite the back yard of Ms. Vance's now-former home,

and the engineering and construction methods used to build that wall. (*Id.* A:2-5.)

The wall in question was built by XXXL as part of their development of the Forest Heights Phase IV subdivision in Longview, Washington, in coordination with various Cowlitz County agencies and subject to their oversight. XXXL built this wall, at significant expense, only after other options became unworkable or were rejected by Cowlitz County agencies.

Ms. Vance closed on the sale of the home referenced in her Complaint on or about December 27, 2007. She no longer lives there, and the home is now occupied by the buyers.

On January 30, 2008, XXXL filed a motion to dismiss Ms. Vance's private and *per se* nuisance claims, arguing that it was impossible for Ms. Vance's use and enjoyment of a property to be unreasonably interfered with if she doesn't own it or even live there. (Appendix B.) On February 15, 2008, the trial court granted XXXL's motion and dismissed Ms. Vance's private and *per se* nuisance claims. (Appellant Appendix A.) On March 14, 2008, the trial court denied Ms. Vance's motion for reconsideration, affirming its decision to dismiss claims for "past nuisance." (Appendix C.) Ms. Vance's claims for trespass, negligence, and strict liability for surface water remained for trial after that March 14, 2008 order was entered.

IV. ISSUE PRESENTED FOR REVIEW

Whether this Court should affirm the trial court's order dismissing Lynn S. Vance's private and *per se* nuisance claims against XXXL when dismissal of the nuisance claims was based on a logical interpretation of the plain language of Washington statutes and case law?

V. ARGUMENT

The trial court's decision was a logical interpretation of the plain language of Washington statutes and case law concerning nuisance claims. The plain language of RCW 7.48.010 and RCW 7.48.020 is stated in the present tense indicating the legislature never intended to create a cause of action for "past nuisance." Consistent with this interpretation, no Washington case has supported such a claim. The trial court's logical decision should stand.

The dismissal of the nuisance claims left three claims standing: negligence, trespass, and "strict liability" pertaining to diversion of surface water. The trial court's decision neither considered nor rendered an opinion concerning whether diminution in value was an available element of damages for the claims which remained. That issue was also never raised in any pleadings or pretrial motions. Instead, Ms. Vance requested that

the trial date be vacated so she could pursue interlocutory appeal of the dismissal of the nuisance claims.

A. The trial court's decision was a logical interpretation of Washington statutes and case law.

The trial court's decision was a logical interpretation of Washington statutes and case law concerning nuisance.

Review of a statute always begins by looking at its plain language. *Lacey Nursing Center v. Department of Revenue*, 128 Wn.2d 40, 53, 905 P.2d 338 (1995). It has also been said that "a court must not add words where the legislature has chosen not to include them." *Restaurant Development, Inc. v. Cananwill, Inc.*, 150 Wn.2d 674, 682, 80 P.3d 598, 601-02 (2003).

RCW 7.48.010 defines nuisance as follows:

"The obstruction of any highway or the closing of the channel of any stream used for boating or rafting logs, lumber or timber, **or whatever 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."

Put another way, a nuisance is an "unreasonable interference with another's use and enjoyment of property." *Wallace v. Lewis County*, 134 Wn. App. 1, 18, 137 P.3d 101 (2006), *citing Kitsap County v. Allstate Ins. Co.*, 136 Wn.2d 567, 592, 964 P.2d 1173 (1998). Nothing in this statute indicates that this is intended to

apply in the past tense; in fact, the use of the phrases “free use of property” and “the comfortable enjoyment of the life and property” imply only the present “use” and “enjoyment” of property.

Similarly, RCW 7.48.020 states that an action on a nuisance claim may be brought “by any person whose property is... injuriously affected.” This statute does not say “is **or was** ... injuriously affected,” nor does it say “is **or was** lessened by the nuisance.” Including such past tense language would have taken the legislature all of five seconds to insert. They did not do so.

In Ms. Vance’s Complaint, she alleged that the presence of the retaining wall near her home “substantially and unreasonably interferes with her reasonable use and enjoyment of her property and residence.” Even if it is assumed, for purposes of this brief, that the wall unreasonably interfered with plaintiff’s use and enjoyment of her property at the time of filing her Complaint, plaintiff has now sold the house and moved away. After Ms. Vance sold the house, the presence of the wall could no longer cause her to lose any use or enjoyment of her home, as she no longer lives there.

Ms. Vance is not suffering any injury presently and the trial court was correct in determining that Ms. Vance was entitled to no relief, as she does not own the property subject to her nuisance claims. As the Washington Supreme Court has explained,

actionable nuisance is an act or omission that injures the plaintiff's property or unreasonably interferes with the plaintiff's enjoyment of the property. *Asche v. Bloomquist*, 132 Wn. App. 784, 133 P.3d 475 (2006) *citing Tieggs v. Watts*, 135 Wn.2d 1, 13, 954 P.2d 877 (1998).

The trial court's holding – that plaintiff's use and enjoyment of property she doesn't own can't possibly be unreasonably interfered with – is based exactly on such an application of the plain language of these Washington statutes. The trial court's determination that Ms. Vance lost standing to assert claims sounding in nuisance should stand.

B. Case law from other jurisdictions is inapplicable to the present case.

Ms. Vance cited three cases from other jurisdictions in her brief. However, this out-of-state case law obviously does not interpret Washington's statutory definition, and thus cannot be considered binding or even persuasive authority. There is no indication that the cases cited reflect statutory codifications of the definition of "nuisance" that are in any way similar to Washington's.

Unlike claims for "past trespass," there is no authority which supports recovery for a "past nuisance." The trial court did not

commit any error when it dismissed Ms. Vance's private and *per se* nuisance claims.

Ms. Vance cites *Radcliff Homes v. Jackson*, 766 S.W.2d 63 (Ky. App. 1989) for the proposition that selling her property did not forfeit her right to recovery on her nuisance claims. However, *Radcliff* is distinguishable from the present case. The issue on appeal in *Radcliff* was not whether a plaintiff has standing to recover nuisance damages for property no longer owned by the plaintiff. Instead, the issue presented in *Radcliff* was whether the trial court erred in not limiting the plaintiffs' damages for the period of time that the plaintiffs did not occupy the home to reduction in rental value. *Id.* at 66-67. The Kentucky Court of Appeals never directly addressed whether the nuisance law in Kentucky allows for recovery of past nuisance.

Ms. Vance also cited *Kinsale v. Tombari*, 95 Conn. App. 472, 897 A.2d 646 (2006) in support of her assertion that she may maintain an action for nuisance. In *Kinsale*, shortly after the plaintiffs put a "for sale" on their property, the defendants caused several inoperable Jeep vehicles and a trailer to be placed on defendants property. *Id.* at 474. The vehicles appeared to be from a junkyard and the trailer had bumper stickers that stated "Bambi makes cute sandwiches" and "I'd rather be loading my muzzle." *Id.* The defendants also erected a ten foot high

structure that consisted of two wooden posts with several rusty cylinders hanging on a wire. *Id.* In addition, the defendants put “No Trespassing” signs on their property and targets in their windows. *Id.* The plaintiffs filed suit claiming nuisance, malicious erection of a structure, and libel. *Id.* The court found that the defendants acted maliciously and with the intent to annoy and to injure the plaintiffs in the use and disposition of their property. *Id.* The trial court granted the plaintiffs a prejudgment attachment in the amount of \$100,000 and the defendants appealed. *Id.* at 475.

However, analogous to *Radcliff*, the issue on appeal in *Kinsale* was not whether a plaintiff can maintain a nuisance action after the plaintiff has sold the nuisance-ridden property. Instead the issue presented to the Appellate Court of Connecticut was whether the finding that the value of the property was diminished by \$100,000 was within the range of evidence presented at trial. *Id.* at 475-476. The *Kinsale* Court never addressed whether the nuisance law in Connecticut allows for recovery of past nuisance. Similar to *Radcliff*, *Kinsale* is not binding and is unpersuasive.

Finally, Ms. Vance cites *Griffin v. Northridge*, 67 Cal. App.2d 69, 153 P.2d 800 (1944), a 1944 Court of Appeals decision from California for support. Once again, the issue in *Griffin* was not whether one may maintain a nuisance action after the property is sold, but rather whether damages awarded for nuisance were

excessive. *Id.* at 76. The Court in *Griffin* found that the defendants created a nuisance by harassing and annoying plaintiffs continuously and interfering with their comfortable enjoyment of life of their home. *Id.* at 75. The *Griffin* court was not asked and made no determination of whether one may maintain an action for nuisance after the nuisance-ridden property has been sold.

Analogous to both *Radcliff* and *Kinsale*, *Griffin* is not on point, is unpersuasive and is not binding on this Court.

The out-of-state case law cited by Ms. Vance does not interpret Washington's statutory definition of nuisance, and thus is not binding or even persuasive authority. Moreover, the three out-of-state cases cited by Ms. Vance (*Radcliff*, *Kinsale*, and *Griffin*) do not construe whether a plaintiff loses standing to maintain an action for nuisance if the plaintiff sells the nuisance-ridden property. These out-of-state cases are not on point, are unpersuasive and not binding on this Court.

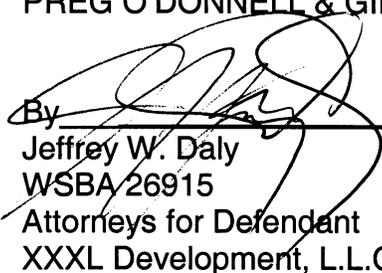
VI. CONCLUSION

The trial court's decision was a logical interpretation of the plain language of Washington statutes and case law concerning nuisance claims. The plain language of RCW 7.48.010 and RCW 7.48.020 is stated in the present tense indicating the legislature never intended to create a cause of action for "past nuisance."

Consistent with this interpretation, no Washington case has supported such a claim. The trial court correctly determined that Ms. Vance no longer had standing to assert claims sounding in nuisance. XXXL Development, LLC respectfully requests that this Court affirm the trial court's ruling.

DATED this 16th day of September, 2008.

PREG O'DONNELL & GILLETT PLLC

By  _____

Jeffrey W. Daly

WSBA 26915

Attorneys for Defendant

XXXL Development, L.L.C.

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COURT OF APPEALS
DIVISION II
STATE OF WASHINGTON

LYNN S. VANCE

Appellant,

v.

XXXL DEVELOPMENT, LLC

Respondent.

APPENDIX TO RESPONDENT'S BRIEF

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ORIGINAL

- A. Lynn S. Vance's Complaint for Damages (filed 12/29/2006)
- B. XXXL Development, LLC's Motion to Dismiss Lynn S. Vance's nuisance claims (dated 2/15/2008)
- C. Order Denying Lynn S. Vance's Motion for Reconsideration (dated 3/14/2008)

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COURT OF APPEALS
DIVISION II
STATE OF WASHINGTON
BY *CM*
DEPUTY

LYNN S. VANCE

Petitioner,

v.

XXXL DEVELOPMENT, LLC,

Respondent.

CERTIFICATE OF SERVICE

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LLC

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on this day the undersigned caused to be served in the manner indicated below a copy of:

Brief of Respondent XXXL Development and Appendix to Respondent' Brief, and Certificate of Service, directed to the following individuals:

Counsel for Lynn S. Vance:

Mr. Steven Turner
Miller Nash, LLC
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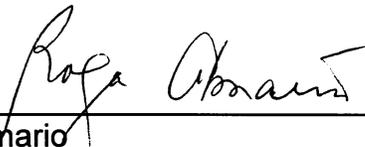
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- Via Facsimile
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DATED at Seattle, Washington, this 16th day of
September, 2008.



Roga Almario

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COWLITZ
RONALD B. ...

SUPERIOR COURT OF WASHINGTON FOR COWLITZ COUNTY

LYNN S. VANCE, an individual,

Plaintiff,

v.

XXXL DEVELOPMENT, L.L.C., a
Washington limited liability company,

Defendant.

Case No. 06 2 02446 1
COMPLAINT

COPY

PARTIES

1.1 Plaintiff Lynn S. Vance is an unmarried person residing in Cowlitz County,
Washington.

1.2 Defendant XXXL Development, L.L.C., is a Washington Limited Liability
Company with its principal operations in Cowlitz County, Washington.

JURISDICTION AND VENUE

2.1 This Court has jurisdiction over this matter pursuant to RCW 2.08.010, and other
statutes, including RCW 7.48.010, *et seq.*

2.2 Venue is appropriate before this Court pursuant to RCW 4.12.010 through
4.12.025 because: (1) the property at issue in this matter is located in Cowlitz County; (2) all acts
complained of herein occurred in Cowlitz County; and (3) the Defendant's principal place of
business is located in Cowlitz County.

COMPLAINT - 1

STATEMENT OF FACTS

1
2 3.1 Plaintiff owns certain real property commonly known as 246 West St. James
3 Place, Longview, Cowlitz County, Washington, which has been assigned Cowlitz County
4 Assessor's Parcel Number 625740256, and is legally described as:

5 Lot 20, Block 5, Cedar Brook Estates Phase II, according to the Plat thereof
6 recorded in Volume 12 of Plats, page 94, records of Cowlitz County; except that
7 portion conveyed under Auditor's File No. 951226035.

8 3.2 Plaintiff's principal residence is located on the above-described property.

9 3.3 Defendant owns certain real property in Longview, Cowlitz County, Washington
10 which has been assigned Cowlitz County Assessor's Parcel Number 6243801, and is legally
11 described as set forth in Exhibit A, attached hereto.

12 3.4 The real property described in paragraph 3.3 above constitutes a portion of the
13 Defendant's proposed subdivision, Forest Heights Phase IV, which is expected to have
14 approximately 21 home sites. The remaining portion of Forest Heights Phase IV is comprised of
15 certain real property in Longview, Cowlitz County, Washington, which has been assigned
16 Cowlitz County Assessor's Parcel Number No. 625060100, and is legally described as set forth
17 in Exhibit B, attached hereto.

18 3.5 Defendant is the developer for Forest Heights Phase IV.

19 3.6 The backyard of Plaintiff's property borders a portion of the Defendant's property
20 as described in paragraph 3.3 above.

21 3.7 On or about August 7, 2006, Defendant began construction of a large, two-tiered,
22 concrete lock-block retaining wall on a portion of it's property described in paragraph 3.3 above
23 which borders the backyard of Plaintiff's property. This retaining wall is part of a stormwater
24 management system for Forest Heights Phase IV and includes large pipes for the purpose of
25 detaining stormwater related to the site. In the location of the pipes, the site was graded, filled,
26 and a retaining wall was constructed to support the pipes and the earth behind the wall.

COMPLAINT - 2

1 3.8 Defendant served as the general contractor for the construction of the retaining
2 wall and stormwater management system. The wall was engineered by Defendant's consultant,
3 Terra Dolce Consultants, Inc., of Gladstone, Oregon.

4 3.9 Construction of the retaining wall was completed by October 2006. The wall is
5 approximately 25-feet in height. The lower-tier of the wall is more than 100 feet long, the
6 majority of which is located approximately two feet from the boundary line separating the
7 parties' respective properties.

8 3.10 Attached as Exhibit C hereto are photographs depicting the subject retaining wall
9 and its proximity to Plaintiff's property and home. Attached as Exhibit D hereto is a sketch from
10 Olson Engineering showing the location of the wall relative to the boundary line between the
11 parties' respective properties.

12 3.11 Defendant failed to use due care when constructing the retaining wall.
13 Construction of the retaining wall involved the use of heavy equipment and machinery. The
14 construction process caused damaging levels of shaking and vibrations to the land and structures
15 in the immediate vicinity of the wall, including Plaintiff's property and residence.

16 3.12 Plaintiff's property suffered damage during the construction of the wall, including
17 but not limited to, physical damage to Plaintiff's perimeter underground drainage and sprinkler
18 system. Plaintiff's residence also suffered damage to a varying degree, including but not limited
19 to, interior wall and garage floor cracking, shifting and separation of the exterior envelope at
20 various locations, and shifting of windows. Plaintiff's personal effects also fell off walls and
21 shelving as a result of the shaking and vibrations.

22 3.13 The wall and stormwater management system lack appropriate engineering—as
23 required by County ordinance—in that they fail to prevent water and debris from seeping and
24 leaking through the wall and flowing onto Plaintiff's property and residence. Plaintiff's property
25 and residence have been damaged—and continue to suffer damage—as a result.

26

COMPLAINT - 3

1 3.14 Investigation is continuing with respect to the structural integrity, stability, and
2 strength of the wall, but based on information and belief, Defendant failed to follow the
3 inspection and reporting requirements during various phases of construction as required by the
4 permit issued for the construction of the wall.

5 3.15 Upon further information and belief, the wall actually constructed behind
6 Plaintiff's home does not comport the wall engineered by Terra Dolce Consultants, Inc., or with
7 the plans for Forest Heights Phase IV developed by TRT Engineering, Inc.

8 3.16 Defendant also failed to implement proper grading and erosion control
9 protocols—as required by County ordinance—in order to prevent the land around the wall from
10 eroding and flowing onto Plaintiff's property.

11 3.17 The wall and stormwater drainage system on Defendant's property artificially
12 collects and channels water and other debris onto Plaintiff's property in quantities that are greater
13 than—and in a manner different from—the natural flow.

14 3.18 Defendant failed to act with due care in constructing and maintaining the wall and
15 stormwater management system on its property and in avoiding unnecessary damage to
16 Plaintiff's property and residence.

17 3.19 Defendant constructed the retaining wall dangerously close to Plaintiff's property.
18 Its location is in violation of County setback standards and is not in compliance with the plans
19 for Forest Heights Phase IV and engineering reports for a wall at the present location. The wall
20 should be removed completely, or alternatively, moved back from the boundary line to a
21 reasonable and safe location.

22 3.20 The mere presence of the wall—in addition to the problems associated with the
23 wall as set forth above—substantially and unreasonably interferes with Plaintiff's reasonable use
24 and enjoyment of her property and residence. There has also been a substantial decrease in the
25 market value of Plaintiff's property and residence. Water and other earth debris continue to flow
26 from the wall—and Defendant's surrounding property—onto the property owned by Plaintiff.

COMPLAINT - 4

(Negligence)

6.1 Plaintiff re-alleges paragraphs 1.1 through 5.4 as if fully stated herein.

6.2 Defendant owed a duty of care to Plaintiff not to cause damage to Plaintiff's property and residence during the construction of the wall and stormwater management system on Defendant's property. Defendant further owed a duty of care to Plaintiff to prevent water and other debris from unnaturally flowing and/or eroding onto Plaintiff's property, and thereby damaging it.

6.3 Defendant breached its duties of care to Plaintiff.

6.4 Plaintiff has been damaged—and continues to suffer damage—as a proximate result of the above in an amount to be proven at trial.

(Trespass)

7.1 Plaintiff re-alleges paragraphs 1.1 through 6.4 as if fully stated herein.

7.2 Defendant has trespassed—and continues to trespass—onto Plaintiff's property by allowing water and other debris to flow from the wall and surrounding property onto Plaintiff's property. Defendant has failed to implement measures to stop this from occurring.

7.3 Plaintiff has been damaged—and continues to suffer damage—as a result of Defendant's past and continuing trespasses.

(Strict Liability for Surface Water)

8.1 Plaintiff re-alleges paragraphs 1.1 through 7.3 as if fully stated herein.

8.2 Defendant is strictly liable to Plaintiff for damages caused by the water and other earth materials flowing from the wall and surrounding property in quantities greater than, and/or in a manner which is different from, that which were naturally flowing before the construction of Defendant's wall and stormwater management system.

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COMPLAINT - 6

PRAYER

WHEREFORE, Plaintiff requests judgment as follows:

9.1 Entry of a decree declaring the subject retaining wall and stormwater management system to be a private nuisance and/or nuisance per se;

9.2 Entry of a decree permanently enjoining Defendant from trespassing onto Plaintiff's property and from further interfering with Plaintiff's reasonable use and enjoyment of her property and residence;

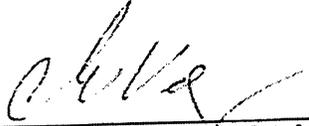
9.3 Entry of a decree ordering Defendant to remove the subject retaining wall and stormwater management system, or in the alternative, moving it back from the boundary line to a reasonable and safe location;

9.4 For an award compensating Plaintiff for all damages incurred as a result of Defendant's actions as set forth above under theories of nuisance, nuisance per se, negligence, trespass, and strict liability.

9.5 And for an award of any further or other relief this Court finds just or equitable.

DATED this 29 day of December, 2006.

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COMPLAINT - 7

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THAT PORTION OF THE HUGH MCMILLAN D.L.C. IN SECTION 16, TOWNSHIP 8 NORTH, RANGE 2 WEST OF THE W.M., COWLITZ COUNTY, WASHINGTON, DESCRIBED AS FOLLOWS: BEGINNING AT A 5/8" IRON ROD AT THE SOUTHEAST CORNER OF LOT 2 OF SHORT SUBDIVISION NO. 77-116, RECORDED UNDER AUDITOR'S FILE NO. 824837, IN VOLUME 2 OF SHORT PLATS, PAGE 111; THENCE NORTH 32° 08' 13" EAST ALONG THE EAST LINE OF SAID LOT 2 A DISTANCE OF 124.17 FEET TO A 5/8" IRON ROD ON THE EAST LINE OF SAID LOT 2; THENCE ALONG THE ARC OF A 37.27 FOOT RADIUS CURVE TO THE LEFT THROUGH A CENTRAL ANGLE OF 120° 56' 40" AN ARC LENGTH OF 78.67 FEET TO A 5/8" IRON ROD ON THE NORTH LINE OF SAID LOT 2; THENCE LEAVING SAID NORTH LINE NORTH 01° 11' 33" EAST 60.00 FEET TO THE SOUTH LINE OF LOT 3 OF SAID SHORT SUBDIVISION NO. 77-116; THENCE SOUTH 88° 48' 27" EAST ALONG SAID SOUTH LINE 41.00 FEET; THENCE ALONG THE ARC OF A 375.00 FOOT RADIUS CURVE TO THE RIGHT THROUGH A CENTRAL ANGLE OF 04° 10' 55" AN ARC LENGTH OF 27.37 FEET TO A 5/8" IRON ROD AT THE SOUTHEAST CORNER OF SAID LOT 3; THENCE NORTH 11° 09' 47" EAST ALONG THE EAST LINE OF SAID LOT 3, A DISTANCE OF 216.83 FEET TO A 5/8" IRON ROD AT THE NORTHEAST CORNER OF LOT 3 OF SAID SHORT SUBDIVISION NO. 77-116; THENCE NORTH 62° 55' 52" EAST 38.39 FEET TO A 5/8" IRON ROD AT THE SOUTHEAST CORNER OF A TRACT OF LAND DESCRIBED UNDER AUDITOR'S FILE NO. 711361, SAID POINT BEING IN THE CENTERLINE OF A CREEK AND THE TRUE POINT OF BEGINNING; THENCE UPSTREAM ALONG SAID CREEK CENTERLINE ALONG THE FOLLOWING COURSES: NORTH 36° 28' 47" WEST 127.59 FEET; NORTH 43° 41' 48" WEST 56.68 FEET; NORTH 24° 53' 14" WEST 31.78 FEET; NORTH 44° 04' 24" WEST 72.86 FEET; NORTH 54° 36' 59" WEST 215.42 FEET; NORTH 35° 37' 29" WEST 107.17 FEET TO A 5/8" IRON ROD IN THE CENTERLINE OF SAID CREEK; THENCE LEAVING SAID CREEK CENTERLINE, NORTH 37° 00' 57" EAST 458.84 FEET TO A 5/8" IRON ROD; THENCE NORTH 00° 38' 30" EAST 556.19 FEET TO THE CENTERLINE OF A CREEK; THENCE DOWNSTREAM ALONG SAID CREEK CENTERLINE, ALONG THE FOLLOWING COURSES: SOUTH 62° 47' 36" EAST 22.36 FEET; SOUTH 49° 12' 41" EAST 150.45 FEET; SOUTH 44° 21' 30" EAST 197.99 FEET; SOUTH 74° 06' 12" EAST 79.81 FEET; SOUTH 64° 21' 54" EAST 146.74 FEET; SOUTH 60° 17' 54" EAST 137.92 FEET; THENCE LEAVING SAID CREEK CENTERLINE, SOUTH 26° 17' 50" WEST 105.00 FEET; THENCE ALONG THE ARC OF A 346.16 FOOT RADIUS CURVE TO THE LEFT (THE INCOMING TANGENT OF WHICH BEARS SOUTH 63° 42' 10" EAST) THROUGH A CENTRAL ANGLE OF 04° 27' 11", AN ARC DISTANCE OF 26.90 FEET; THENCE SOUTH 21° 50' 39" WEST 155.00 FEET; THENCE NORTH 65° 36' 20" WEST 131.94 FEET; THENCE ALONG THE ARC OF A 685.00 FOOT RADIUS CURVE TO THE RIGHT (THE INCOMING TANGENT OF WHICH BEARS NORTH 15° 32' 20" EAST) THROUGH A CENTRAL ANGLE OF 01° 00' 22", AN ARC DISTANCE OF 20.00 FEET; THENCE NORTH 63° 12' 15" WEST 115.00 FEET; THENCE SOUTH 20° 46' 53" WEST 115.00 FEET; THENCE SOUTH 00° 26' 20" EAST 150.00 FEET; THENCE SOUTH 89° 33' 40" WEST 100.00 FEET; THENCE NORTH 00° 26' 20" WEST 10.00 FEET; THENCE SOUTH 89° 33' 40" WEST 145.00 FEET; THENCE SOUTH 00° 26' 20" EAST 247.00 FEET; THENCE NORTH 82° 48' 22" EAST 103.34 FEET; THENCE ALONG THE ARC OF A 380.00 FOOT RADIUS NON-TANGENT CURVE TO THE LEFT, THE RADIAL BEARING OF WHICH BEARS NORTH 72° 02' 30" EAST, THROUGH A CENTRAL ANGLE OF 19° 28' 49" FOR AN ARC DISTANCE OF 129.20 FEET; THENCE ALONG THE ARC OF AN 880.00 FOOT RADIUS CURVE TO THE LEFT THROUGH A CENTRAL ANGLE OF 26° 46' 52" FOR AN ARC LENGTH OF 411.33 FEET; THENCE ALONG THE ARC OF A 20.00 FOOT RADIUS CURVE TO THE RIGHT THROUGH A CENTRAL ANGLE OF 79° 56' 56" FOR AN ARC LENGTH OF 27.91 FEET; THENCE ALONG THE ARC OF A 309.16 FOOT RADIUS CURVE TO THE RIGHT THROUGH A CENTRAL ANGLE OF 36° 57' 43" FOR AN ARC LENGTH OF 199.44 FEET TO THE CENTERLINE OF A CREEK; THENCE UPSTREAM, ALONG SAID CREEK CENTERLINE ALONG THE FOLLOWING COURSES: NORTH 60° 33' 13" WEST 68.49 FEET; NORTH 40° 58' 38" WEST 123.24 FEET; NORTH 72° 20' 20" WEST 48.08 FEET; NORTH 49° 44' 38" WEST 103.71 FEET TO THE TRUE POINT OF BEGINNING.

EXCEPTING THEREFROM THAT PORTION OF THE ABOVE DESCRIBED PREMISES LYING WITHIN THE PLAT OF CEDAR BROOK ESTATES, PHASE 1A, RECORDED IN VOLUME 12 OF PLATS, PAGE 31, RECORDS OF COWLITZ COUNTY, WASHINGTON.

ALSO EXCEPTING THAT PORTION LYING WITHIN THE PLAT OF CEDAR BROOK ESTATES, PHASE II, RECORDED IN VOLUME 12 OF PLATS, PAGE 93.

ALSO EXCEPTING THAT PORTION LYING WITHIN THE PLAT OF FOREST HEIGHTS PHASE III, AS RECORDED IN VOLUME 13 OF PLATS, PAGE 157.

SITUATE IN THE COUNTY OF COWLITZ, STATE OF WASHINGTON

THAT PORTION OF THE HUGH MCMILLAN DONATION LAND CLAIM IN THE SOUTHWEST QUARTER OF SECTION SIXTEEN, TOWNSHIP 8 NORTH, RANGE 2 WEST OF THE WILLAMETTE MERIDIAN, AS SITUATED WITHIN THE COUNTY OF COWLITZ, STATE OF WASHINGTON, AND BEING MORE PARTICULARLY DESCRIBED AS FOLLOWS, TO-WIT:

BEGINNING AT THE NORTHEAST CORNER OF THAT PARTICULAR TRACT CONVEYED TO DAN HIEBERT UNDER AUDITOR'S FILE NO. 493687, IN THE RECORDS OF COWLITZ COUNTY, WASHINGTON, BEING LOCATED NORTH 17° 36' 20" WEST 1,984.40 FEET FROM THE NORTHWEST CORNER OF OLSON'S COLUMBIA HEIGHTS ACRES AS DETERMINED FROM THAT DEED RECORDED UNDER AUDITOR'S FILE NO. 3017586, IN THE RECORDS OF SAID COUNTY;

THENCE SOUTH 01° 16' 00" WEST ALONG THE EAST LINE OF SAID DEED, FOR A DISTANCE OF 159.50 FEET;

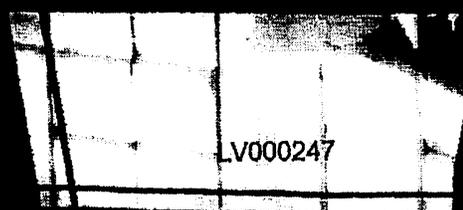
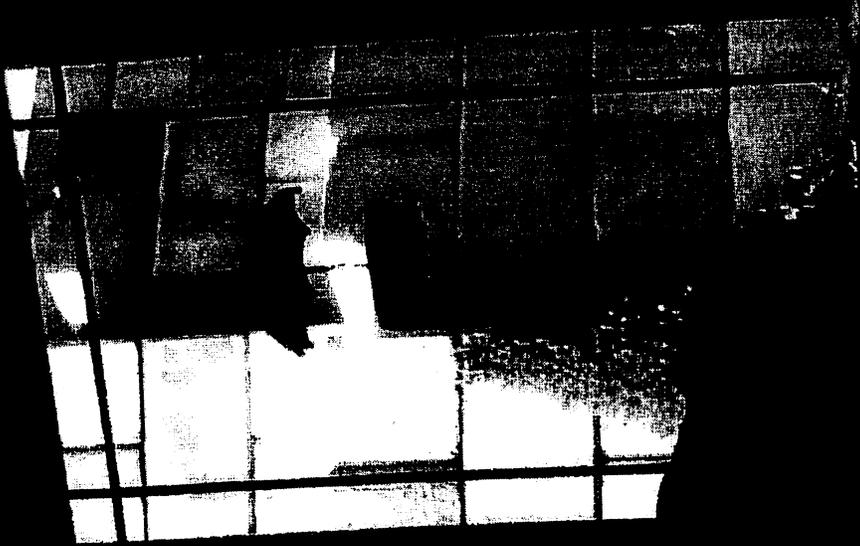
THENCE SOUTH 34° 01' 00" WEST ALONG THE EAST LINE OF SAID DEED, FOR A DISTANCE OF 458.84 FEET TO A 5/8" REBAR LOCATED IN THE CENTERLINE OF A CREEK;

THENCE NORTH 40° 11' 20" WEST FOR A DISTANCE OF 727.72 FEET TO THE NORTH LINE OF SAID DEED, AT A POINT NORTH 88° 44' 00" WEST 730.00 FEET FROM THE POINT OF BEGINNING;

THENCE SOUTH 88° 44' 00" EAST ALONG SAID NORTH LINE, FOR A DISTANCE OF 730.00 FEET TO THE POINT OF BEGINNING.

SITUATE IN THE COUNTY OF COWLITZ, STATE OF WASHINGTON

TOGETHER WITH AN EASEMENT FOR INGRESS, EGRESS AND UTILITIES AS DISCLOSED BY AUDITOR'S FILE NO. 3162311.



LV000247

EXHIBIT C
PAGE 1 OF 3

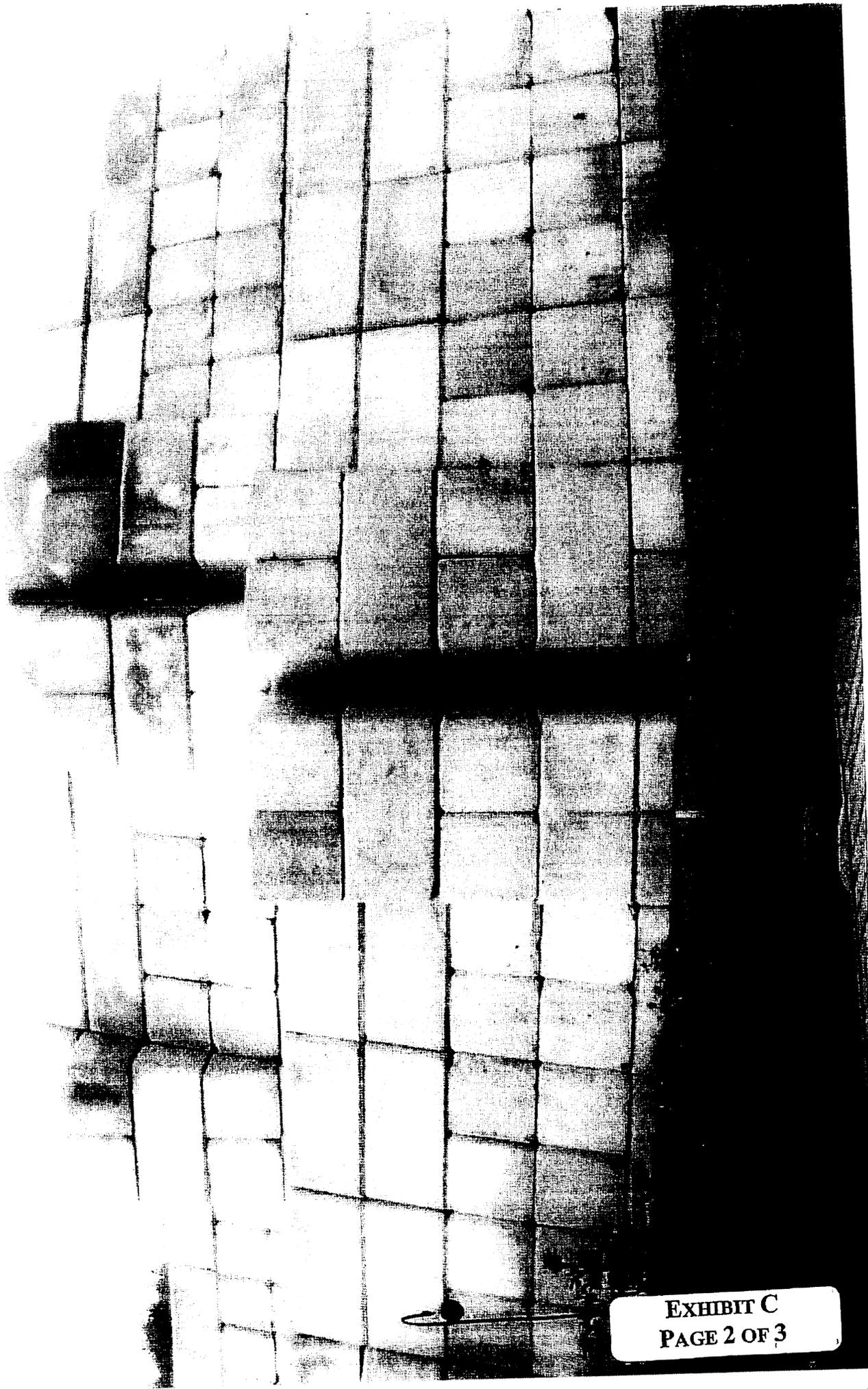


EXHIBIT C
PAGE 2 OF 3

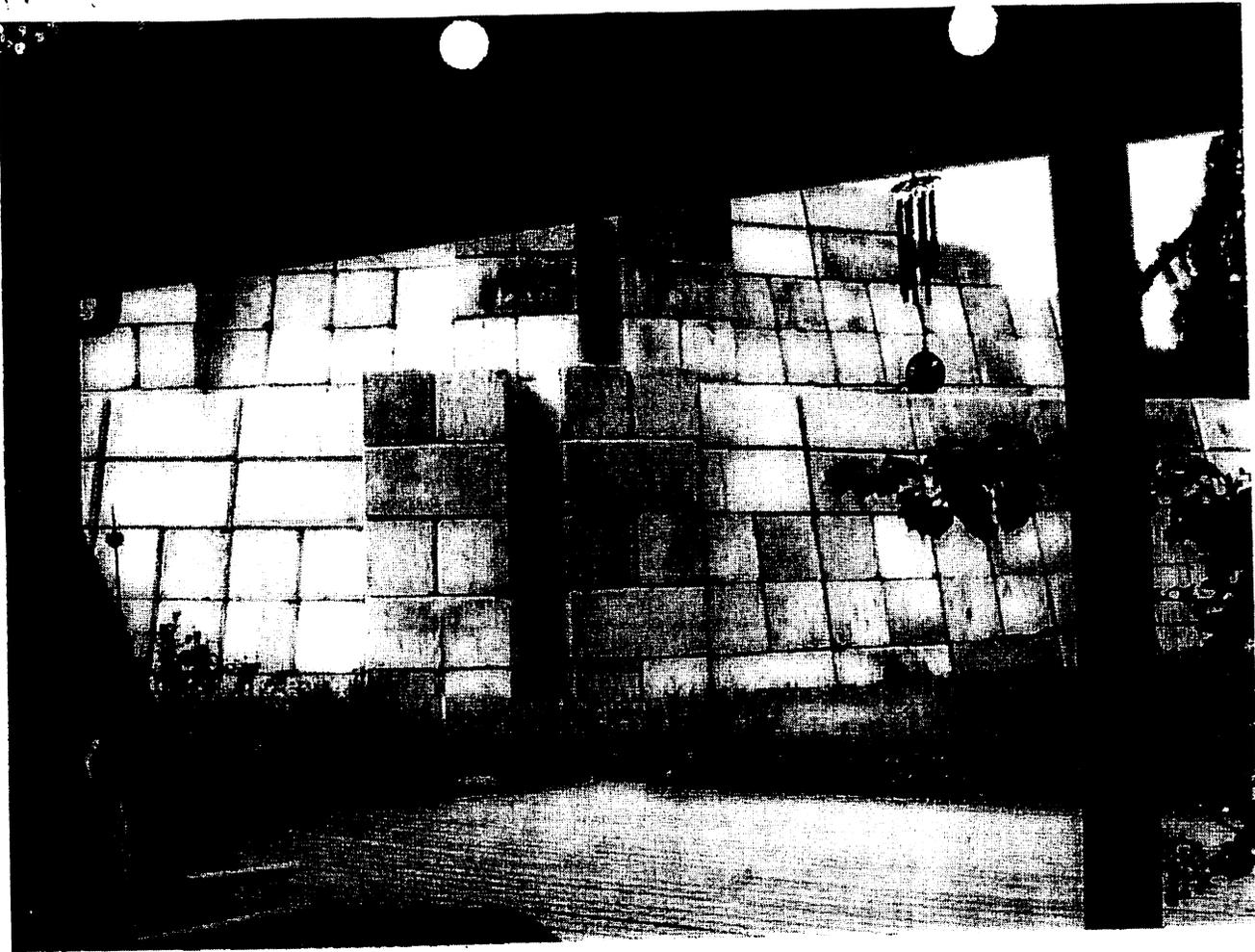


EXHIBIT C
PAGE 3 OF 3

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF COWLITZ

LYNN S. VANCE, an individual,

Plaintiff(s),

v.

XXXL DEVELOPMENT, L.L.C., a
Washington limited liability company,

Defendant(s).

NO. 06-2-02446-1

MOTION TO DISMISS PLAINTIFF'S
NUISANCE CLAIMS

I. NATURE OF THE MOTION

This motion is presented to pare down the issues presented for trial. Plaintiff's recent sale of the home referenced in her Complaint removes her standing to assert any nuisance claims against XXXL Development ("XXXL"). XXXL submits that those claims should be dismissed.

II. PERTINENT FACTS

Plaintiff's Complaint contains two nuisance claims: (1) private nuisance and (2) nuisance *per se*. See Ex. 1, copy of Complaint, at 5, ¶ 4.1 - 5.4. Plaintiff's theories of nuisance are based on the presence of a retaining wall built by XXXL on its property opposite the back yard of her home, and the engineering and construction methods used to build that wall. *Id.*

1 Plaintiff has now sold the home referenced in her Complaint. The sale of that home
2 closed on or about December 27, 2007. It is believed by XXXL that the home is now occupied
3 by the buyers.

4 III. ISSUES PRESENTED

5 A. **Whether plaintiff's sale of, and moving out from, the home near the**
6 **retaining wall referenced in her Complaint results in her having no standing**
7 **to assert nuisance claims concerning that wall, and as such the "nuisance"**
8 **claims should be dismissed.**

9 IV. EVIDENCE RELIED UPON

10 In bringing this Motion to Dismiss Plaintiff's Nuisance Claims, XXXL relies on the
11 pleadings and papers on file herein, the Declaration of Jeffrey W. Daly and exhibits attached
12 thereto, the points and authorities contained in this Motion, and any such oral argument as may
13 be adduced by the Court at the time of the hearing on this Motion.

14 V. POINTS AND AUTHORITIES

15 A. **Plaintiff's sale of, and moving out from, the home near the retaining wall**
16 **referenced in her Complaint removes her standing to assert any claims that**
17 **the retaining wall is a "nuisance."**

18 RCW 7.48.010 defines nuisance as follows:

19 "The obstruction of any highway or the closing of the channel of any stream used for
20 boating or rafting logs, lumber or timber, or whatever is injurious to health or
21 indecent or offensive to the senses, or an obstruction to the free use of property,
22 so as to essentially interfere with the comfortable enjoyment of the life and
23 property, is a nuisance and the subject of an action for damages and other and further
24 relief."

25 Put another way, a nuisance is an "unreasonable interference with another's use and enjoyment
of property." *Wallace v. Lewis County*, 134 Wn.App. 1, 18, 137 P.3d 101, 110 (Div. II, 2006),
citing *Kitsap County v. Allstate Ins. Co.*, 136 Wn.2d 567, 592, 964 P.2d 1173 (1998). RCW
7.48.020 states that an action on a nuisance claim may be brought "by any person whose
property is... injuriously affected." Under 7.48.130 and 7.48.150, there are two types of
nuisances: private and public.

1 1. Plaintiff can no longer assert a claim for private nuisance.

2 Plaintiff's Complaint alleges that the presence of the retaining wall near her home
3 "substantially and unreasonably interferes with Plaintiff's reasonable use and enjoyment of her
4 property and residence." See Ex. 1 at 4, ¶ 3.20. Even if it is assumed, for purposes of this
5 Motion, that the wall unreasonably interfered with plaintiff's use and enjoyment of her property at
6 the time of the filing of her Complaint, plaintiff has now sold the house and moved away. The
7 presence of the wall can therefore no longer cause plaintiff to lose any use or enjoyment of her
8 home, as she no longer lives there. As noted above, ownership of the property is required to
9 maintain an action in nuisance. Since plaintiff no longer owns the property she cannot pursue a
10 private negligence action. Unlike claims for "past trespass," there is no authority which supports
11 recovery for a "past nuisance." Plaintiff's nuisance claims should be dismissed.

12 2. Plaintiff cannot assert a claim for public nuisance.

13 Plaintiff has also asserted a claim for "negligence per se." Regardless for how the
14 nuisance claim is phrased, under the statutes a nuisance claim is either private or public.
15 Plaintiff's lack of standing to pursue a private nuisance claim is discussed above. She also
16 cannot pursue a claim for "public nuisance."

17 Under RCW 7.48.210, a private plaintiff can prosecute an action for "public nuisance" on
18 behalf of other members of the public only if the condition complained of is "specially injurious"
19 to that particular plaintiff. Plaintiff no longer even lives anywhere near this wall or her now-
20 former home. Since that is the case there is nothing about this wall that is "specially injurious"
21 to this plaintiff that would allow her to pursue a claim in sounding in public nuisance. As such,
22 her claim for "nuisance *per se*" should also be dismissed.

23 3. Plaintiff cannot pursue injunctive or equitable relief via a nuisance claim.

24 Even if plaintiff were allowed to maintain an action for past damages allegedly incurred
25 as a result of the presence of the wall, XXXL asserts that plaintiff would have no standing to

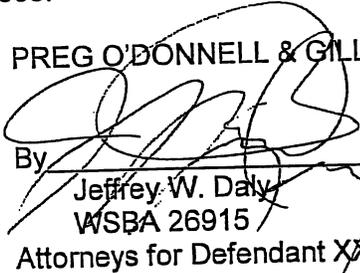
1 seek injunctive or other equitable relief – such as an order for the removal of the wall or to have
2 it moved – since she no longer owns the adjacent property. In the alternative, XXXL requests
3 that the Court enter an Order *in limine* that plaintiff cannot request at trial that the wall be moved
4 and/or removed from its present location.

5 VI. CONCLUSION

6 Plaintiff's sale of the home referenced in her Complaint removes her standing to assert
7 any claims sounding in nuisance against XXXL. XXXL requests that plaintiff's claims for "private
8 nuisance" and "nuisance per se" be dismissed.

9 DATED this 29th day of January, 2008.

10 PREG O'DONNELL & GILLETT PLLC

11 By 

12 Jeffrey W. Daly
13 WSBA 26915

14 Attorneys for Defendant XXXL Development,
15 L.L.C.

Return

COPY

ENDORSED
FILED
SUPERIOR COURT

MAR 14 2008

COWLITZ COUNTY
RONIA. BOOTH, Clerk

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF COWLITZ

LYNN S. VANCE, an individual,	
	Plaintiff(s),
v.	
XXXL DEVELOPMENT, L.L.C., a Washington limited liability company,	
	Defendant(s).

NO. 06-2-02446-1

ORDER DENYING PLAINTIFF'S MOTION
FOR RECONSIDERATION

[PROPOSED]

THIS MATTER having come before the above-entitled Court on Plaintiff's Motion for
Reconsideration, and the Court having considered the files and records herein, including:

1. Plaintiff's Motion for Reconsideration;
2. Defendant XXXL Development Inc.'s Response to Plaintiff's Motion for
Reconsideration
3. _____;
4. _____;

and being otherwise fully advised in the premises, now, therefore, it is hereby

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ORDERED that Plaintiff's Motion for Reconsideration is DENIED.

DATED this 13 day of MAR, 2008.

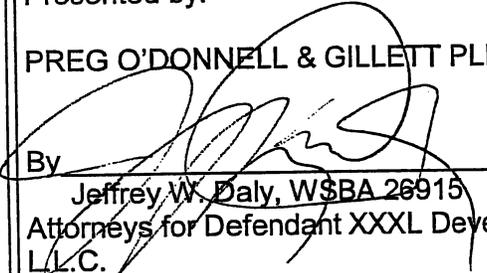
JILL JOHANSON

Cowlitz County Superior Court Judge

Presented by:

PREG O'DONNELL & GILLETT PLLC

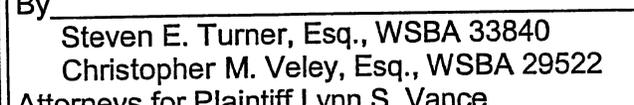
By


Jeffrey W. Daly, WSBA 26915
Attorneys for Defendant XXXL Development,
LLC.

Copy Received; Approved as to Form; Notice of
Presentation Waived:

MILLER NASH, LLP

By


Steven E. Turner, Esq., WSBA 33840
Christopher M. Veley, Esq., WSBA 29522
Attorneys for Plaintiff Lynn S. Vance

1 Copy Received; Approved as to Form; Notice of
Presentation Waived:

2
3 CRANDALL, O'NEILL, MCREARY &
IMBODEN, P.S.

4
5 By _____
6 M. Jamie Imboden, Esq., WSBA 28416
Attorneys for Defendant XXXL Development,
L.L.C.

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